

Business Law Breakfast Series

Director Penalty Notices

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TRAFALGAR BUSINESS ADVISORY
Business Advisory Services

Director Penalty Notices

5 December 2018

Presented by Brent Morgan

Who Are We?

- National Chartered Accounting Firm specialising in insolvency and turnaround solutions
 - Offices in Melbourne, Sydney, Brisbane, Adelaide, Darwin, Singapore, Malaysia, Hong Kong and Auckland
 - 20 Directors & over 100 staff
- Expertise in the following services:-
 - Insolvency Services
 - Restructuring
 - Forensic Accounting
 - Business Valuations
 - Litigation Support Services
 - Financial Due Diligence



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Expertise

Extensive knowledge of industry operating processes, drivers, regulatory considerations and market dynamics in the following sectors:-

- Building and Construction
- Property
- Farming & Agribusiness
- Transport & Logistics
- Printing
- Manufacturing
- Retail
- Hospitality
- Financial sector
- Pubs & Clubs

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The Director Penalty Regime

- Companies obligated to report and pay to Australian Taxation Office (“ATO”) amounts under PAYG withholding regime and Superannuation Guarantee Charge (“SGC”) provisions
- The aim of the Regime is to ensure that each company meets its legal obligations, failing which, the directors are held personally liable accountable.
- Imposes personal liability without the delay or expense of legal action

History - The Director Penalty Regime

- Director Penalty Regime started in 1993
 - Replace Priority of ATO
 - Principally Unpaid PAYG
- Wilderness until early 2000's
- Major Amendments 2010 and 2012
 - Unpaid Superannuation Contributions
 - Automatic Liability
 - Strengthen to avoid Phoenix Activity



What is a DPN?

A Director Penalty Notice (“DPN”) can be issued by the ATO to personally recover unpaid PAYG and/or SGC liabilities from a director.

There are two types of:–

1. Those that lodge their returns (PAYG and Superannuation)

Non Lockdown DPN

2. Those that do not lodge returns (PAYG and Superannuation)

Lockdown DPN

Lodge Returns on Time – Non Lockdown DPN

Company Lodges both PAYG and Superannuation within 3 months of actual date of Lodgement, then only way Director Personally Liable is:

- ATO Issues DPN
- Sent to Director's Home Address (ASIC Records)

Gives Four options to be actioned within 21 days

1. payment of the debt
2. appointment of an administrator under section 436A, 436B or 436C of the Corporations Act 2001

Lodge Returns on Time – Non Lockdown DPN (cont)

3. having a liquidator appointed to wind up the company.
 4. Agree a payment arrangement of the debt.
- If options 1-3 are adopted with 21 days, personal liability extinguished.
 - If option 4 adopted, personal liability will return if company defaults payment arrangement

Returns not Lodged on Time – Lockdown DPN

- If Company does not lodge/pay returns for PAYG or Superannuation within three months of the due date for lodgement, then:
 - Director(s) become personally liable – Penalty Locks Down on Director
 - ATO will send DPN, but
 - Only option is to have Company pay or pay themselves
- If financial difficulty, must lodge PAYG and Superannuation Returns

Returns not Lodged on Time – Lockdown DPN (cont)

- Example

BAS Quarter	Due Date	Lockdown DPN Date
1 July to 30 September	28 October	28 January

- Placing company into Liquidation or VA after 3 months will not extinguish liability
- Tax Agents are allowed extra month to lodge BAS electronically, benefit of extra month before three-month lockdown DPN starts

ANNEXURE 1

PO Box 123
Pennyland VIC 3128



Mr Smith
XYZ Pty Ltd
123 Penny Lane
PENNYLAND VIC 3000

Our reference:
Contact officer:
Telephone: ()
Facsimile: ()
Your reference:
Issue date: 22 September 2004

Dear Mr Smith,

PENALTY NOTICE: PAYG WITHHOLDING AMOUNTS

Please find enclosed a notice of your liability to pay a penalty equal to the amount(s) unpaid to the Commissioner by the company XYZ PTY LTD, ACN 123 456 789 of which you were a director at relevant times as referred to in section 222AOC and/or section 222AOD of the *Income Tax Assessment Act 1936* (ITAA 1936). You automatically became liable to the penalty when the company failed to remit the amount(s) set out in the notice by the due date(s), or, where a particular amount fell due before your appointment as a director, on the 15th day after your appointment.

