Law Council
OF AUSTRALIA

Business Law Section

9 October 2026

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Tax Ombudsman
Director Penalty Notices Review
GPO Box 551
Sydney NSW 2001

By email: consultations@taxombudsman.gov.au

Dear Ms Owen

ATO's administration of Director Penalty Notices

1. The Business Law Section of the Law Council of Australia (the **BLS**) welcomes the opportunity to participate in the Ombudsman's review (**Review**) of the Australian Taxation Office's (**ATO**) administration of the Director Penalty Notices (**DPN**) regime. This submission is made with the joint input of the Taxation Committee, the Insolvency & Restructuring Committee, and the Small and Medium Enterprise (**SME**) Business Committee (together, the **Committees**) of the BLS.

2. This submission identifies a number of themes experienced by practitioners who are members of the Committees. While anonymised anecdotes can at times be unhelpful in isolation, the consistent and broad experience reported by practitioners consulted for this Review is that there are serious issues with the administration of the DPN regime.

3. For the reasons set out in this submission, the Committees recommend as follows:

Recommendations

The legislature should consider whether the regime requires amendment in order to maintain a logically consistent and policy-based basis in the context of the broader insolvency regime. Suggested amendments include extending the defences available and extending the period of 21 days currently allowed for action to 60 days.

The legislature should amend the Taxation Administration Act 1953 (Cth) to ensure that the applicability of the defence is a matter for judicial determination rather than determination only by the Commissioner given the constitutional concern discussed below.

The ATO should conduct a thorough urgent review of the widespread issue of improper and incorrect DPNs and should cease enforcing DPNs which the Office is aware are incorrect.

The ATO should materially improve the resources allocated to the administration of the DPN regime in order to ensure consistency, compliance with law and fairness in its administration of the regime. If sufficient resources cannot be allocated, the ATO should cease issuing DPNs until they can be.

The ATO should adopt a more deliberate, targeted decision-making process for when a DPN should be issued, rather than issuing DPNs indiscriminately.

Any such decision-making process should account for whether the director penalties are locked down, and the impact this has on both the ATO's recovery strategy and on the affected director.

The ATO should issue updated public guidance for taxpayers and advisers on DPN defences. This should include updating Law Administration Practice Statement PS LA 2011/18 'Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts', especially Appendix B, paragraphs 41 to 73, and explaining its relationship with Practical Compliance Guideline PCG 2020/2, 'Expansion of estimates regime to GST, LCT, and WET'.

The ATO should give its staff clear guidance on the appropriate response to DPN defence submissions where the evidence supports the defence.

The origins and evolution of the DPN regime

4. Parliament first introduced the DPN regime in 1993 through Division 9 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**).

5. Prior to the introduction of the DPN regime, the Commissioner had a statutorily conferred 'paramount priority' over all unsecured creditors with respect to unremitted deductions for specified taxes and charges (Pay-As-You-Earn and Prescribed Payment System withholding amounts) pursuant to former section 221P of the ITAA 1936.

6. The abolition of the Commissioner's statutory priority and its replacement with the DPN regime followed recommendations by the Australian Law Reform Commission in the General Insolvency Inquiry, known as the 'Harmer Report'.[1]

7. The Harmer Report argued that the existence of the Commissioner's priority was contrary to fundamental principles of equality and that a rateable distribution among unsecured creditors should be reinforced.[2]

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[1] See the Australian Law Reform Commission, *Discussion Paper No 32*, *General Insolvency Inquiry,* Canberra, August 1987, (**Harmer Discussion Paper**); and the Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988) (**Harmer Report**).

[2] *Harmer Report*, vol 1, at 221 .

8. The Harmer Report advocated for the imposition of a rigorous standard of conduct on directors with respect to payment of a company's debts and liability for those whose conduct falls short of the required standard.

9. However, the Harmer Report also acknowledged that there should be appropriate exceptions for directors who did not participate in the management of the company at the relevant time due to illness or some other sufficient cause.[3]

10. In November 2009, the Commonwealth Treasury published a proposals paper titled 'Action Against Fraudulent Phoenix Activity'. The paper reported that revenue losses as a result of phoenixing activity had risen to hundreds of millions of dollars and were continuing to rise.[4] The paper set out a number of further taxation and corporations law reforms intended to address the problem.[5] Among these were the expansion of the DPN regime to capture a broader range of taxes and charges and the 'automation' of the regime, so that directors become automatically liable after 3 months, if the relevant debt remained outstanding.[6]

