# Summary of a Company Operation and Taxation

The operation of a company, and some of the legal consequences of running a company can be very confusing to many people. If set up and run correctly, a company can provide lower tax, asset protection, and many other benefits – but if run incorrectly, all these benefits can be lost.

The Corporations Act 2001 governs pretty much everything to do with starting up, running, and closing a company. The directors of a company are charged with the duty of ensuring that the company adheres to the Corporations Act.

To assist you in operating a company, we have compiled this document for you. This is not an exhaustive discussion on all of the aspects that the directors of a company must consider, but merely a simplistic look at the basics.

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## Disclaimer

*Please note that this is not intended to be an exhaustive description of a company, how a company operates, or the many laws surrounding companies, income tax, or any other subject.*

*We have provided this document as a very basic guide to a company which is intended to assist people in improving their understanding of a company and how it operates. There are many other factors to consider in deciding whether or not a company is suitable for you which have not been outlined in this document to keep it simple.*

*This document is not to be taken as advice under any circumstances. If you are considering acting based on anything written in this document, we suggest you seek professional advice first.*

***We will not accept liability for anyone relying on the contents of this document.***

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## The main types of companies

A company can take a number of different forms for a number of different purposes, namely:

- Proprietary company limited by shares – this is by far the most common type of company;
- Public company limited by shares – a company listed on the stock exchange for example;
- Public limited by guarantee – many clubs, sporting associations etc are this;
- No liability – restricted to mining companies; and
- Unlimited liability – very uncommon, but used by some mutual societies.

This document will focus on a proprietary company limited by shares, as this makes up 98% of all companies, and would be the only type of company suitable for most clients.

### Proprietary companies

A proprietary company is basically a private company with less than 50 shareholders. Being a private company, it cannot invite the public to purchase shares.

A proprietary company has a number of advantages over a public company, the most important being:

- A number of rules in the Corporations Act can be replaced by similar (but better suited) rules in the constitution;
- An annual general meeting is not required;
- Shareholders can pass resolutions by individually signing a document, as opposed to holding a meeting;
- Only 1 director is required, opposed to a minimum of 3 for public companies; and
- A "small" proprietary company does not need to lodge accounts with the Australian Securities and Investments Commission (ASIC) – meaning that it does not need to prepare accounts that comply with the onerous Accounting Standards and do not need to have those accounts audited.

### Small vs Large Proprietary Company

A proprietary company is considered small unless it passes two of the three tests below:

- Turnover of the company (and entities it controls) is $25mil or greater;
- Gross assets of the company (and entities it controls) is $12.5mil or greater; and
- The company (and entities it controls) has 50 or more employees.

The only significant difference between a small and large proprietary company is the obligation to provide financial reports to ASIC.

## Important components of a company

Throughout this document, we refer to components of the company such as the constitution. Below is a short explanation of these components.

### Constitution

The company constitution is essentially the set of rules (along with the Corporations Act) that the company (and therefore its directors and employees) is bound by.

While a company is not required to have a constitution when being set up, it is considered vital as the constitution usually includes a number of items the Corporations Act does not, such as specific powers of directors, classes of shares, who shareholders can sell shares to, what transactions require additional approval, etc.

A company's constitution can be repealed or amended by the directors and shareholders of the company at any stage.

Because all directors and shareholders are bound by the terms of the constitution, it is important that directors read the constitution before signing it.

### Company Seal

Most companies have a company seal or common seal. This seal is essentially the company's signature. While the directors of the company can often sign contracts on behalf of the company without the seal, there are times (normally those specified by the Corporation Act or the constitution) where the common seal is required to be stamped on a contract.


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Documents requiring the common seal also usually require the secretary's and one other director's signature, and as such is a way of the company ensuring that one person cannot enter into certain transactions without the authorisation of two or more directors.

## Shares

A company issues shares to people to denote who are its owners. These shares are visible via a share certificate, and often in disputes, shareholders will be asked to present their share certificate as proof that they own shares in the company.

Depending on the value of the company (i.e. all the assets less all the liabilities), the shares may go up or down in value.

## Separate Legal Entity Concept

This concept is vitally important to the success of a company, as it is the reason why most companies are formed. Basically it defines a company as a separate thing to any of its members or directors, acting in its own right separate to its members and directors – similar to the company being a human being separate to each and every owner and director.

