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Director penalties

Directors must ensure their company complies with tax and super obligations. Failure will result in personal liability.

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As a company director you are responsible for ensuring that the company's tax and super obligations are reported and paid on time. If your company does not pay certain liabilities by the due date, we can recover these amounts from you personally as a current or former company director.

What is a director penalty

As a company director you become personally liable for your company's unpaid amounts of:

- [pay as you go withholding \(/businesses-and-organisations/hiring-and-paying-your-workers/payg-withholding\)](#) (PAYGW)
- [goods and services tax \(/businesses-and-organisations/gst-excise-and-indirect-taxes/gst\)](#) (GST)
- [super guarantee charge \(/businesses-and-organisations/super-for-employers/missed-and-late-super-guarantee-payments/the-super-guarantee-charge\)](#) (SGC).

These amounts that you are personally liable for are called director penalties. We can recover the penalty amounts from you once we issue you a [director penalty notice \(#Directorpenaltynotice\)](#).

Becoming a new company director

Before you become a company director, check if the company has any unpaid or unreported PAYGW, GST and SGC liabilities. Once you are appointed as a company director you become personally liable for any unpaid amounts.

As a new director you can avoid becoming liable for director penalties that were **due before** your appointment, if within **30 days of your appointment**, you ensure the company does one of the following:

- pays their debts in full for PAYGW, net GST from 1 April 2020 (including luxury car tax (LCT) and wine equalisation tax (WET) amounts) and SGC from 1 April 2012
- appoints an administrator under section 436A, 436B or 436C of the *Corporations Act 2001*
- appoints a small business restructuring practitioner under section 453B of that Act
- begins to be wound up (within the meaning of the *Corporations Act 2001*).

Even if you resign as a company director within the 30 day period, you will still be liable for the company's unpaid PAYG withholding, net GST or SGC liabilities that were due before your appointment.

Example: appointment of a new director

Kevin and Ashley are directors of XYZ Pty Ltd. During the January to March quarter of the 2019–20 income year, the company withheld tax from employees' wages but failed to pay PAYGW. When the company did not pay by the due date of 28 April 2020, Kevin and Ashley both became personally liable for a penalty amount equal to the unpaid amounts.

On 2 June 2020, Michael became a director of the company. Michael has 30 days from the date of his appointment to ensure that the company:

- pays the amount
- appoints a voluntary administrator
- appoints a small business restructuring practitioner, or
- is put into liquidation.

If Michael fails to ensure the company does at least one of the above within 30 days of the date of his appointment, he too will become liable for the unpaid PAYGW.

You need a director identification number (<https://www.abrs.gov.au/director-identification-number>) (director ID) if you're a director of a company, registered Australian body, registered foreign company or Aboriginal and Torres Strait Islander corporation.

Once you become a director

Once you become a director, you are responsible for ensuring the company meets its PAYGW ([/businesses-and-organisations/hiring-and-paying-your-workers/payg-withholding](#)), net GST ([/businesses-and-organisations/gst-excise-and-indirect-taxes/gst](#)) and SGC obligations ([/businesses-and-organisations/super-for-employers/work-out-if-you-have-to-pay-super](#)) in full by the due date.

If these obligations are not met, you become personally liable for director penalties ([#Beforeyoubecomeadirector](#)), unless you take steps to ensure the company lodges and pays its:

- PAYGW by the due date,

- Net GST (as well as LCT and WET amounts) by the due date, and
- Superannuation guarantee (SG) to employees' superannuation funds by the due date – if that doesn't occur, the company must lodge a superannuation guarantee statement and pay the resulting SGC liability.

A director penalty is a parallel liability

If the company has more than one director, the amounts owed are likely to be the same for all directors.

This is because the company liability (what the company owes) and the director penalty liability are parallel in nature.

When we recover director penalties (#Howparalleliabilityworks) we may do so equally from all the directors, depending on each director's circumstances.

You are no longer a director

If you resign as a director of the company, you remain liable for director penalties (#Beforeyoubecomeadirector) for liabilities of the company that:

- were due before the date of your resignation
- fell due after your resignation if
 - for PAYGW and net GST (including LCT and WET), the first withholding event in the reporting period occurred before your resignation
 - for SGC liabilities, the date the charge became payable.

If you resigned as a director before:

- the first withholding event in that period for **PAYGW** and **net GST**, you will also be liable for any unpaid liabilities for reporting periods that started while you were a director
 - the date the **SGC** became payable, you will also be liable for any unpaid liabilities for reporting periods that started while you were a director.
-

Example: resigning as director within 30 days of appointment

On 2 June 2020, Gabrielle became a director of 123 Pty Ltd. The company owes \$20,000 in PAYGW and \$30,000 in net GST. To avoid becoming personally liable for penalty amounts equal to the above liabilities, Gabrielle has 30 days starting on the day of her appointment to do **one** of the required actions:

- cause the company to pay the debt
- appoint an administrator under section 436A, 436B or 436C of the *Corporations Act 2001*
- appoint a small business restructuring practitioner under section 453B of that Act, or
- have a liquidator appointed to wind up the company.

