



DIRECTOR PENALTY NOTICES - COMMONLY ASKED QUESTIONS

The ATO has issued, and is issuing, Director Penalty Notices galore.

Below are some answers to commonly asked questions.

What is a DPN?

The DPN regime exists in Division 269 of the Schedule to the *Taxation Administration Act 1953* (Cth).

It extends the ATO's reach to recover unpaid tax by a company by giving the ATO the right to seek payment from a *director personally*, where the company does not meet its obligations to report or pay:

- (a) PAYG - Pay As You Go withholding tax;
- (b) SGC - Superannuation Guarantee Charge; and
- (c) GST - Goods and Services Tax.

Think of it as a *forced* personal guarantee by directors to pay specific types of tax debts.

There are two **types** of DPN, each imposing personal liability in its own way.

Lock Down: This is a DPN where the company has failed to lodge BAS or Superannuation Guarantee Returns within the required timeframes of the DPN regime (see below), and the debts remain outstanding.

Once the deadline passes, the director is automatically personally liable.

Non-Lock Down: This is a DPN where the company does lodge BAS or Superannuation Guarantee Returns within the required timeframes of the DPN regime (see below), but the debts nevertheless remain outstanding.

Once the deadline passes, the director may at any time thereafter be issued with a written notice by the ATO (i.e. a Director Penalty Notice) which gives the director a number of options



to avoid personal liability, any of which must be done within 21 days of the date of the DPN, being:

- (a) Pay the debt.
- (b) Appoint an administrator to the company.
- (c) Appoint a small business restructuring practitioner to the company.
- (d) Appoint a liquidator to the company (winding-up).

As can be seen, the ATO prioritises lodgment above payment (but requires both).

If you lodge on time, you will get a 21-day leeway period (from the date of an issued DPN) to choose the fate of the company and avoid personal liability.

But if you don't lodge on time, you don't get that 21-day leeway period; you are automatically and immediately personally liable.

Is there a written notice? How do I know if I am liable?

A DPN itself is a written notice issued by the ATO to a company director personally, which:

- (a) Notifies the director that they are personally liable to pay the company's outstanding PAYG, SGC or GST debts.
- (b) Outlines what can be done to remit (cancel) that personal liability, dependent on which type of DPN it is (i.e. Lock Down or Non-Lock Down).

A single Director Penalty Notice can set out liability in respect of both types of DPN (i.e. Lock Down and Non-Lock Down).

If you haven't yet received a DPN and want to know if you are already liable on a Lock Down basis, you can compare the due dates for each lodgment against the actual dates of each lodgment. If you missed the deadline, you are liable.

If you have lodged on time, then the *risk* that the ATO will take steps to try and make you personally liable (by the ATO issuing a notice) is always present thereafter unless the relevant debt is paid.

How is a DPN served on the director?

The DPN is usually posted to the director's address as shown on the ASIC register for the company.

Accordingly, keep the ASIC register updated or you might miss an important notice.

Is one DPN issued to all directors?

Usually, a separate DPN will be issued to each director in respect of the same (or similar) debts.



Due dates for lodgments

To avoid a Lock Down DPN, you will need to lodge:

- (a) BAS (PAYG and GST) within three months of the normal due date for lodgment; and
- (b) SGC statements within one month of the normal due date for making the relevant superannuation payment.

If we “catch up” on all the late lodgments in one go, does Lock Down personal liability disappear?

No. If lodgment deadlines are missed, personal liability (ie. Lock Down) will remain even if a bunch of lodgements are later done to “catch up” and none remain outstanding.

If a liquidator is already appointed, can the ATO issue a DPN to me?

Yes; if lodgment deadlines are missed, personal liability (ie. Lock Down) will remain even if a liquidator is appointed. Accordingly, you could receive a Lock Down DPN after liquidation has commenced.

However, if lodgment deadlines are met, then once a company is in liquidation, a Non-Lock Down DPN cannot be issued.

What defences are there to a DPN?

The defences are found at s. 269-35 of the Schedule to the *Taxation Administration Act 1953* (Cth). They include:

- (a) It was unreasonable to expect the director to take part, and the director did not take part, in the company’s management because of illness or for some other good reason;
- (b) The director took all reasonable steps to ensure the directors either caused:
 - i. The company to comply with its PAYG, SGC or GST (whichever is relevant) obligations;
 - ii. An administrator to be appointed;
 - iii. A small business restructuring practitioner to be appointed; or
 - iv. The company to begin to be wound up;
- (c) There were no reasonable steps a director could have taken to ensure that any of the events referred to in (b) above happened; or
- (d) To the extent that the penalty resulted from the company treating the *Superannuation Guarantee (Administration) Act 1992* (Cth) or the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as applying to a matter in a particular way that was reasonably arguable, if the company took reasonable care in connection with applying that Act to the matter.



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Will the ATO forget about it if I don't engage with them?

Highly unlikely. To the contrary, failure to engage with the ATO will more likely be viewed unfavourably by the ATO and may hasten Court action against you.

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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