11. The paper identified two forms of increasingly prevalent phoenixing activities. The 'basic' kind involved the incorporation of a new company to take over the business of an entity that had been deliberately liquidated to avoid the payment of taxes and other debts, and the so-called 'sophisticated' kind involved the use of a special purpose vehicle within a broader corporate group to incur significant PAYG, superannuation and other liabilities, which is then liquidated.[7]

12. In 2012, the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth) and the *Pay As You Go Withholding Non-compliance Tax Act 2012* (Cth) introduced significant changes to the DPN regime. Although Parliament enacted the changes with the aim of deterring fraudulent phoenix activities, they had the effect of expanding the regime so as to encompass all directors who fail to meet PAYG withholding and superannuation guarantee charge (**SGC**) obligations.[8]

13. A further set of amendments commenced on 1 April 2020, including the expansion of the DPN regime to cover GST, WET, and LCT liabilities.[9] The stated policy rationale for the repeated expansion of the DPN regime has focused mainly on combatting phoenix risks.

Two types of director penalties

14. Following the above history, there are currently two main types of director penalties, potentially covering PAYGW, SGC and/or GST liabilities of a company:

    (a) A standard or "non-lockdown" director penalty arises where the company has lodged its business activity statements (**BAS**), instalment activity statements

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3 Ibid, at 138.
4 Treasury (Cth), 'Action against Fraudulent Phoenix Activity' (Proposals Paper, Treasury, Australian Government, 2009).
5 Ibid.
6 Ibid.
7 Ibid.
8 For further commentary, see Sylvia Villios, 'An Evaluation of Australia's Director Penalty Regime' (2016) 3(6) *Australian Tax Law Bulletin* 107 at 107.
9 *Treasury Laws Amendment (Combating Illegal Phoenixing) Act* 2020.

(**IAS**) and SGC statements within the relevant due date (or the due date for SGC) being within 3 months of the due date for activity statements, or by the due date for SGC statements, but has not made the required payments. In order to have the personal penalty in respect of the underlying liability remitted, a director must, within 21 days of the issue date of the DPN (or before the DPN is issued), cause the company to **either**:

(i) pay the full amount of the director penalty debt, or

(ii) appoint:

- a voluntary administrator
- a liquidator; or
- if the company is eligible, a small business restructuring partner.[10]

(b) A director penalty becomes "locked down" where the reporting of the company's PAYGW and/or GST liabilities occurs outside the required timeframes (or, in the case of SGC liability, is overdue at all) and the liabilities remain unpaid. As a matter of practice, this will automatically be the case where the ATO issues assessments (or relevant estimates) at any time after the relevant reporting period has lapsed. If a director penalty is "locked down", the **only way** for the director to have the personal liability remitted is to pay the full amount of the director penalty (or underlying company) debt,[11] irrespective of when the DPN is issued.

15. The lockdown feature of the director penalty regime specifically addresses illegal phoenixing risks. It operates to prevent a director avoiding personal liability by placing a company that has accumulated tax and superannuation liabilities into an insolvency process before, or shortly after, its debts are crystallised. The regime locks in the director's personal liability at or around the time the underlying reporting obligation fell due, even if those liabilities are assessed or estimated at a later date.

16. Notably, the terminology "lockdown" and "non-lockdown" is commonly used, including by the ATO, but does not appear in the legislative language. The complexity of the legislative language around these matters is a possible reason for:

(a) the widespread misdescription of the applicable deadlines in commentary (for example, advisers regularly fail to appreciate that the deadline for SGC reporting differs); and

(b) possibly also the ATO's own misinterpretation of the regime in its widespread issue of "lockdown" notices to directors where companies had reported PAYG debt under the single touch payroll (**STP**) mechanism over a number of years.

17. Practitioners report that directors receiving non-lockdown DPNs do not readily understand DPN correspondence from the ATO, and that this lack of understanding

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[10] Shane Williamson and Nell McGill, 'Director Penalty Notices – A Blunt Instrument', Sparke Helmore (Web Page, 2 September 2024) <https://www.sparke.com.au/insights/director-penalty-notices-a-blunt-instrument/>.

[11] Ibid.

adversely affects their ability to take appropriate action within the 21 days allowed for placing the company into external administration (assuming the company cannot pay the DPN liabilities in full). The Committees recommend extending the period in subsection 269-25(1) of the *Taxation Administration Act 1953* (Cth) (**TAA**) to 60 days, particularly where a director was unaware of the company's position before the DPN arrived, or where there is an imbalance of power (or voting blocks) between directors.

18. Given differences in timing, a director may receive both non-lockdown and lockdown DPNs for different periods and/or heads of liability. Practitioners report that client directors have particular difficulty understanding such notices and distinguishing between the two types of liability, which adversely affects their choice of action on the non-lockdown component.