On 13 June 2020, Gabrielle resigns from being a director of the company.

By 1 July 2020, the company had not paid the above amounts, nor did the company enter administration, restructuring or liquidation.

Gabrielle is still liable for the \$20,000 PAYGW and \$30,000 net GST.

Although Gabrielle resigned from being a director of the company within 30 days of her appointment, she did not cause the company to do one of the 4 required actions within those 30 days.

As a result, she incurs a director penalty at the end of that 30th day.

How we recover director penalties

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Director penalty notices

A Director penalty notice (DPN) is a notice we must give you that allows us to recover the company's unpaid amounts.

The notice outlines the unpaid amounts and [remission options \(#Remittingthepenalty\)](#) available to you.

We can recover the amounts of the director penalty by:

- issuing [garnishee notices \(/individuals-and-families/paying-the-ato/if-you-don-t-pay#Garnisheenotices\)](#)
- offsetting any of your tax credits against the director penalties
- initiating legal recovery proceedings against you to recover the director penalty.

If you are a current director, when we give you the DPN, we will use the address you registered with Australian Securities & Investment Commission (ASIC). Otherwise, we will use the address last known to us, therefore it is important you keep this address updated.

The date we post (or leave the DPN at the address registered with ASIC) is the date the notice is **given** to you.

How a parallel liability works

Once DPNs have issued, we may commence or recommence recovery action from each director personally, because these penalties are a parallel liability.

To recover the debt, the Commissioner can pursue either:

- the company
- the directors.

This means that any payment or credit applied to the company's account or to a director's account to reduce the penalty, will reduce the director penalty amount for the other directors and the company's corresponding liability for the same reporting period.

Example: issuing parallel liabilities

Kerry and Claire are directors of ABC Pty Ltd, which is required to pay PAYGW on a quarterly basis. For the January to March quarter in the 2019–20 income year, the company withheld \$4,000 (PAYGW) from payments made to its employees and directors.

If ABC Pty Ltd does not pay its PAYGW liability, we will issue Kerry and Claire DPNs and then seek to recover the amount of the director penalty (\$4,000) from either Kerry or Claire, or both.

If Kerry pays \$1,000 against her director penalty liability, both the liability of the company and Claire's director penalty will be reduced by \$1,000 as they are parallel liabilities. Alternatively, if the company pays \$1,000 against its PAYGW liability, both Kerry and Claire's director penalty will be reduced by \$1,000 as they are parallel liabilities.

Remittance of the director penalty

PAYGW and net GST

Remission of a director penalty is possible, but it depends on when the PAYGW and net GST payable was reported to us.

Liabilities reported within 3 months of the due date

If the unpaid amount of PAYGW or net GST is reported **within 3 months** of the due date (or, in the case of new directors, within 3 months of the date of their appointment), the penalty can be remitted by ensuring the company does one of the following:

- paying the debt in full
- appointing an administrator under section 436A, 436B or 436C of the *Corporations Act 2001*
- appointing a small business restructuring practitioner under section 453B of that Act
- the company begins to be wound up (within the meaning of the *Corporations Act 2001*).

Liabilities reported 3 months after the due date

If the unpaid amount of PAYGW or net GST:

- is reported **more than 3 months** after the due date (or, in the case of new directors, 3 months or more after the date of their appointment), the only way to remit the director penalty is to pay the debt in full
- **remains unreported after 3 months**, the corresponding director penalty can only be remitted by payment in full.

Example: remittance of director penalty amounts for PAYGW and GST

Kerry and Claire are directors of ABC Pty Ltd, which is required to pay PAYGW on a quarterly basis. For the January to March quarter in the 2019–20 income year, the company withheld \$4,000 from payments made to its employees and directors.

They also failed to report or pay \$2,000 in GST collected.

The company did not report or pay the above amounts within 3 months of the due date of liability.

Kerry and Claire each receive DPNs.

The only way Kerry and Claire's director penalties can now be remitted is by Kerry or Claire making sure that the amounts are paid in full within 21 days of the date the notices are given to them.

Kerry and Claire place the company into administration. However, Kerry and Claire's director penalty amounts are still payable by **either one or both** to the equivalent amount of \$6,000 (\$4,000 + \$2,000).

SGC amounts

For SGC, remission of the director penalty depends on when we have been notified about SGC amounts.

If the unpaid amount of the SGC is **reported by the due date** for the SGC statement, the penalty can be remitted by ensuring the company does **one** of the following:

- paying the debt

- appointing an administrator under section 436A, 436B or 436C of the *Corporations Act 2001*
- appointing a small business restructuring practitioner under section 453B of that Act
- beginning to wind the company up (within the meaning of the *Corporations Act 2001*).

The only way to remit the amount is to pay the debt in full if:

- the unpaid amount of the SGC obligation is reported **after the due date**
- any part of the liability remains unreported.

