

Ms Ruth Owen
Tax Ombudsman
GPO Box 551
Sydney NSW 2001

By email: consultations@taxombudsman.gov.au

Dear Ms Owen,

Tax Ombudsman Review: ATO's administration of Director Penalty Notices

The Tax Institute welcomes the opportunity to provide feedback on the Tax Ombudsman's review of the ATO's administration of Director Penalty Notices (**DPNs**).

In developing our feedback, we have worked closely with our National Technical Committees to prepare a considered response that represents the views of our broader membership.

While members generally recognise the important role played by the DPN regime in encouraging compliance with tax obligations, feedback indicates that aspects of the ATO's administration of the regime can produce outcomes that are perceived as unfair, particularly where taxpayers face genuine barriers to compliance or have limited understanding of their rights and obligations. The concerns raised broadly relate to the consideration of individual circumstances, the effectiveness of communications with directors, and how DPN liabilities interact with insolvency and restructuring processes. We discuss these matters below.

Individual circumstances and DPN defences

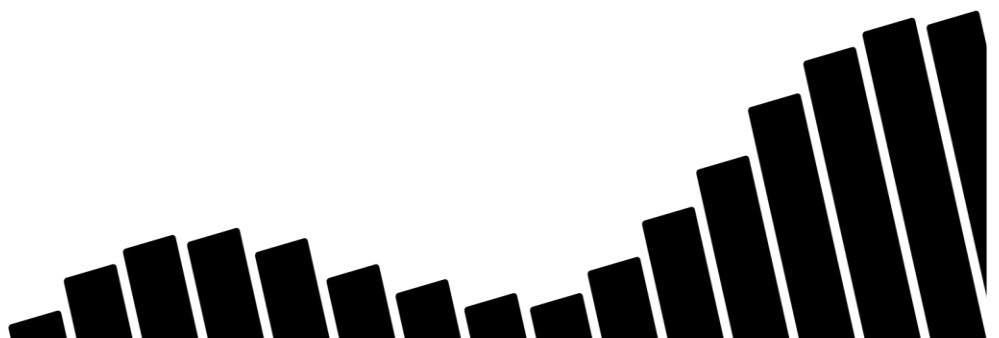
Minority Directors and reasonable steps

We are concerned that minority directors can face significant practical difficulties where, despite making genuine and substantial efforts to address the company's tax debts, or to place the company into voluntary administration or liquidation, they are unable to do so because those actions require the support of a majority of directors. In such circumstances, a minority director may have exhausted all steps reasonably available to them. The Tax Institute considers that the ATO's assessment of a director's conduct should appropriately recognise the requirements of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the practical limitations on a minority director's ability to compel lodgement, payment of liabilities, or the adoption of alternative debt management arrangements.

Level 21, 60 Margaret Street
Sydney NSW 2000

T 1300 829 338
E tti@taxinstitute.com.au

taxinstitute.com.au



Recommendations

The ATO's assessment of the steps that a director could reasonably have taken should take into account the practical limits of a minority director's power under the Corporations Act to compel lodgement, payment of liabilities, or the adoption of other debt management options.

Illness, caring responsibilities and capacity to manage company affairs

We are concerned that the evidentiary requirements for establishing a defence are not always clear, creating uncertainty for taxpayers seeking to demonstrate that they satisfy the relevant legislative criteria. We understand that, in some cases, taxpayers have provided medical evidence to support their position, only for questions to be raised about the extent to which the illness affected their capacity to manage the company during the relevant period. There also appears to be inconsistent recognition of caring responsibilities for an ill family member as a circumstance that may materially impair a person's ability to manage company affairs.

The Tax Institute is further concerned that insufficient distinction may be drawn between a person's ability to continue performing their particular occupation or technical role and their ability to manage the broader affairs of a company. For example, a director experiencing illness may be capable of continuing aspects of their day-to-day work, particularly where those tasks rely on established routines, experience, or habitual execution, while still lacking the capacity to fulfil governance, oversight, and decision-making responsibilities associated with managing a company. Similarly, a director continuing to work out of financial necessity should not, by itself, be taken as evidence that they could effectively manage the company's affairs.