19. The complexity of the regime is one reason for that lack of understanding. The Committees also note that:

    (a) in order for laws to be effective in encouraging or discouraging certain behaviours, they must be understood; and

    (b) there are also clearly areas for improvement in making DPNs more easily understandable and actionable.

20. For example, DPNs that list tens or even hundreds of line items of tax debt often do not state total amounts, whether in "lockdown" or "non-lockdown" columns or overall. This appears to be an attempt to ensure that an error in one line item does not invalidate the rest of the notice. The better approach would be for the ATO to provide totals so that notices are more readily understood, and to bear the consequences if an error invalidates a notice.

Errors in the ATO administration of the lockdown and non-lockdown allocation for DPNs

21. When PAYGW tax debt became reportable through STP, Parliament amended the TAA so that reporting of PAYGW liability by way of single touch payroll within the requisite time period (that is, three months from the due date for reporting) is sufficient to prevent a lockdown DPN. That is necessarily the appropriate interpretation because, at least on the face of the legislation, there is no underlying obligation to report that liability by way of a BAS once it has been reported through the STP regime (though as a matter of practice, when filing a BAS through the ATO portal, the PAYGW details automatically prepopulate with the STP data already disclosed).

22. For many years, the ATO did not recognise that position when issuing DPNs, and instead issued "lockdown" DPNs for debt that was properly "non-lockdown". To the Committees' knowledge, the ATO has:

    (a) never acknowledged this issue publicly;

    (b) never taken any steps to notify all directors who have received incorrect DPNs of the mistake;

(c) continued to commence proceedings based on DPNs which, if examined by an officer, would clearly be incorrect; and

(d) as a matter of practice, only acknowledged the issue and addressed it at the point in time where a solicitor has entered an appearance and the matter has been transferred internally within the ATO from the anonymous "Summons Team A" to an actual ATO officer for consideration, at which point without prompting, the officer as a matter of practice will write to the solicitors for the defendant and notify them that the matter needs to be repleaded.

23. The Committees acknowledge that errors can occur in the administration of government. This issue, however, represents a widespread failure of the regime. The Committees estimate that thousands, if not tens of thousands, of erroneous DPNs have been issued. Practitioners suggest that senior officers of the ATO must be aware of the issue and must have been aware of it for years, whilst the ATO continues to commence proceedings on knowingly false DPNs. It has taken no steps to address the fact that directors will presumably have gone bankrupt inappropriately or paid debts under a false apprehension. Despite the recognition following the Royal Commission into the Robodebt Scheme of the material mental health consequences of receiving Commonwealth correspondence containing erroneous statements about debts owing, the ATO and its senior officers have taken no steps to address those matters in clearly similar circumstances. The Committees recommend that the ATO should provide public guidance addressing this issue and confirming that any such previously raised, but defective, DPN liabilities are not properly collectable, in such STP-reported circumstances.

Timeframes for liability as a Director

24. Directors become potentially liable for a director penalty if they are a director at the time that the company's underlying liability arises, or if they subsequently become a director (and the liability continues to be outstanding 30-days thereafter).[12]

25. For lockdown director penalties, that DPN exposure remains in place even where the company is placed into external administration. As a result, the ATO may issue DPNs years after the relevant period and well after the company has ceased trading or completed liquidation or another form of external administration.

26. The ATO's systems do not appear to assess adequately the period during which a director held office when issuing a DPN. Practitioners report that directors have received (incorrect) DPNs where the company entered external administration well before the 30-day deadline.

Case study

In at least one case where a company was placed into external administration within 30 days of the appointment of a new director, the director still received a DPN and the Deputy Commissioner then commenced collection proceedings against the director for those DPN liabilities.

[12] Section 269-20.

> *Despite being told immediately of the error, the Deputy Commissioner still took some 10 months to discontinue the proceedings – with the director incurring time, costs and stress during that delay.*
>
> *During that period, sustained attempts to contact the ATO officer responsible for the matter went unanswered, and the solicitors for the director could not speak to an ATO officer without providing personal tax file numbers.*

27. Practitioners with knowledge of the matter suggest that, if the ATO is unable to administer the regime effectively in such cases, it should not issue DPNs in the first place.

Decision-making for Issue of DPNs

28. DPNs have become a routine, high-volume debt enforcement mechanism. It is acknowledged that there must be some basis upon which decisions are made by the ATO whether or not to issue a DPN, but it is notable that:

    (a) there are often DPNs directed to some but not other directors of the same companies; and

    (b) there are often DPNs directed to directors which are in part "lockdown" and in part "non-lockdown" DPNs, despite the fact that each type of DPN by its design encourages opposite behaviour (see discussion below) and with no clear policy basis behind the decision to issue such a DPN.

