

Unpaid GST Now Included in the Director Penalty Notice Regime



The [Treasury Laws Amendment \(Combating Illegal Phoenixing\) Bill 2019](#) received Royal Assent on 17 February 2020 and will commence from 1 April 2020. The new legislation allows the Australian Taxation Office (ATO) to recover a company's unpaid GST amounts from its directors personally through a Director Penalty Notice (DPN).

Before the legislation was introduced, the ATO could only take action against the company itself for unpaid GST, not the company director/s. These actions included issuing the company a [Garnishee Notice](#) or going to the Court to initiate [company wind-up](#) proceedings. With this new legislation, company directors can be held personally liable for the company's unpaid GST, together with other debts which are already recoverable under a DPN.

It's important to understand the changes this legislation brings and the impact they can have on you as a company director.

What is a Director Penalty Notice?

A [Director Penalty Notice](#), or DPN, is a recovery action initiated by the ATO which pursues company directors directly for a company's unpaid tax liabilities. These include:

- Pay As You Go (Withholding) (PAYG) amounts,
- Superannuation Guarantee Charge (SGC), and now
- Goods and Services Tax (GST) including Luxury Car Tax (LCT) and Wine Equalisation Tax (WET) amounts reported on a company's Business Activity Statement (BAS).

If the ATO issues you with a DPN, you are no longer protected by the company's corporate structure. At best, you will have just 21 days to appoint a Liquidator or Administrator to avoid being held personally liable for the unpaid debts. At worst, you will be automatically liable for these debts and may be made Bankrupt if you are unable to pay them.

Types of Director Penalty Notices

There are two different types of DPNs that the ATO can use to recover unpaid tax debt. The type of DPN you may be issued with is determined on whether you have lodged your Activity Statements that relate to the unpaid tax debts **on time**.

Where you have an outstanding PAYG or GST debt in respect of a reporting period:

21-day DPN – If you lodged the respective BAS and IAS on time, or within three months of the due dates, the ATO may issue a DPN giving you 21 days to take action to avoid personal liability.

Lockdown DPN – If you have **not** lodged your BAS and IAS at all, or within three months of their due dates, you are automatically liable for your company's GST and PAYG debts.

Both of these types of notice also apply to SGC, however where there is an unpaid quarter of SGC, a **Quarterly SGC Statement MUST** be lodged by the **quarter due** date to avoid becoming personally liable.

It's also important to note that both types of debt may exist in your company. In these cases, the ATO will issue a single DPN detailing the amounts and types of notice that apply in separate columns. An example of this type of notice **can be found here**.

What can the ATO do if you don't lodge your BAS or SGC Statements?

In the past, some business owners have tried to hide their debts from the ATO by not lodging them. This is a key behavior this legislation is designed to change. As discussed above, if you don't lodge your BAS, IAS or SGC Statements on time, you become personally liable for the debts. Additionally, the ATO can conduct an audit or make estimates of your GST, PAYG and SGC debts and issue a DPN to you based on these amounts. Accordingly, if you fail to lodge your returns on time, you should assume you will become personally liable for the debt if it's not paid.

What are your Options if you Receive a DPN?

If your company has unpaid debts for BAS which were not lodged on time or within three months of their due dates, you **cannot** avoid personal liability. The debts must be paid to avoid being pursued personally by the ATO and possibly being made Bankrupt.

It is at the ATO's discretion as to whether they pursue payment of the debt from you. If the ATO issues a Lockdown DPN to you in these circumstances, it is merely to advise you of your liability and that the ATO may soon commence recovery action against you.

If the unpaid debts relate to BAS which have been lodged on time, or within three months of the due dates, you have 21 days to act in order to avoid personal liability. The available options within the 21-day window are to:

1. Place your company into **Voluntary Administration** with a view to it surviving through a **Deed of Company Arrangement**, or
2. Wind up the company through Liquidation.