This concept can be summarised by five characteristics.

### Perpetual succession

The company continues to exist even if its principal shareholders and directors die and can only be dissolved by an operation of law.

### Separate entity

A company is a distinct and separate entity from its shareholders and directors. It can sue and be sued in the company name, and assets held are those of the company, not the shareholders.

*It is this characteristic that is most often overlooked or poorly understood by "mum and dad" companies.*

### Limited liability

Generally the shareholders are not personally liable for the debts of the company. If the company cannot pay its debts, the shareholders will not have to "make up the difference" unless they hold shares in the company they have not fully paid for yet.

### Transferability of interest

Shares in a company can generally be transferred freely.

### Business action

A company's decisions come from the directors, who have the right to allow or disallow other people (employees or agents) to make decisions or enter contracts on the company's behalf. Shareholders maintain some control over the company by being able to remove and appoint directors.

## Dividends

A dividend is the payment of company profits to the shareholders, and it can only be paid out of profits (i.e. a company cannot declare a dividend if it has no profits).

One important thing to note is that the shareholders have no right to any of the company's assets until a dividend is declared by the company. Once a dividend is declared, the company has the right

to delay the payment of that dividend until it sees fit – the shareholders has no right to demand payment at any stage.

The payment of a dividend is not tax deductible.

# The main parties of a company

Most companies will have the following parties:

- Director(s);
- Shareholders(s); and
- A secretary.

## Directors

The directors are basically the decision-makers of the company. Under law, the directors **and no one else** are responsible for the management of the company (this will be discussed later in the document).

A company can have as little as 1 director or as many as the shareholders of the company see fit. Anyone can be a director of a company unless they are:

- Under 18; or
- A disqualified person (e.g. bankrupt)

## Shareholders

The shareholders of the company are the owners. If the company makes a profit, it is the shareholders who can share in those profits (by way of a dividend).

To become a shareholder, you must buy a share in the company – even if you are starting up the company. In a typical "mum and dad" company, normally a nominal number of shares will be purchased at $1 each.

The number of shares held by a person dictates the % of profits that person is entitled to.

## Secretary

The secretary is the person nominated by the company to be the chief administrative officer. It is normally the secretary's role to sign documents requiring the common seal of the company, and to ensure that all ASIC lodgments are kept up to date.

Normally one of the directors will also stand as the secretary – they are not required to be different people.

# Minutes of Meetings

Every company has certain decisions that must be made (or should be made) by either the shareholders as a whole, or the directors as a whole (e.g. at a meeting of shareholders or directors).

The Secretary is responsible for ensuring that the company has a record of what was discussed at these meetings, and the outcome of the meeting.

The requirement to have minutes of meetings still exists for companies with 1 director and 1 shareholder -- so basically every company is required to make minutes of all major decisions.


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The company constitution may stipulate what sort of business must be conducted in a directors meeting or shareholders meeting (i.e. certain decisions therefore must be put to a vote of shareholders or directors), and the Corporations Act also dictates in certain circumstances.

### Directors Meetings

Any formal meeting where directors discuss the company's affairs is a directors meeting. A discussion over lunch or similar is not a "directors meeting" as it is not a formal meeting.

The directors are charged with running the company and can therefore make a number of decisions without shareholder approval. Major decisions should be made by the directors as a whole, and therefore done at a meeting.

It is these meetings that require minutes. Examples of decisions made at meetings (which therefore require minutes) include:

- Decision to invest money in a new major asset;
- Decision to dispose of a major asset;
- Decision to recommend to the shareholders a disposal of the business; and the
- Decision to hire or fire staff.

This is far from an exhaustive list, but the general idea here is that any decision that requires a discussion with all other directors, should be done at a formal meeting and minuted.

### Shareholders Meetings

For a shareholders meeting to be called, each shareholder is required to get 21 days notice unless an agreement for short notice is signed by all shareholders.

Examples of the types of business that **must** be conducted at a shareholders meeting are:

- Appointment or removal of an auditor;
- Acceptance of reports at an Annual General Meeting;
- Altering the rights attached to shares;
- Increasing or decreasing share capital;
- Election or removal of directors;
- Declaration of a dividend; and
- Altering the company constitution.