29. The ATO Annual Report numbers for DPNs support this view – with the total volume being in the many tens of thousands issued each year.

> *In 2024–25, we experienced the smallest growth in collectable debt since before the pandemic, with 89.4% of payments being made on time and in full, exceeding our target of 88%. This increases to over 95% paid within 90 days.* ***We issued 84,529 director penalty notices to individual directors in respect of liabilities of $5.5 billion****. At 30 June 2025, $1.2 billion of these liabilities had been collected and we expect this to increase over time as collection activity continues.*[13] [Emphasis added]

30. As a result, little discretion or targeting appears to be applied in selecting which directors should be subject to a DPN. Practitioners report that many directors receive DPNs in circumstances where they otherwise have good compliance histories, or are experiencing situations of significant vulnerability already known to, or identifiable by, the ATO (see below).

31. Further, practitioners report that lockdown DPNs are not being targeted at serial offenders suspected of being phoenix operators. Rather, there appears to be no public policy or procedure document that details if and how the locked down status of the director penalty affects the ATO's approach to issuing the DPNs.

32. The apparent failure to appreciate and consider the policy objectives of the lockdown system manifests in perverse outcomes:

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[13] Australian Taxation Office, *Commissioner of Taxation Annual Report 2024-25*, page 21.

(a) Where the ATO issues a DPN in respect of locked down penalties and the company remains active, the director is often incentivised to keep the company trading in order to try to pay the personal liabilities. Directors in these circumstances are actively disincentivised from utilising the corporate insolvency regime, which was designed to mitigate the escalation of corporate debts. In circumstances where phoenixing is not a risk, the decision to issue locked down director penalties therefore appears directly contrary to the intent of director penalty regime.

(b) Where the ATO issues a DPN for locked down penalties concurrently (or after) the company has entered into a deed of company arrangement or a small business restructuring plan, they have effectively given the Commonwealth priority over other creditors, as it allows the ATO to collect an amount above its proportional dividend under the relevant arrangement – given the automatic crediting of director penalty collections against the company's DPN-relevant liabilities.

(c) The ATO has taken action to issue and recover DPNs for locked down penalties after the company has been liquidated and deregistered. Directors reasonably believed that the company's liabilities had been addressed through the insolvency, particularly where the ATO has proven for its debt in the liquidation. Practitioner feedback suggests that such recovery actions, while perhaps legally permitted, erode trust and confidence in the system.

Interaction with the ATO's recovery strategy

33. As stated in its corporate plan for 2025-26, one of the ATO's corporate priorities has been to strengthen payment performance and debt collection.[14] The corporate plan provided that the ATO's Payment Strategy had seen the growth of collectable debt slow over the preceding 12 months through increased firmer action for non-payment and clear messaging to the community that the ATO would be more active in collecting amounts owed.

34. However, as can be seen in the above examples, DPN actions taken without due consideration to the policy intent of the regime and insolvency considerations may have the inverse effect of either consolidating or increasing collectable debt.

35. Further, the over-focus on reducing collectable debt by forcing companies (and directors) into insolvency will lead to an overly punitive "now in enforcement-mode" mentality on the part of ATO staff. Practitioners observe that the metrics used as Key Performance Indicators drive resulting staff behaviour, which makes this outcome highly likely, which appears consistent with practitioner feedback as to overly harsh and inflexible approaches being taken by ATO staff in evaluating DPN defence cases. The Committees therefore recommend that an alternative performance measure be introduced that specifically focuses upon 'dealing **effectively** with evaluating DPN defences', rather than in simply counting the reduction in DPN debts through payment being enforced or insolvency action being taken (as the latter now appears to be the case).

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[14] Australian Taxation Office, *Corporate Plan 2026-27*, page 12.

Discretion to issue DPNs

36. Practitioners have observed ATO staff and correspondence emphasising that director penalties are imposed as a matter of law, and suggesting that the ATO has no discretion as to whether directors are made personally liable. The ATO states that it is therefore compelled to pursue these liabilities under rule 11 of the Public Governance, Performance and Accountability Rule 2014 (Cth). In this context, issuing a DPN is being seen as a mere administrative precondition to the recovery of those liabilities.

37. The legislative framework for the director penalty regime is designed to impose a liability by way of penalty that is parallel to the underlying obligations of the company. This framework is necessary to avoid:

    (a) multiple recoveries in respect of the same underlying obligation, particularly in matters involving multiple directors; and

    (b) the Commissioner needing to assess or otherwise turn its mind to quantifying the liability at a point in time.