Action to recover the penalty from you will be taken without further notice unless, at the end of 14 days from the date the enclosed notice is given to you:-

- (a) the company's liability has been discharged; or
- (b) an agreement under section 222ALA of the ITAA 1936 to pay the liability is in force; or
- (c) the company is under administration within the meaning of the *Corporations Act 2001*; or
- (d) the company is being wound up.

The penalty will be remitted if any one of these options is adopted within 14 days from the date the notice was given to you.

You should keep in mind that you will continue to be liable to a penalty if any one of the options has not been adopted **at the end of 14 days** after you are given the notice (that is, any agreement would need to be signed before the expiration of the 14 days).

Section 222AOE

Income Tax Assessment Act 1936

NOTICE OF DIRECTOR'S LIABILITY TO PAY A PENALTY
TO THE COMMISSIONER OF TAXATION

PAYG WITHHOLDING AMOUNTS

TO: Mr Smith
XYZ Pty Ltd

In exercise of the powers and functions conferred on me as a Deputy Commissioner of Taxation by a delegation from the Commissioner of Taxation under the provisions of the *Taxation Administration Act 1953* (TAA 1953), I give you notice under section 222AOE of the *Income Tax Assessment Act 1936* (ITAA 1936) that you, as a director of the company, are liable to pay the Commissioner by way of penalty an amount equal to the unpaid amount of each liability of XYZ PTY LTD, ACN 123 456 789, ("the company") pursuant to subsection 16-70(1) in Schedule 1 to the TAA 1953 in respect of amounts withheld by the company for the purposes of Division 12 in Schedule 1 to the TAA 1953, details of which are set out in the following table:-

TABLE

Column 1 Particular withholding period	Column 2 Amount withheld \$	Column 3 Unpaid amount of company's liability \$
1 January 2004 to 31 January 2004	100,000.00	100,000.00
1 February 2004 to 29 February 2004	100,000.00	100,000.00

The penalty in respect of each unpaid amount of the company's liability as detailed in the above table will be remitted if, **at the end of 14 days after this notice is given to you:-**

- (a) the company's liability in respect of that unpaid amount has been discharged; or
- (b) an agreement relating to the liability is in force under section 222ALA of the ITAA 1936; or
- (c) the company is under administration within the meaning of the *Corporations Act 2001*; or
- (d) the company is being wound up.

Dated this 22nd day of September 2004

DEPUTY COMMISSIONER OF TAXATION AND
DELEGATE OF THE COMMISSIONER OF TAXATION

What does a
DPN look like?

Liability for New Directors

New directors have 30 days from their appointment before they become liable to penalties equal to:

- all of the company's unpaid PAYG withholding liabilities
- all unpaid SGC liabilities.

As a new director, you will not be liable for penalty amounts due prior to your appointment if, within 30 days from your date of appointment, the company:

- pays the amount outstanding
- goes into voluntary administration
- goes into liquidation.

Defence – Took all Reasonable steps into Liquidation or VA

Liability even if resign within 30 Days of Appt

Liability for Former Directors

Former Directors remain liable under the director penalty regime for:-

- penalties equal to the unpaid PAYG withholding and SGC liabilities of the company which were due up to the date of their resignation; and also
- Liabilities which fell due after the director's resignation, but where the first withholding event in the reporting period occurred prior to the director's resignation. – i.e. tax liabilities incurred before resignation.

Defences

The grounds on which a DPN may be defended are (60 Days to raise):

- Unreasonable to expect the director(s) to take part in the management of the company because of illness or other good reason;
- Took all reasonable steps to ensure that the directors caused the company to comply with its taxation obligations or appoint an administrator or liquidator;
- Took reasonable care in applying the law in respect of the superannuation guarantee charge.

The Traps and the Pitfalls

- Sent To Director's Home Address
- New Directors
- No Negotiations
- ATO Estimates – PAYG & SCG
- ATO Indemnity – Unfair Preferences
- Payment Agreements
 - The First Trap - Balance
 - The Second Trap – Unfair Preferences



What you should do now and into the future?



1. ASIC Database Updated
2. Act Immediately – 21 Days of Date of Notice
3. Seek Advice – (Solicitor, IP or Accountant)
4. Financial Status
5. Continue Trading
6. Ability to Re-negotiate
7. New Directorships

Future DPN Powers?

- Targeting Phoenix Activity
- Single Touch Payroll - transparency
- DPN's to extend to GST, luxury car tax and WET

Questions?



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