Again, this is not an exhaustive list. If in doubt whether a specific action requires shareholder approval, just ask us.

## Directors Duties

Being a director sounds good, but it comes with a number of responsibilities that must be adhered to or the director risks being personally liable for the actions of the company. These are known as "directors duties".


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Considering that most people start up a company for asset protection (i.e. so that if the company fails or gets sued, the shareholders and directors are not out of pocket), it is very important to be a "responsible director".

*For example, XYZ Pty Ltd has Mum and Dad as Directors. If Mum **or** Dad break one of the directors duties under Corporations Law, **both** Mum and Dad could be held personally responsible for the Company's actions.*

*If XYZ was to be sue for $1mil and it only had $100,000 of assets, it is possible that Mum and Dad would be required to make up the $900,000 shortfall.*

*If Mum and Dad had adhered to the Directors duties, then they would not be required to dip in from their own pockets to cover the company's debts.*

There are two types of directors duties – Fiduciary and Statutory. Fiduciary duties have been established by a long history of court cases basically stating that someone with the power to act as an agent for another must act properly at all times. Statutory duties are specifically stated in the Corporations Act.

In most cases, the fiduciary and statutory duties overlap each other, and the sum of these duties can be summarised as the following:

- The duty to act in good faith;
- The duty to exercise powers for a proper purpose;
- The duty to avoid conflicts of interests;
- The duty of exercise care and skill; and
- The duty to retain discretions.

## Who are these duties owed to?

It is important to note exactly who the directors owe a duty to. In general terms, the directors owe these duties to **the company**, and the company only.

The directors **do not** have a duty to each and every individual shareholder, creditor, employee, etc etc. There are two main reasons for this:

- Having a duty to each and every person would result in numerous law suits for each breach of the duties (*i.e. each shareholders could sue the director*); and
- Many decisions made do not explicitly benefit all parties at the one time. If one party (*i.e. one group of shareholders*) did not like the decision to not pay a dividend one year, they may have the option to bring legal action against the directors. It would not matter if the decision was in the best interests of the company as a whole if each and every person had these rights.

In order for the company to bring action against the directors, the members (shareholders), directors, or other officers of the company must begin that action on behalf of the company. As such, there will only be one action against the directors, and not many (*i.e. one for each shareholder*).

It is also possible for ASIC to bring action against directors at the request of a person affected by the directors breach (*i.e. a disgruntled creditor*).


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## Taxation of a Company

Most people would be aware that a company is taxed on its profits at 30%. The taxable income of a company is worked out in much the same way that an individual's taxable income is worked out – taxable income less allowable deductions.

*For example, XYZ Pty Ltd earns income of $150,000 during the 2010 financial year, and has $50,000 of allowable deductions (expenses) during the year, its taxable income is $100,000.*

$100,000 multiplied by the tax rate of 30% is $30,000 tax payable.

### What happens to these profits?

Once a company has made profits and paid any applicable tax, the company can either accumulate these profits, or pay them out to its shareholders.

*Following on for the above example, lets say that XYZ borrowed $50,000 from the bank to start its business, it may have $70,000 in the bank (being the after tax profits). The shareholders of XYZ have the choice to either:*

- *accumulate those profits in the company and use some or all of the $70,000 to pay off the bank loan and have a little cash to spare to fund the next purchase of equipment; or*
- *pay these profits to the shareholders (as dividends), leaving XYZ to continue to pay repayments on the $50,000 loan and have no money to fund the business.*

#### Accumulating the profits

In most cases the company would accumulate these profits to help fund the company in running its business, buying further investments, paying off loans, etc etc.

Why? Because in most cases it is cheaper (and easier) to leave those profits in the company than to go to the bank and get a loan or an advance on a loan.