38. Importantly, the Committees contend that, contrary to the emphasis reported above, the Commissioner has discretion as to whether or not to issue a DPN. Where a DPN is not issued, the Commissioner cannot seek to recover the director penalty liability. In addition, offsetting of credits under Division 3 of Part IIB of the TAA does not apply with respect to the liability.

Service of DPN on a director

39. From a practical perspective, director penalties are not raised on any ATO account for a director that they would normally see (the DPN account is not one that a director would normally view or even realise exists, until the ATO absorbs a credit otherwise refundable or seeks to take recovery action) and a director will often experience difficulties in proposing a payment plan with respect to the personal debt created.

40. A DPN is generally served on a director by post, sent to the last recorded address on the ASIC Companies Register. Practitioners report the following issues with service upon directors:

    (a) out-of-date addresses being used by the ATO (notably, where a director has resigned there is no obligation on the director to continue to update the director's address with the Company; nevertheless, the regime deems service upon the director at the old address);

    (b) widespread reported lack of receipt by directors at their registered address;

    (c) widespread reported lack of receipt by tax agents of copies of DPNs at their business address;

    (d) reported lack of DPN correspondence being recorded on the ATO Tax Agent Portal; and

    (e) directors only becoming aware of DPNs having been issued against them when:

(i) DPN liabilities start appearing on their [DPN-specific] ATO account;

(ii) credits otherwise refundable being instead applied to DPN liabilities (without any other notification); and

(iii) ATO legal action is commenced seeking to recover the DPN liabilities.

Defences

41. There are three defences[15] a director can raise in response to a DPN. Broadly speaking, they are:

(a) that the director, "*because of illness or some other good reason*", did not take part in the management of the company "*at any time*" when they were a director during the period since the relevant obligation arose, and it would have been unreasonable to expect the director to have done so;[16]

(b) that the director took *all* reasonable steps which could have been taken, or there were *no other* reasonable steps that could have been taken, to ensure that the company complied with the relevant obligation or that an administrator or small business restructuring practitioner was appointed or that the winding up of the company began;[17] or

(c) for unpaid SGC or GST liabilities, the company treated the relevant legislation as applying in a way that could be reasonably argued was in accordance with the law, and took reasonable care in doing so.

42. The test for the first two grounds of DPN defence is whether the Commissioner is 'reasonably satisfied' that any of those grounds apply. There does not appear to be any equivalent specification of the test for the availability of the third ground.

43. It is strongly arguable that the applicability of the defence only where the Commissioner is 'reasonably satisfied' that it applies is unconstitutional – given that it involves an administrative officer in the Executive branch of Government making a binding determination.

44. Whilst in the case of subsequent Court proceedings there is ultimately an ability to raise the question at trial, the combination of:

(a) the fact that the Commissioner may enforce a DPN in other ways (for example, by garnishee notice or by set-off against credits to the director's account); and

(b) the fact that the defence cannot be argued if the Commissioner is not reasonably satisfied within the requisite 60-day period (as to which, see below),

may constitute the exercise of judicial power by a non-Chapter III Court contrary to the first limb of *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

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[15] TAA, Schedule 1, section 269-35.
[16] TAA, Schedule 1, section 269-35(1).
[17] TAA, Schedule 1, section 269-35(2).

Evidence to reasonably satisfy the Commissioner

45. There is no statutory guidance as to what evidence a director might need to provide to 'reasonably satisfy' the Commissioner as to the application of either the 'medical excuse/other good reason or 'all/no reasonable steps' defences.

46. The examples of evidence types provided in the current ATO Vulnerability Framework page[18] are of some assistance, however practitioner feedback indicates that this material does not provide guidance as to how ATO case officers should evaluate such evidence, or what they should do differently as a result of considering the evidence provided.

Illness

47. Many practitioners report ongoing difficulties with ATO staff considering evidence intended to support claims for both physical and mental health conditions that the directors contended prevented them from effectively participating in the management of the relevant company during the entirety of the periods to which the relevant DPNs relate. This has included ATO staff rejecting such medical or psychological evidence from qualified practitioners, on various grounds, including:

    (a) that the evidence was retrospective, rather than having been provided contemporaneously with the DPN period;

    (b) that the evidence was not provided by those medical or psychological practitioners as independent experts, but rather as treating practitioners for the relevant director;

    (c) that the reported condition referred to general incapacity and did not specifically refer to not being able to operate as a director; and

    (d) that the ATO case officer otherwise 'disagreed' with the content or accuracy of the report

48. Practitioners report that evidence of disabling psychological conditions presents particular difficulties in demonstrating that a director was suffering from such a condition.

