DIRECTORS PENALTY NOTICE

The DPN regime was introduced to prevent companies and their directors from avoiding their PAYG and SGC liabilities. The laws administering the DPN regime have over the past been strengthened to reduce the occurrence of phoenix activities which were prevalent under previous laws. The ATO's recovery options are now broader and linked to the company's reporting obligations.

It is now easier for directors to be held personally liable for these debts. Directors in receipt of a DPN face personal liability and should act immediately.

Directors should ensure their financial management systems allow for PAYG and SGC contingencies and their company reporting requirements are regularly reviewed and maintained. This may require the assistance of a professional to ensure that personal liability, penalties and interest, wherever possible, are avoided.

A DPN is a Notice that the ATO can send a director that can make that director personally liable for two types of tax debts of a company – Pay As You Go (PAYG) and Superannuation Guarantee Charge (SGC) liabilities.

The DPN regime is set out in Division 269 of Schedule 1 of the Taxation Administration Act 1953. There are two types of Director Penalty Notices. The first is the traditional Director Penalty Notice which gives a director 21 days to take certain actions to avoid personal liability. The second type of DPN, often referred to as a "Lockdown DPN", can make a director automatically personally liable for PAYG and SGC if company tax returns are not lodged on time – there is no opportunity to avoid that liability once the DPN is served on the director.

The options available to directors for avoiding personal liability of a company's unpaid PAYG or SGC liability will depend on the circumstances under which the DPN issues. If the unpaid amounts of PAYG or SGC are reported within three months of their due date, a director has 21 days from the date of the DPN to have the director penalties remitted (cancelled) by:

- paying the liability;
- appointing an administrator under s 436A, 436B or 436C of the Corporations Act 2001;
- causing the company to be wound up.

If the unpaid amounts of PAYG or SGC are reported more than three months after their due date, or are unreported, then the only option available for remitting the penalty is by paying the liability.

In such cases, a director cannot avoid personal liability for those amounts by placing the company into administration or liquidation. The only option available where the ATO has commenced proceedings to recover a company's liability that is unpaid and unreported after three months, is for a director to cause the company to pay the debt or to pay it personally.

Failure to report a PAYG or SGC obligation may result in the ATO making an estimate of the unpaid and overdue amount to which the DPN regime will apply. A company may enter into an arrangement with the ATO to pay the debt in which case the ATO will not commence personal recovery action against a director, however, the ATO may use a director's personal tax credits to offset the company debt.

How can Helm Advisory Help?

Directors in receipt of a DPN should seek urgent advice on their available options to avoid personal liability or to lodge a defence. If handled properly, early intervention by a qualified restructuring advisor may completely avoid the need to appoint an external administrator in future. If you need any guidance or assistance please contact one of the Helm Advisory Specialists on 02 9194 4000.

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Recovery & Insolvency Accountants