*As above, XYZ makes a profit of $70,000 after tax and is unsure what to do with its new found (but hard earned) wealth. The directors sit down and ponder what might be waiting up ahead for XYZ and its business.*

*The directors decide that to ensure the business' constant growth, XYZ needs to invest in new (but expensive) equipment at a cost of $150,000. The question is how to fund this?*

*If XYZ accumulates its profits and use these towards the purchase, it only needs to go to the bank for the remaining $80,000.*

*If XYZ instead pays these profits to its shareholders, then it will need to fund the entire $150,000 from the bank – and given that times ahead are likely to be tough, it is possible that either the bank will not loan the full $150,000, or XYZ will be unable to pay off this loan.*

Think of the company as a family. Mum and Dad work so they can accumulate earnings to pay off the family's debts, living expenses, etc, with the end goal of having enough assets to live comfortably.

If after a few years of working hard, Mum and Dad have saved $20,000, they have a choice. They can either:

- continue to accumulate these savings to pay for a deposit on an investment property, buy some shares, or pay off some of the home loan (*i.e. accumulate profits*); or
- go and buy a huge plasma TV with surround sound and the works, or some other luxury item that they would enjoy, but is not ultimately necessary at this time (*i.e. pay dividends to shareholders*).


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It sounds great to get the plasma TV (*i.e. pay dividends out to shareholders*), but for the wealth of the family to grow it would be better spent on investments (*i.e. accumulate profits*).

This is not to say that getting that TV is the wrong option, but if you buy the TV and down the track decide that you need to extend the house, that money could have no doubt been better spent, and by the time you redraw on your loan to fund the extension, it would have cost you more money than simply keeping the original savings.

## Paying dividends

In your everyday Mum and Dad company, a distribution of profits is pretty much the same as a bonus. The company has "surplus" money, and Mum and Dad want to take the kids on a holiday, extend the house, etc etc.

In order for the company's money to become Mum and Dad's money, it must pay it to Mum and Dad via a dividend (or by an increased wage).

### The tax consequences of this dividend

As mentioned earlier, the payment of a dividend is not tax deductible to the company. So why would we choose to do that when we can simply pay an extra wage that is tax deductible?

Because to the receivers of the dividend (*i.e. Mum and Dad*), there is a tax benefit called "imputation credits", or "franking credits". ***It is important to note here that not all dividends have imputation credits attached to them, but in reality this only occurs in large public companies (e.g. Telstra) and is outside the scope of this brochure.***

Basically, the receivers of the dividend get a tax credit for the tax paid by the company on that dividend. In the end, it means that the receivers only pay tax on that dividend if their personal tax rate is higher than the company's.

*For example. XYZ pays a $7,000 dividend to its owners (Mum and Dad). Lets say Mum and Dad both earn other income (say wages) of $40,000 per year. As Mum and Dad are in the 30% personal tax bracket (even with the dividend included in their income), they will essentially pay no tax on the dividend.*

If the receivers are in a lower tax bracket than the company tax rate, then they essentially get a refund of the difference between their tax rate and the company tax rate. If their personal tax rate is higher, then they have to pay the difference.

### How does this work on my tax return?

There are two stages to a dividend being recorded on your tax return, the "gross up" of your dividend, and the reduction of tax by the "imputation credit".

<u>Grossing up the dividend</u>

When you receive a dividend, your income is made up of the actual cash received, and the imputation credit that comes with the dividend.

The imputation credit represents the tax that the company has already paid. In other words, for the company to pay a $7,000 dividend, it had to earn $10,000 of profits and pay $3,000 of tax on these profits. It is these after-tax company profits that are being distributed.

The imputation credit can be calculated from the net dividend as:

Net dividend (*cash received*) x 30% (*company tax rate*) / 70% ( *1-company tax rate*)


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*Following on from the above example, when Mum and Dad receive their $7,000 dividend, their taxable income is actually $10,000, $3,000 of which is in the form of an imputation credit.*

Your personal tax rate is then applied to the "grossed up" amount to get your gross tax on this dividend.