    Case study

    The director was appointed to a small service-sector company after many years working in it as an employee. She had no management or accounting background. A co-director resigned (without telling her) early in the pandemic, and she was left as the sole director through the COVID-19 period.

    The lock-down DPNs were issued a few months before the company entered liquidation. DPNs were issued for unpaid PAYG withholding and GST covering roughly two years. The combined amount was under $200,000, and very little had been paid or credited since.

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[18] See https://www.ato.gov.au/about-ato/commitments-and-reporting/our-support-for-people-experiencing-vulnerability/our-vulnerability-framework/evidence-of-experiencing-vulnerability.

The director attempted to rely on the 'illness or other good reason' defence under s 269-35(1) of Sch 1 to the TAA 1953. Her evidence was:

- *a GP mental health treatment plan, showing that she suffered from major anxiety and depression, and had been referred to a treating psychologist; and*
- *an independent psychologist report diagnosing both anxiety/depression and a chronic psychological condition (an 'adjustment disorder' which prevented her from making decisions, due impaired executive functions), which the psychiatrist said stemmed mainly from being left to run the company alone through the pandemic and struggling to manage its debt problems. The psychiatrist's report also said the condition would probably not have been able to be diagnosed when the stressful events began, but would only fully manifest as the stress mounted over time.*
- *acceptance by workers' compensation insurer of the incapacitating psychological injuries that she sustained as a result of her employment by the company in the circumstances of struggling through the financial difficulties, resulting in a payment of personal injury compensation for those injuries.*

The ATO rejected the defence several months after it was lodged and apologised for the delay. The ATO cited the following reasons for that adverse decision:

- *Inability to take part in management must cover the entire period she was a director while the debt was unpaid (citing DCT v George [2002] NSWCA 336) – and their view was that her circumstances did not cover that whole period.*
- *Her dealings with the company were asserted to show that she was involved in management for some of the relevant period, including:*
    - *seeking help with a COVID-19 support form;*
    - *lodging payroll reports (via accounting software);*
    - *engaging a new tax agent;*
    - *trying to negotiate a payment plan (via new tax agent);*
    - *querying a creditor's statutory demand; and*
    - *arranging to appoint a liquidator.*

Other good reason

49. There is no clear guidance from the statute or extrinsic materials as to what might constitute such an 'other good reason'.

50. Practitioners report that ATO staff do not appear receptive to this ground being raised in defence submissions, even as part of a wider consideration of the director's underlying circumstances preventing effective participation in the management of the company.

51. Conceptually, the ‘other good reason’ test may be applicable in circumstances involving coerced directorships or similar instances involving financial or other abuse. Whilst legislative change would be highly beneficial in dealing with this problematic area of financial abuse and coerced directorships (as per our previous submissions on point to Treasury), the Committees argue that the existing provisions already allow scope for this to be considered by the Commissioner as an ‘other good reason’ for non-participation in the management of the company. However, practitioners have observed a reluctance from ATO staff to interpret the test in this way. Positive guidance on this topic would assist (see ‘Vulnerability’ below, as well as the case study on coerced directorships).

All reasonable steps and no reasonable steps

52. From the wording of the statute, both tests appear to be an objective test applied in the subjective circumstances in which the specific director found themselves, covering both matters affecting the company and the director’s broader personal context.

53. Practitioners report that ATO staff tend to apply an unduly high standard in assessing submissions on both the ‘all reasonable steps’ and ‘no reasonable steps’ defences.

All reasonable steps

54. The case law indicates that the test is whether the director has taken all reasonable steps to cause the company to do any, rather than all, of the four actions specified in section 269-35(2)(a) of Schedule 1 to the TAA, being to:

    (a) comply with its obligations (pay the DPN debt); or

    (b) appoint:

        (i) a voluntary administrator

        (ii) a liquidator; or

        (iii) if the company is eligible, a small business restructuring partner

55. Practitioners report that there are particular difficulties with ATO consideration of submissions where directors contend that they took ‘all reasonable steps’, including:

    (a) Where the company was technically solvent, and would have been able to pay the relevant DPN liabilities, but became unable to do so due to circumstances outside their control (such as where there was a dispute regarding accounts receivable with a Government agency or credit-entitlements from the ATO). In such cases, practitioners report that the ATO case officers have not accepted the financial circumstances as constituting the director having exercised all reasonable steps, despite the company’s solvency arguing against placing it into external administration. The Committees recommend that the ATO should publish guidance as to the application of the ‘reasonable steps’ defence in such situations, including what evidence should be provided in support of such submissions.