In addition, we consider that greater regard should be given to the realities of mental illness. For some individuals, continuing to work may be part of a coping strategy or provide a sense of routine and stability. The ability to perform limited work-related functions in these circumstances does not necessarily indicate an ability to manage the broader affairs of a company or to discharge all of the responsibilities expected of a director during the relevant period.

Recommendations

In pursuit of the objective that the issuing of DPNs is fair, effective and supported by appropriate safeguards, The Tax Institute recommends that the ATO:

- provide clearer guidance on the evidence expected to support a defence;
- give appropriate weight to medical evidence and the views of treating health professionals;
- recognise that a taxpayer need not be incapacitated for every day of the relevant period for illness to be a relevant factor affecting their compliance obligations;
- recognise that caring responsibilities for an ill family member may, in appropriate circumstances, materially affect a taxpayer's ability to manage company affairs; and
- distinguish between a director's ability to perform the specific role or profession in which they have expertise and their capacity to manage the broader affairs of a company.

Domestic violence, coercive control, financial abuse and vulnerable directorship arrangements

Feedback from our members suggests the ATO's vulnerability framework is not always applied effectively when assessing vulnerable circumstances, particularly those involving domestic and family violence, coercive control and financial abuse.

We are aware of cases where taxpayers have been asked to provide evidence, such as police reports, in circumstances where concerns for their personal safety may have prevented them from reporting the violence at the relevant time. We are concerned that evidentiary expectations do not always reflect the realities faced by victims of domestic and family violence.

We are also concerned that insufficient regard may be given to the ongoing effects of coercive control and domestic violence. In some cases, there appears to be an expectation that a taxpayer will take immediate steps to address a debt once they become aware of it, without adequate consideration of the psychological, emotional and practical barriers that may continue to affect their ability to act.

Further concerns have been raised regarding the treatment of evidence from psychologists, counsellors and other professionals, particularly where questions are raised about the extent to which traumatic events affected a taxpayer's capacity to manage their affairs despite supporting expert evidence.

We also note difficulties that can arise where a taxpayer's involvement in company affairs has been influenced by a de facto director through coercion, intimidation or threats of violence. In these circumstances, reliance on the principle that a taxpayer cannot rely on a lack of knowledge may not fully account for the realities of domestic and family violence. Evidence of direction or control by a de facto director will not always be available, as such conduct often occurs in private and the individual exercising control may be unwilling to provide evidence that could implicate them.

We are further concerned about the impact of the DPN regime on vulnerable individuals who have been appointed as directors through coercion, undue influence, financial abuse or without a genuine understanding of the role and its responsibilities. Feedback from members indicates that some individuals are appointed as directors despite having little or no involvement in the management of the company, limited understanding of the obligations associated with directorship and no practical access to the company's books and records.

We are aware of cases involving Indigenous community members who have been appointed as directors to assist a company in obtaining Indigenous business certification, despite having little involvement in the operation of the business. In some instances, these individuals have not been aware of subsequent changes to their office or shareholding interests and have had no visibility over the company's tax affairs. Where substantial PAYG withholding, GST or SGC liabilities subsequently arise, these individuals may become subject to significant DPN liabilities, default judgments and, ultimately, bankruptcy, despite having had little practical involvement in the management of the company or understanding of the consequences of their appointment.

We are concerned that taxpayers in these circumstances can face significant challenges in engaging with the Commissioner and explaining the circumstances surrounding a coerced, nominal or uninformed directorship, particularly once recovery or enforcement action has commenced.

