



The ATO's director penalty notice powers

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The ATO's enhanced debt collection powers against directors and other third parties seem to be continually expanding, but the fundamental touchpoint remains the director penalty notification mechanism, which has developed a very substantial body of law.

Government announcements that want to press errant directors to pay a widening field of withheld amounts seem to be happening on a regular basis. When coupled with the parliamentary inertia that happens with minority governments, the passing of such proposed legislation with amendments is both intermittent and usually unannounced.

This process seems to lead to a state of confusion and an inability to properly interpret the DPN rules.

Overview

A DPN is a formal notification to a director advising that certain tax -related liabilities are payable, even where the taxpayer company enters liquidation or administration.

It represents one of the most favoured, and one of the most feared, ATO tools against directors, and gives rise to parallel liabilities with the company in question, and also joint liabilities to two or more current or former directors.

In a decision of the High Court, two purposes were identified about the nature and purpose of a DPN.

The first was to *inform* the relevant director of the unpaid amount of a company's liability and of the corresponding liability to a penalty in the same amount.

The second was to inform the director of the alternative courses available which would result in remission of the penalty. However, the scope of the liabilities caught under a DPN since 2000 has expanded since the introduction of the "lockdown" rules, and include pay as you go withholding (PAYGW), superannuation guarantee charge (SGC) and will likely extend to goods and services tax (GST).

The Commissioner must not commence proceedings to recover the penalty until the end of 21 days after the Commissioner gives notice of the penalty.

For the purpose of the DPN rules, a “director” takes the *Corporations Act 2001* (Cth) meaning, which includes actual directors, and shadow directors or de facto directors. The term “director”, as defined in the Corporations Act, includes a person who, though not validly appointed as a director, acts in the position of a director (a de facto director) or whose instructions or wishes are ones in accordance with which the directors of the company or body are accustomed to act (a shadow director).

This means that a person may be treated as a director and be liable to pay a penalty under a DPN, even if they are a non-executive director with little involvement in the day-to-day management of the company or have never been formally appointed to the company’s board or notice of their appointment lodged with ASIC.

The DPN ensures that certain employment-related obligations, being PAYGW and SGC arising in cases of unpaid superannuation contributions, do not fall within the protection of the corporate veil and allows the Commissioner to issue proceedings.

A director may be liable for the full amount where a superannuation obligation to report an amount is owed and where that obligation remains in effect until:

- the obligation is satisfied; and
- the company is in liquidation or administration.