(b) Where there was a majority of directors on the company's board who voted against arrangements to either pay the company's DPN liabilities or to place the company into external administration. In those cases, the minority directors are argued to be unable to force the company to take any of the specified actions, whilst practitioners report that the ATO case officers have not accepted that inability in rejecting minority directors' defence submissions. The Committees recommend to Government to introduce a specific legislative defence for a director who took reasonable steps, was outvoted by the majority of other directors, and reported the position to the ATO. In the meantime, the Committees recommend that the ATO publish guidance on the application of the 'all reasonable steps' defence to situations involving a minority director who can provide evidence as to their genuine efforts to try to arrange for the company to either/both pay the tax-related liabilities and/or appoint an external administrator.

Case study

Two directors of a four-director company repeatedly sought to have the company pay tax-related liabilities at Board meetings, but were out-voted by the other two directors (one of whom was the majority shareholder).

Those two directors then sought to have the company placed into external administration by subsequent resolutions to the Board, but were again outvoted by the other two directors (including that majority shareholder).

The two directors then resigned, as there was no other action that they could reasonably take (given the lack of funds to pursue Court litigation to seek orders to compel the payment of the debt or that the company be placed into liquidation).

The two directors each filed DPN statutory defences outlining the above circumstances, providing copies of Board documents (resolutions and minutes) and audio recordings of the relevant Board meeting deliberations.

The first of those two directors received a negative decision on their DPN defence and the second director is still awaiting a decision eight months after filing his defence.

The ATO grounds for the negative decision for the first director cited that every director was subject jointly to a DPN liability and that no director could simply delegate responsibility to another person – seemingly ignoring the relevant Corporations Act provisions relating to Board decision-making and roles of directors or the evidence of the steps that the two directors had each taken in this matter.

56. Other cases involving the same issue have also been reported, with varying levels of supporting evidence regarding director actions to attempt payment/appoint external administration being available – all with similarly negative decisions from the ATO.

No [other] reasonable steps

57. Practitioners report similar issues arising with the 'no reasonable steps' defence as are outlined above, with an additional complicating factor relating to the actions of other directors, including:

    (a) if another director has already taken all reasonable steps on behalf of the company, there would logically be no further reasonable steps that a second director could take. Practitioners report that ATO case officers appear to disregard this ground, treating the alternative defence as if it required a positive action (such as the second director personally having taken all reasonable steps); or

    (b) if another director has misled a second director as to the company's true financial circumstances, the second director may reasonably not believe that any further steps should be taken, based on that false understanding of the circumstances.

58. In both situations, practitioners report that ATO case officers tend to state that a director cannot delegate their directorial duties to another director. Those officers do so without considering the informational reliance issue when evaluating the misled director's DPN defence, or the subjective reasonableness of the director's actions or inactions.

    Case study

    A director was in a financially abusive relationship with their domestic partner, who was an accountant.

    That partner systematically misled them as to the true state of the finances of the company, including the non-payment of the tax-related liabilities, whilst embezzling those funds for his personal use.

    The ATO emails, physical mail and phone messages regarding the debts were all being filtered by the abusive partner – who also advised staff not to bother the victim director, because it would distress her.

    The victim director only became aware of the DPN liabilities after the abusive partner died unexpectedly – by which time the business was no longer viable.

    In making an adverse decision on the DPN defence, the ATO relied upon the ATO communications as evidence of the director having been constructively aware of the liability AND also that the victim director had had two years since their partner's death to have dealt with the payment of the liabilities – ignoring the evidence of abuse and the embezzlement having taken all the missing funds.

When a DPN defence may be raised

59. As noted above, there is an initial 60-day period[19] for a director to raise a DPN defence with the Commissioner, which may be renewed if the Commissioner:

[19] TAA, Schedule 1, section 269-35(4A)(a).

(a) notifies the director that the ATO has issued a garnishee notice seeking to recover the director's DPN liability from a third party; or

(b) otherwise, the Commissioner notifies the director in writing that the ATO has recovered any of the DPN liability. Practitioner feedback indicates that there is some uncertainty regarding what constitutes such notification in writing,[20] particularly regarding application of a director's refund credits against the DPN liability.

60. After that initial period, a director can also rely upon those defences when the Commissioner takes action in Court attempting to recover a DPN liability[21] or against action by another director under joint/several liability[22] for that DPN liability.

Case study

Three directors of a single company separately raised statutory defences against DPN liabilities, after each was separately notified of the crediting of refundable amounts against their respective DPN accounts.

Those separate statutory DPN defences were raised in parallel to DPN collection litigation which was then underway – each raising the 'all reasonable steps' and no other reasonable steps' defences.