Recommendations:

We recommend the following:

- The ATO's administration of DPN defences be more closely aligned with the principles underpinning its vulnerability framework.
- Appropriate discretion be exercised where a taxpayer reasonably feared for their safety and was therefore unable or unwilling to report domestic and family violence to the police.
- The ongoing impacts of coercive control, domestic and family violence, and financial abuse be recognised when assessing a taxpayer's capacity to address a debt situation after becoming aware of it.
- Appropriate weight be given to evidence from psychologists, counsellors and other relevant professionals regarding the effect of traumatic events on a taxpayer's ability to manage their affairs.
- Careful consideration be given to circumstances involving a de facto director, recognising that corroborating evidence of coercion, intimidation or control may not always be available and that the absence of such evidence should not, of itself, be treated as evidence that the taxpayer had knowledge of, or control over, the relevant affairs of the company.
- A more responsive and flexible approach be adopted when dealing with taxpayers who may have been appointed as directors through coercion, financial abuse, undue influence or without a genuine understanding of the role and its responsibilities.
- Appropriate weight be given to evidence demonstrating that an individual had limited involvement in, or knowledge of, the management of the company, including circumstances where they lacked access to company records, financial information and decision-making processes.
- Consideration be given to whether the existing statutory defences adequately accommodate circumstances involving domestic and family violence, coercive control, financial abuse, and coerced, nominal or uninformed directorships, and whether further legislative or administrative safeguards are warranted.

ATO communications regarding DPN liabilities

The Tax Institute is concerned that many directors do not fully appreciate the significance of the DPN regime or the circumstances in which they may become personally liable for company tax debts. Feedback from members suggests clearer communications would help distinguish routine debt collection activities from situations that may give rise to personal liability under the DPN regime.

Awareness of DPN liabilities and pre-DPN communications

We are concerned that directors are often unaware of issues relating to a company's tax affairs until the ATO issues a DPN or commences enforcement action. While the ATO undertakes communication activities before issuing a DPN, members report that these efforts are not always effective in practice. In particular, the ATO frequently attempts to contact directors from unknown or blocked telephone numbers without first notifying them through other channels, such as email or text message. Given the prevalence of spam and scam activity, many individuals are understandably reluctant to answer calls from unknown numbers.

As a result, the first substantive communication some directors receive regarding the issue may be the DPN itself. By that stage, the matter may already have escalated significantly, reducing the opportunity for early engagement and resolution while increasing stress and uncertainty for affected directors.

We further note concerns regarding the methods used to communicate DPNs and related correspondence. Notification continues to rely heavily on postal correspondence, in addition to communications through the taxpayer's registered tax agent, despite the availability of alternative channels such as email, SMS and myGov. This can create practical difficulties when taxpayers are travelling or otherwise away from their usual address and do not regularly check their mail.

Particular concerns arise where DPNs are issued during holiday periods. Feedback from members indicates that DPNs issued in late December can significantly reduce the practical time available for taxpayers to seek advice and consider their options, given the limited availability of tax agents, legal advisers and insolvency practitioners during this period. As a result, taxpayers may face additional challenges in responding appropriately within the relevant statutory timeframes.

Recommendations

We are of the view that the ATO should consider adopting a more contemporary, multi-channel communication approach before issuing a DPN. This could include:

- issuing advance notifications via email, SMS or secure online messaging advising that the ATO is attempting to make contact;
- clearly identifying the nature and urgency of the issue, while maintaining appropriate privacy protections;
- providing directors with dedicated contact channels to verify the legitimacy of the communication; and
- implementing structured escalation pathways where previous contact attempts have not been acknowledged.

This multi-channel approach should also continue once a DPN is issued, with the ATO contacting the taxpayer in multiple ways in addition to post and the tax agent, such as text, email and myGov.

Understanding DPN communications and exercising rights

We are concerned that taxpayers who engage with the ATO without professional assistance may struggle to understand their obligations, rights and available options under the DPN regime. Feedback from members suggests that the information provided in DPN correspondence is often complex and difficult for taxpayers to navigate. In particular, the distinction between lockdown and non-lockdown DPNs is not always clearly explained, and the practical implications of that distinction for the options available to a taxpayer can be difficult to understand. The availability of statutory defences is also not clearly articulated, with correspondence typically noting only that a defence may be lodged within the relevant timeframe, without providing meaningful guidance on the nature of those defences or the steps required to establish them.

The Tax Institute is also concerned that former directors may face practical barriers in responding to a DPN. Once a director ceases to hold office, they may no longer have access to the company's records or online systems yet remain personally exposed under the DPN regime. Limited access to basic company information can make it difficult for former directors to assess their position, understand the underlying liabilities and determine the most appropriate course of action.