Example: remittance of SGC liability

Kerry and Claire are directors of ABC Pty Ltd, which has incurred a SGC liability as it failed to remit employees' superannuation to a complying superannuation fund by the due date. It also failed to report the unpaid amounts to the ATO by the due date for the SGC statement.

Kerry and Claire each receive DPNs.

The only way Kerry and Claire's director penalties can now be remitted is by causing the amounts to be paid in full within 21 days of the date the notices were given to them. This is because the company did not report or pay the SGC amounts by the due date for the SGC statement.

Once we give you a Director Penalty Notice

Once we give you a DPN, you have 21 days to either:

- pay the corresponding penalty amounts in full
- engage with us and negotiate a payment plan for the company debt – we may still offset your personal credits against this debt.

If neither of the above happens, we may recommence action against you to recover the director penalty amounts.

Example: failing to report and pay within 3 months

Kerry and Claire are directors of ABC Pty Ltd which is required to pay PAYGW on a quarterly basis. For the January to March quarter in the 2019–20 income year, the company withheld \$4,000 from payments made to its employees and directors. It also collected net GST of \$10,000 for the same period.

The company did not report or pay the amounts withheld within 3 months of the due date of the liability. Kerry and Claire each receive DPNs.

The only way Kerry and Claire's director penalties can now be remitted is by causing the amounts to be paid in full within 21 days of the date the notices are given to them.

Estimates

If the company fails to report PAYGW, net GST or SG obligations by the due date, we may make a reasonable estimate of the unpaid and overdue amounts.

The director penalty provisions apply to these estimated liabilities.

The estimate is due and payable by the company on the day we give the company the estimate notice.

The estimated amounts of PAYGW, net GST or SGC are treated as an unreported amounts.

Example: ATO estimate of unpaid PAYGW

Kerry and Claire are directors of ABC Pty Ltd, which is required to pay PAYGW on a quarterly basis. For the January to March quarter in the 2019–20 income year, the company withheld from payments made to its employees and directors but failed to report or pay this to the ATO by the due date of 28 April 2020.

On 21 August 2020, the ATO estimated the unpaid amount of PAYGW for the January to March quarter and gave the company written notice of the estimate that same day. At the end of this day, both Kerry and Claire are both personally liable for a director penalty amount equal to the unpaid amount of the estimate.

A DPN based on the estimated amount of PAYGW was issued on 21 September 2020.

As the unpaid amount was not reported within 3 months of the due date of the liability, the director penalty can only be remitted by the company or directors paying the amount of the estimate.

Example: ATO estimate of unpaid GST

Kerry and Claire are directors of ABC Pty Ltd, which collected GST on sales on a monthly basis. The company was required to report and pay GST collected during the month of April 2020 by 21 May 2020 but failed to do so.

On 21 September 2020, the ATO estimated the unpaid amount of GST for April 2020 and gave written notice of the estimate to the company that same day. At the end of this day, both Kerry and Claire are both personally liable for a director penalty amount equal to the unpaid amount of the estimate.

A DPN based on the estimated amount of GST was issued on 21 October 2020.

As the unpaid amount was not reported within 3 months of the due date of the liability, the director penalty can only be remitted by the company or directors paying the amount of the estimate.

Defence to a Director Penalty Notice

The director penalty regime outlines circumstances in which a director is not liable for director penalties. You can ask us to consider a defence you may have to your director penalty before any legal recovery proceedings begin.

You will have a defence and not be liable for a director penalty if:

- you did not take part (and it would have been unreasonable to expect you to take part) in the management of the company during the relevant period because of illness or other acceptable reason
- you took all reasonable steps, unless there were no reasonable steps you could have taken, to ensure that **one** of the following happened
 - the company paid the amount outstanding
 - an administrator was appointed to the company
 - a small business restructuring practitioner was appointed to the company

the directors began winding up the company (within the meaning of the *Corporations Act 2001*)

- in the case of an unpaid SGC liability – the company treated the *Superannuation Guarantee (Administration) Act 1992* as applying in a way that could be reasonably argued, was in accordance with the law, and took reasonable care in applying that Act.

The courts have:

- held that these defences must be proved for the entire period the director was under the obligation
- also ruled that, as a director, it is not a defence if you relied on others (including fellow directors and professional advisors) to ensure your obligation was met
- ruled that the natural meaning is that the combined defences must cover the whole of the period between the breach of the obligation on the due date, and the expiry of the notice (*Canty v Deputy Commissioner of Taxation* [2005] NSWCA 84). See also *DCT v George* [2002] NSWCA 33).

A director's non-participation in the management of the company will usually involve a breach of the duty, **whether the director is aware of this or not** (*DCT v Lesley Frances Robertson* [2009] NSWSC 597).

A DPN defence needs to be submitted to the Commissioner in writing, clearly articulating what defence you are seeking to rely on. It should provide all the necessary information and supporting documentation to substantiate the defence.

Once you have completed your application, you can either:

- ask your tax agent to lodge the application through Online services for agents
- mail it to

Attention: Debt Case Leadership
Australian Taxation Office
PO Box 327
ALBURY NSW 2640

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If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

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