*In the above example, if Mum and Dad are in the 30% tax bracket, then their gross tax on the dividend is $3,000.*

Applying the imputation credit

The following table is designed to illustrate this process using different personal tax rates (and in particular the shaded line of the table).

| | **Personal tax rate** | **15%** | **30%** | **40%** | **45%** |
|---|---|---|---|---|---|
| | Net dividend | $ 7,000 | $ 7,000 | $ 7,000 | $ 7,000 |
| Plus: | Imputation credit | $ 3,000 | $ 3,000 | $ 3,000 | $ 3,000 |
| *Equals:* | *Taxable income* | *$ 10,000* | *$ 10,000* | *$ 10,000* | *$ 10,000* |
| Multiplied by: | Personal tax rate | 15% | 30% | 40% | 45% |
| *Equals:* | *Gross tax* | *$ 1,500* | *$ 3,000* | *$ 4,000* | *$ 4,500* |
| Less: | Imputation credit | $ 3,000 | $ 3,000 | $ 3,000 | $ 3,000 |
| **Equals:** | **Tax payable** | **($1,500)** | **$ 0** | **$ 1,000** | **$ 1,500** |

Once the gross tax has been calculated, this can be reduced by the amount of the imputation credit. This reduction avoids the "double taxation" of that dividend.

*Following the example, The $3,000 gross tax is reduced by the $3,000 imputation credit to give a tax payable of $0 on the dividend.*

## Shareholders Loans (Division 7A)

Normally when you hear the term "shareholder loan" or "Division 7A loan", a particular situation is being referred to where the shareholders (or their associates/related parties) have borrowed money from the company.

However, it doesn't have to be just a simple case of the company writing out a cheque to the shareholders that is a loan, it could be another situation that essentially has the effect of the shareholders owing money back to the company. Common examples are:

- Transfers of assets out of the company to the shareholders without adequate consideration being paid (i.e. Mum and Dad getting the company car transferred to their names without them paying for it – essentially Mum and Dad owe the company money equal to the value of the car);
- The Company paying the private expenses of Mum and Dad (i.e. Personal phone bills – Mum and Dad owe the company money equal to the phone bill); and
- Mum and Dad using the company's assets for private purposes (i.e. Mum and Dad essentially owe a hiring fee to the company);


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These "shareholder loans" are bad news from a tax point of view. The ATO don't consider these to be a loan, but rather a taxable payment to shareholders. This can be avoided however by the use of a physical loan agreement that is signed **and adhered to**.

*For example. XYZ pays the private school fees of Mum and Dad's only child – Junior. As these school fees are a private expense, it is as if XYZ has loaned Mum and Dad money, and then Mum and Dad have paid the school fees – which has created a shareholder loan.*

*If Mum and Dad do not have a signed loan agreement (or have one but don't adhere to it), then this payment is taxable to Mum and Dad.*

The amounts caught under these rules are referred to as a "deemed dividend". Basically the ATO see these amounts as a distribution of profits by the company, and in the absence of the company actually declaring a dividend for this amount, they will deem it a dividend for you.

What makes these rules worth mentioning is that the amount is taxable to Mum and Dad (like a dividend), the company receives no tax deduction for the payment (like a dividend), but the shareholders are **not** allowed to claim any imputation credits.

*Using the above example, lets say the school fees were $10,000. Mum and Dad will have a deemed dividend included in their tax return of $10,000, and will pay tax on this amount with no imputation credits available to lower their personal tax.*

*If their tax rate is 30%, then Mum and Dad will have to pay $3,000 of tax. As the company is not entitled to a tax deduction for this amount, this $3,000 of tax is essentially a penalty tax.*

The table on the following page illustrates the differences from a tax point of view between a wage, a dividend, and a deemed dividend.

| | | **Wage** | **Dividend** | **"Deemed Dividend"** |
|---|---|---|---|---|
| Company tax consequences: | | | | |
| | School fees | $ 10,000 | $ 10,000 | $ 10,000 |
| Less: | Tax deduction | $ 10,000 | $ 0 | $ 0 |
| *Equals:* | *Taxable income* | *$ 0* | *$ 10,000* | *$ 10,000* |
| Multiplied by: | Company tax rate | 30% | 30% | 30% |
| *Equals:* | *Company tax payable* | *$ 0* | *$ 3,000* | *$ 3,000* |
| Personal tax consequences: | | | | |
| | School fees | $ 10,000 | $ 10,000 | $ 10,000 |
| Plus: | Imputation credits | $ 0 | $ 4,286 | $ 0 |
| *Equals:* | *Taxable income* | *$ 10,000* | *$ 14,286* | *$ 10,000* |
| Multiplied by: | Personal tax rate | 30% | 30% | 30% |
| *Equals:* | *Gross personal tax* | *$ 3,000* | *$ 4,286* | *$ 3,000* |
| Less: | Imputation credits | $ 0 | $ 4,286 | $ 0 |
| *Equals:* | *Personal tax payable* | *$ 3,000* | *$ 0* | *$ 3,000* |
| **Total tax payable** | | **$ 3,000** | **$ 3,000** | **$ 6,000** |