Further concerns have been raised regarding engagement channels available to legal representatives assisting taxpayers with DPN matters. Members report that the removal of the Debt Case Leadership email function has reduced opportunities for timely engagement with the ATO before a case officer is appointed. Where DPN defences are lodged by post, representatives may have limited ability to follow up on the status of the matter, and contacting the ATO without a dedicated case officer or reference point can be time-consuming and costly. Members also note that email communication is not always practical, particularly where a defence is supported by extensive documentary evidence that may exceed email attachment limits.

We are also additionally concerned about uncertainty regarding the ATO's approach to notification for the purposes of the 60-day defence period. Members have raised concerns that, where an amount is credited to a taxpayer's DPN account, this should constitute notification for the purposes of the *Electronic Transactions Act 1999* (Cth) and recommence the period within which a defence may be raised. Feedback suggests that the ATO does not consistently accept this interpretation, creating uncertainty for taxpayers and their advisers when seeking to rely on available defences.

Recommendations

We recommend the following:

- Simplifying DPN communications so that taxpayers who are not represented by a professional adviser can readily understand their obligations, rights and available options. This should include a clearer explanation of the distinction between lockdown and non-lockdown DPNs, the consequences of each type of DPN, the options available in each circumstance, and the defences that may be available, including the steps required to establish and lodge a defence.
- Providing former directors who no longer have access to company records, systems or online portals with access to basic information relevant to the DPN, enabling them to understand the underlying liabilities and make informed decisions about how to proceed.

- Establishing a dedicated electronic pathway for legal representatives to engage with the ATO on DPN matters and lodge supporting material. This could include a secure document exchange platform, such as Kiteworks, that can accommodate large volumes of documentary evidence.
- Clarifying the ATO's view on whether a credit applied to a taxpayer's DPN account constitutes notification for the purposes of the *Electronic Transactions Act 1999* (Cth) and whether this results in the recommencement of the 60-day period for raising a defence.

External administration, restructurings and DPN liabilities

DPNs and deeds of company arrangement (DOCAs)

We are concerned about circumstances where a DPN is issued, the company subsequently enters voluntary administration after the 21-day period expires, and a deed of company arrangement (**DOCA**) is negotiated with the Commissioner as a creditor. In many cases, directors understand that the DOCA provides a pathway for the business to continue trading and reflects an agreed compromise of the company's liabilities, particularly where the Commissioner, as a significant creditor, has voted in favour of the arrangement.

However, members report that directors are often surprised to discover that, notwithstanding the Commissioner's support for the DOCA, the ATO may continue to pursue them personally for the parallel liability arising under the DPN regime on the basis that the DOCA does not release the director from personal liability. This can create a disconnect between the outcome supported by the Commissioner in its capacity as a creditor of the company and the position subsequently taken against the director personally.

We are concerned that directors may not always fully appreciate this distinction when considering restructuring or insolvency options. As a result, directors may proceed on the assumption that the compromise reached through the DOCA resolves the relevant tax debts, only to later face recovery action for their personal liability under the DPN regime.

Recommendations

We recommend the following:

- The ATO provide clearer guidance to directors, insolvency practitioners and advisers regarding the interaction between DPN liabilities and DOCAs, including an explicit explanation of whether a DOCA will generally release a director from personal liability under a DPN.
- Where the ATO votes in favour of a DOCA, it clearly communicates to affected directors whether it intends to continue pursuing the related DPN liability and the basis on which it may do so.
- The ATO improve transparency around the consequences of a DOCA for directors by ensuring that communications issued during external administration clearly distinguish between the compromise of company liabilities and any continuing personal liability of directors under the DPN regime.
- Consideration be given to whether additional administrative safeguards or disclosure requirements are warranted to ensure directors are fully informed of the potential continuation of DPN liabilities before a DOCA is approved.

We trust that these comments are helpful to the Tax Ombudsman's Review. We welcome the opportunity to discuss these matters further and to provide additional examples or case studies if required.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Tax Counsel, John Storey on (03) 9603 2003.

Yours faithfully,

Tim Sandow

President