

DIRECTOR INFORMATION SHEET

New Director Penalty Notice laws expand personal liability.

What directors need to know and do.



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DIRECTOR INFORMATION SHEET

The Director Penalty Notice laws – old and new

The 21-day Director Penalty Notice

Most company directors were familiar with the Director Penalty Notice laws. In brief, if a company had outstanding Pay As You Go (“PAYG”) debts then the Australian Tax Office (“ATO”) could send a Director Penalty Notice (“DPN”) to a director giving that director 21 days to:

- cause the company to pay the debt; or
- put the company into liquidation; or
- put the company into voluntary administration; or
- come to a payment arrangement with the ATO.

If a director does none of the above within 21 days, then they are personally liable, by way of an equivalent “penalty”, for that company debt. If they do one of the first three options then the penalty is “remitted”, or cancelled. So be careful of the fourth option as it does not relieve a director of personal liability.

The 21 days are counted starting from the date written on the DPN. This is a strict deadline so be careful, as you’d be surprised how many people call us who have mis-counted! 21 days is plenty of time to get a voluntary liquidation under way. We only need the signatures of all directors and shareholders on our paperwork and for you to pay our fee. We can get the forms out to you on the same day you first call us, but we don’t recommend leaving it to the last day.

If you think there might be a DPN coming soon, make sure your address is up to date with both ASIC and the ATO, because not receiving the letter is no defence.

The “Knockdown” Director Penalty Notice (New Laws)

New legislation was passed in June 2012 that dramatically increased the scope of the DPN laws and director personal liability. In brief, the new laws:

- Expand the DPN regime to include Superannuation Guarantee amounts (“SG”);
- Make directors automatically personally liable if PAYG or SG amounts remain **unpaid** and **unreported** three months after the due date for lodging a return and a director **cannot** cause their director penalties to be remitted (i.e. cancelled) by placing their company into voluntary administration or liquidation;
- Restrict access to PAYG withholding credits for company directors and their associates where the company has failed to pay withheld amounts to the Commissioner of Taxation;
- Have effectively backdated the director personal liability for existing PAYG liabilities if the amounts are already **unpaid** and **unreported** three months after their due date.

Very soon after the Knockdown DPN Laws were introduced, we saw the ATO use its new powers to pursue directors for company PAYG liabilities that had accrued in 2009, 2010 and 2011. Yes, that is retrospective personal liability and it is being enforced.

Note that the old DPN laws still apply so you may get a DPN that gives no opportunity to have the penalty remitted, being a Knockdown DPN, or one that gives 21 days in which to act and avoid personal liability.

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What should I do to avoid penalties?

Advice for all directors regarding tax debts and tax returns going forward

The new DPN laws are designed to change the behaviour of directors. In the past, directors tended to leave tax debts at the bottom of the payments pile. That was often achieved by directors simply not complying with tax lodgement and payment requirements – BAS's were not lodged on time and tax debts were often the last to be paid. That is now a very bad approach!

Advice for all directors regarding Superannuation Guarantee

Under Superannuation Guarantee law if an employer is not able to meet their superannuation obligations by the due date for payment they are required to lodge a "Superannuation guarantee charge statement - quarterly (NAT9599)" with the ATO. With this new legislation it is now imperative that a company lodge a NAT9599 with the ATO within 3 months of the due payment date or its directors will be automatically personally liable for the company's Superannuation Guarantee Charge (SGC) liability. It should be noted that SGC is made up of the shortfall in Super payments plus interest (10% pa) and a processing fee (currently \$20 per employee, per period). So unlike PAYG where a director is made liable for the shortfall only, for Super the director is liable for the shortfall plus interest and fees!

OUR ADVICE TO ALL COMPANY DIRECTORS		
ISSUE	ADVICE	COMMENT
General approach to BAS Returns and Super debts	Get your company tax returns up to date and lodge them. If the company can't pay the debt due under a BAS for PAYG or a Super debt, <u>lodge the return anyway</u> , otherwise you may be personally liable for the debt.	In the past, directors tended to just not lodge Returns and they only risked personal liability if the ATO sent a Director Penalty Notice. It was hard for the ATO to pursue a debt they didn't know about. Because of the new Laws, that's now a very bad approach.

Advice for directors regarding past PAYG tax debts

The sting-in-the-tail of the new laws is that they effectively backdated the director personal liability for existing PAYG liabilities if the amounts are already **unpaid** and **unreported** for three months after their due date. Let us explain by way of example:

A company had a PAYG debt from say the quarter ended December 2011 so it should have lodged its BAS before 28 February 2012 and paid that debt. It did not lodge its BAS return or pay the debt. So the company has not lodged its BAS within three months of its due date.

Now that the new laws have been passed, the director is personally liable for that debt – the ATO can issue a DPN to the director and then pursue them personally for the debt. Putting the company into liquidation now does not remove the penalty.

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Contact Dissolve for specific advice

So what should a director do if their company has a past due PAYG debt or is in financial difficulty? Each situation will be different and advice is complicated by the fact that the old and new laws both apply. We suggest that you:

- Speak to your external accountant and establish what returns have been lodged and when they were lodged; and
- Call us at Dissolve so we can advise you of the best way forward.

About Dissolve

Dissolve specialises in low cost company liquidations. Dissolve initially provides online and telephone advice to directors of companies in financial distress.

The Dissolve website www.dissolve.com.au provides some unique tools to assist directors of companies in financial distress including:

- **Information Centre.** A raft of information and tools to assist Directors of companies in financial distress.
- **Is my company insolvent?** A simple “tick box” page that simplifies the extremely complicated question of whether or not a company is insolvent.
- **Ask IRA!** An online tool that asks directors four questions and, depending on the answers given, provides directors with an assessment of where their company sits in the Restructuring Spectrum and what solutions are available to a company in that position.

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