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The above shows the different options available to the company if it intends on doing anything that would trigger a "shareholder loan":

- Pay a wage of $10,000 to Mum and Dad first, and then have Mum and Dad pay the school fees;
- Pay a dividend of $10,000 to Mum and Dad first, and them have Mum and Dad pay the school fees; or
- Simply have the company pay the school fees for Mum and Dad, and not worry about a loan agreement.

As you can see, the "deemed dividend" column is the worst option of the lot.

### Shareholder loan agreements

A loan agreement may be the answer as it prevents these rules from applying (so the payment of the school fees is not taxable to Mum and Dad). However, its not as simple as knocking up a one page summary stating Mum and Dad have borrowed $10,000 and they'll repay it whenever they get around to it.

*Following the example, We don't want to pay a wage or dividend to Mum and Dad this year (say the 2010 financial year) because they are in the top tax bracket due to the sale of an investment property, and don't want to pay the extra tax on it.*

The loan agreement must adhere to specific rules, which are basically:

- The loan must be repaid within 7 years (beginning from the start of the **next** financial year);
- Regular repayments must be made every year in accordance with the prescribed formula (which essentially treats it like a bank loan where you must pay 1/7$^{th}$ of the amount each year);
- Interest must be charged at the prescribed rate (which is similar to a home loan interest rate); and
- The loan agreement must be written and signed before your tax return is lodged (or due to be lodged).

While cumbersome, utilising this option gives you the option of deferring the timing that a wage or dividend is paid to the shareholders. Useful where you know your personal income will be lower in future years.

*Using the above example, Mum and Dad adhere to their loan agreement, and in the following financial year (2011), pay themselves an extra $10,000 wage, and they use this to repay the company. Instead of paying $4,500 on this amount (at the top tax rate), they are now paying $3,000 (as they are now in the 30% tax bracket) and have saved $1,500.*

## Director's Liability for PAYG Withholding

There is a little known area of the Tax Act that makes the directors of a company personally responsible for unpaid PAYG Withholding (tax withheld from employees wages). Basically for it to be enforced, all the ATO must do is issue a "Director Penalty Notice" (DPN).

### How the ATO applies payments of Activity Statements

PAYG Withholding is reported to the ATO via Activity Statements (or BAS's). These forms often also have a range of amounts payable – GST, FBT, etc. When you lodge your Activity Statement, all these amounts are added to your Integrated Client Account, and then when you pay the ATO, it is allocated to the Integrated Client Account.


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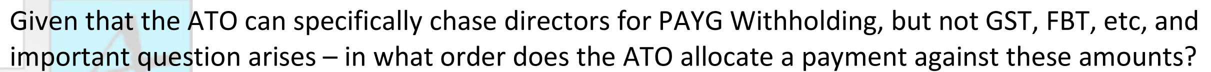

Given that the ATO can specifically chase directors for PAYG Withholding, but not GST, FBT, etc, and important question arises – in what order does the ATO allocate a payment against these amounts?

Unfortunately, PAYG Withholding is down the wrong end of the list from our point of view. It is one of the last items to be "paid". While this isn't relevant for a company that is paying all ATO liabilities in full, when a company gets into trouble and starts not paying the ATO, it can be a problem.

*For example, XYZ Pty Ltd has a BAS payable of $50,000, being $40,000 GST and $10,000 PAYG Withholding. XYZ is under financial difficulty and can only pay $30,000 to the ATO.*

*This $30,000 payment would be applied entirely to the GST owing and the ATO could issue a DPN for the $10,000.*

## When can/do the ATO issue DPN's?

In reality, the ATO only issue DPN's when they feel it is they only way that they will recover these amounts. Companies with a short-term debt arising from an Activity Statement, or even long-term debt covered by a payment arrangement will almost always be left as they are – without a DPN.

It is when the Company makes no realistic attempt to pay that the ATO will pursue these amounts though a DPN.


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