However, the ATO lawyers indicated that their instructions refused to acknowledge that the crediting of those amounts against their DPN liability account on the ATO Portal constituted a 'notification in writing'.

Reportedly, this is a general experience encountered by many practitioners – where the ATO refuses to accept, or indefinitely delays consideration of, statutory defences when filed after the original 60-day period, even when there has been such crediting of refundable amounts to the directors' respective DPN accounts.

Vulnerability

61. In response to changing community expectations and stakeholder lobbying, the ATO introduced a Vulnerability Framework in 2025, which outlined a philosophy of assisting vulnerable taxpayers to comply with their tax obligations.

62. Despite the introduction of the Framework, the Committees argue that the previous BLS submissions[23] on how the ATO deals with vulnerable taxpayers are still applicable to the more recent practitioner experience of how the ATO deals with DPN defence matters.

63. Practitioner feedback further suggests that this focus does not sufficiently consider the exercise of statutory discretionary powers or, specifically in the case of DPNs, how such vulnerable circumstances may 'reasonably satisfy' the Commissioner that a DPN defence may apply.

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[20] Ostwald v Commissioner of Taxation [2026] FCA 868
[21] TAA, section 269-35(4)(a).
[22] Ibid, section 269-35(4)(b).
[23] Improving how the ATO deals with vulnerable taxpayers (Submission 7 December 2021) and The ATO's approach to taxpayer relief provisions (Submission 2 October 2025)

Coerced directorships

64. The previous submission from the BLS[24] on coerced directorships specifically refer to the practical issues for DPNs involving directors who are victims of coercive control and financial abuse, especially by intimate domestic partners.

65. In the absence of the legislative change foreshadowed by Government,[25] directors as recorded with ASIC will continue to be subject to DPN action – even where they are suffering from profound financial abuse and coercive control.

66. Recent practitioner feedback still reflects a failure by the ATO case officers dealing with such matters to properly consider that source of vulnerability in determining whether any or all of the 'illness/other good reason' or all reasonable steps/no reasonable steps' defences may apply – in the subjective circumstances of the abuse victim/coerced director.

Mental health conditions

67. As mentioned above, practitioner experience is that there is a lack of guidance for ATO case officers dealing with directors who suffer from disabling mental health conditions, both as to how they should evaluate such evidence and as to what action they should take where such disability is found to have existed at the relevant times.

Physical health conditions

68. Again, as mentioned above, similar issues arise for physical health conditions. However, from practitioner feedback, the disabling nature of purely physical conditions appears to be more readily understood by ATO case officers, aside from the complicating factor of side-effects of medications – which may also give rise to mental health issues.

Multi-factorial vulnerability

69. Perhaps the most challenging circumstance from practitioner feedback is where directors may be suffering from more than one such circumstance – as is common in situations where a person with physical health problems also becomes mentally affected as a result, and the common overlap between coercive control/financial abuse and mental health conditions like PTSD. Again, practitioners report that ATO case officers appear less likely to accept DPN defence submissions where there are two or more such sets of circumstances that the director contends apply on their evidence.

Directors may be unaware that a DPN can still issue despite the ATO having voted in favour of a deed of company arrangement

70. There are situations where directors have entered into deeds of company arrangement (**DOCA**s) in the belief that, as the ATO has supported the DOCA, the balance of the ATO debt will not be required to be paid. Those directors then receive

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[24] Combatting financial abuse perpetrated through coerced directorships (Submission 24 December 2025)

[25] See, Treasury, *Combatting financial abuse perpetrated through coerced directorships* (Consultation paper, November 2025), pp 15–16 and Joint interview with the Hon Dr Andrew Leigh MP and the Hon Dr Andrew Mulino MP, 26 November 2025.

a DPN for that debt. In one such case, a director contributed a material sum to the DOCA and then received a DPN. The director stated that he would not have pursued the DOCA had he known that this would be the case. The Committees submit that the ATO should be required to state that voting in favour of a DOCA does not relieve directors of their DPN liabilities.

71. Given the peculiarities of the DPN defence regime, the significantly increased use of DPNs and the types of vulnerable director circumstances encountered in practice, the Committees recommend that it would be highly beneficial for the ATO to introduce a specialist team within the ATO who deal with DPN defence matters, along with a special pathway for the filing of DPN defence submissions to ensure that they promptly reach that specialist team.

Further engagement

The Committees would be pleased to discuss any aspect of this submission if it would assist the Ombudsman in finalising the Review. Please contact Bruce Collins [redacted] or Chris Pearce [redacted] if you would like to discuss this submission with representatives of the Committees who have contributed to the submission.

Yours sincerely



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