If you act within this strict timeframe, you will avoid becoming personally liable for the debts listed in the DPN. If you do not take such steps, you will become personally liable

for the debts at the expiry of 21 days. To protect yourself during these circumstances, it's important to lodge your BAS, IAS and SGC returns on time. Additionally, you must be aware of the [warning signs of insolvency](#) and investigate [options to prevent your business failing](#) and place your company in Administration before the ATO begins recovery action for unpaid debts.

Example of a DPN Due to Unpaid GST

Best Restaurant Pty Ltd lodges its BAS statements quarterly. Its BAS for the quarter ended 31 March 2020 is due on 28 April 2020 and its BAS for the quarter ended 30 June 2020 is due on 28 July 2020. Due to increasing financial difficulties, Best Restaurant misses the due dates and its BAS are not lodged until 20 August 2020. This means the March BAS is lodged more than 3 months late, and the June BAS is lodged within three months of its due date.

Each BAS has a GST debt of \$10,000 and a PAYG debt of \$15,000. When the BAS are lodged, the total debt owed to the ATO is therefore \$50,000. Of this, \$25,000 relates to a BAS lodged more than three months after its due date (lockdown DPN risk) and \$25,000 relates to a BAS lodged within three months of its due date (21-day DPN risk).

Tom, as the company director, has to determine whether the company can pay the debts over time under an affordable [ATO payment plan](#). If the company can negotiate and maintain an affordable payment arrangement, the ATO should not issue a DPN and regardless the debt will be paid in full over time. However, if the company is unable to pay the debt or negotiate an ATO payment plan it will need to enter into an insolvency appointment, either Voluntary Administration or Liquidation.

While considering this, the ATO issues a DPN for the March and June BAS debts. The DPN states that \$15,000 for the PAYG in the March BAS is lockdown and Tom is personally liable for this. The GST is not included as it only applies from 1 April 2020 onwards. It also includes the \$25,000 for the June BAS and notifies Tom that he has 21 days to appoint an Administrator or Liquidator to avoid personal liability for this debt.

It's a very difficult decision for Tom, an insolvency appointment is a last resort, and there's a hope that trading on could let Tom pay the debt in full. But in reality:

- Without significant changes, the business won't be able to pay its debts in full and its position is likely to worsen,
- Tom will become liable for the full amount of the \$50,000 DPN debts if he does not act. Additionally, he may be held liable for other company debts under an insolvent trading claim by a subsequently appointed Liquidator,
- The ATO will likely take steps to wind up the company and appoint a Liquidator, and
- There are options to rescue the business if Tom takes a proactive approach to dealing with the situation. First and foremost, he should seek professional insolvency advice.

What About New Directors?

The ATO can issue a DPN to new directors after they have been appointed for 30 days. Incoming directors should therefore take steps to satisfy themselves that the company is complying with its ATO lodgement obligations before being appointed as director. If following your appointment as a new director, you may resign within 30 days to avoid being liable under a DPN.



As a Company Director, What Should You Do?

To minimise the potential risk of personal liability for your company's ATO debts, you should:

- Always lodge your BAS, SGC and GST statements on time, even if you can't pay,
- Contact the ATO and seek to negotiate an [ATO payment plan](#) for outstanding tax debts,
- Ensure your personal address registered with the Australian Investments & Securities Commission (ASIC) is up to date – this is where a DPN will be sent, and
- Be aware of your company's potential insolvency and seek to appoint a Voluntary Administrator or Liquidator if your company is insolvent.

Worried About Your Company's Finances?

If your business is struggling financially, it's important to act fast and seek professional advice to understand the options available to you. Not only will the ATO begin recovery actions if you have unpaid GST, you may be at [risk of trading insolvent](#) or losing your family home. Get in touch with our insolvency specialists today at Revive Financial on 1800 531 510.

Disclaimer: The information included in this article is general in nature and should not be relied upon. If you have an ATO debt or receive a DPN, you should urgently seek advice from your professional advisors or us.