



Director penalty regime

- <https://www.ato.gov.au/Business/Your-workers/In-detail/Director-penalty-regime/>
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Director penalties

This information only applies to you if you're a director or former director of a company.

If a company does not meet its pay as you go (PAYG) withholding, goods and services tax (GST) or super guarantee charge (SGC) obligations, we may recover these amounts from you personally as a director of the company.

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Before you become a director

If you are about to become a director of a company, check for any unpaid or unreported PAYG withholding, goods and services tax (GST) or SGC liabilities.

If you become a director and the company has outstanding PAYG withholding, net GST or SGC obligations, you will become personally liable for a penalty equal to these amounts (these are called director penalties).

As a new director, you have 30 days, starting on the day of your appointment, before you become liable to director penalties equal to:

- all of the company's unpaid PAYG withholding liabilities
- all unpaid net GST liabilities (inclusive of LCT and WET) from 1 April 2020;
- all unpaid SGC liabilities from 1 April 2012.

However, as a new director, you will not be liable to director penalties for amounts

due before your appointment if, within 30 days starting on the date of your appointment, the company does one of the following:

- pays their PAYG withholding, net GST or SGC debt in full
- 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 become a new director and you resign within the 30 day period, you will still be liable for the unpaid PAYG withholding, net GST or SGC liabilities of the company that were due before your appointment.

For PAYG withholding and net GST, you will also be liable for any unpaid liabilities for reporting periods that started while you were a director, except if you resigned before the first withholding event in that period.

For SGC, you will also be liable for any unpaid liabilities for reporting periods that started while you were a director, except if you resigned before the date the charge became payable.

Example 1

Kevin and Ashley are directors of XYZ Pty Ltd (the company). During the January to March quarter of the 2019–20 income year, the company withheld tax from employees' wages but failed to pay the amounts withheld. 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. To avoid incurring a director penalty, Michael had 30 days from the date of his appointment to cause the company to pay the amount, appoint a voluntary administrator, appoint a small business restructuring practitioner or have the company put into liquidation.

As a director

You are responsible for making sure the company meets its PAYG withholding, net GST and SGC obligations.

If your company fails to meet a PAYG withholding, net GST or SGC liability in full by the due date, you will become personally liable for director penalties equal to the unpaid amounts.

To avoid director penalties, take steps to have the company lodge and pay its:

- PAYG withholding to us by the due date
- Net GST (inclusive of LCT and WET) to us by the due date
- super guarantee (SG) to employees' super funds by the due date or, if that doesn't occur, lodge a super guarantee statement and pay the resulting SGC liability to us.

You need a director identification number^{EQ3} (director ID) if you're a director of a company, registered Australian body, registered foreign company or Aboriginal and Torres Strait Islander corporation.

Director penalty as parallel liability

A director penalty is equal to the amounts outlined on the Director penalty notice (DPN) for each reporting period. If the company has multiple directors, the amounts owed are likely to be the same for all directors. This is because the company liability and the directory penalty liability are parallel in nature.

No longer a director

If you are no longer a director, you remain liable for director penalties equal to the unpaid PAYG withholding, net GST and SGC liabilities of the company that:

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

Example 2

On 2 June 2020, Gabrielle became a director of the 123 Pty Ltd (the company). To avoid becoming personally liable for a penalty amount, Gabrielle has 30 days starting on the day of her appointment to do one of the four 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
- have a liquidator appointed to wind up the company.

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

On 1 July 2020, the company did not pay the amounts, nor did the company enter administration, restructuring or liquidation. 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 four required actions within those 30 days. As a result, she incurs a director penalty at the end of that 30th day.

Recovering director penalties

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Director penalty notice

Before we can recover director penalties from you personally, we must first give you a Director Penalty Notice (DPN) outlining the unpaid amounts and remission options available to you.

Recovery options include:

- [garnishee notices](#)
- 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 at the time the DPN is given, we will use your address registered with Australian Securities & Investment Commission (ASIC). Otherwise we will use the address last known to us.

The date we post or leave the DPN is the date the notice is given to you.

How a parallel liability works

Once DPNs have issued, we may commence or recommence action to recover the director penalty from each director personally because this is a parallel liability.

In order to recover the debt, the Commissioner can pursue either:

- the company, or
- the directors.

This means that any payment made, or credit applied to the company's account or to a director's account to reduce the penalty, will result in a reduction by the same amount, on the accounts of other directors and the company for the same reporting period.

Example 1

Kerry and Claire are directors of ABC Pty Ltd, which is required to pay PAYG withholding provisions 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.

The company did not report or pay the amounts withheld within three months of the due date of the liability. The only way Kerry and Claire’s director penalties can now be remitted is by making sure the amounts are paid within 21 days of the date the notices are given to them.

The company has not paid the underlying liability. The Commissioner can also seek to recover an amount equivalent to the liability of the director penalty (\$4,000) from either Kerry or Claire, or both.

If Kerry pays \$1,000 against their director penalty liability, both the underlying liability of the company and Claire’s director penalty liability will be reduced by \$1,000 as they are parallel liabilities. Alternatively, if the Company pays \$1,000 against its underlying PAYG withholding liability, both Kerry and Claire’s director penalty liabilities will be reduced by \$1,000 as they are parallel liabilities.

Example 2

Kerry and Claire are directors of ABC Pty Ltd (the company), which is required to pay PAYG withholding 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.

The company did not report or pay the amounts withheld within three months of the due date of liability. The only way Kerry and Claire’s director penalties can now be remitted is by Kerry and Claire making sure that the amount is paid within 21 days of the date the notices are given to them.

Kerry and Claire place the company into administration. Kerry and Claire’s director penalty amount are still payable by either one or both to the equivalent amount of \$4,000.

Remitting the penalty

PAYG withholding and net GST

The timing of when the PAYG withholding or net GST is notified to us will determine what actions are available to remit director penalties.

If the unpaid amount of PAYG withholding or net GST is reported within three months of the due date (or, in the case of new directors, within three months of the date of their appointment), the penalty can be remitted by 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
- the company begins to be wound up (within the meaning of the *Corporations Act 2001*).

If the unpaid amount of PAYG withholding or net GST is reported more than three months after the due date (or, in the case of new directors, three months or more after the date of their appointment), the only way to remit the penalty is to pay the debt.

For any portion of the underlying liability that is reported outside of three months or remains unreported, the director penalty for that portion can only be remitted by payment.

Remission can be achieved any time prior to a DPN being given; however once it is given, a director only has 21 days from the date of that notice to remit any director penalties stated on that particular DPN.

If the company enters into and maintains a satisfactory arrangement to pay the entire company debt, we will not seek to recover the penalty from you personally; however, we may offset your personal tax credits. If the entire company debt is no longer under a payment arrangement, we may commence or recommence action to recover the director penalty.

Example 3

Kerry and Claire are directors of ABC Pty Ltd (the company), which is required to pay amounts withheld under the PAYG withholding provisions 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.

The company did not report or pay the amounts withheld within three months of the due date of the underlying liability. The only way Kerry and Claire’s director penalties can now be remitted is by causing the amounts to be paid within 21 days of the date the notices are given to them.

Example 4

Kerry and Claire are directors of ABC Pty Ltd (the company), which is required to pay GST collected during April 2020. During April 2020, the company collected net GST of \$10,000.

The company did not report or pay the amounts collected within three months of the due date of the underlying liability. The only way Kerry

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

SGC amounts

The timing of when SGC amounts are notified to us will determine what actions are available to achieve remission of the director penalties.

If the unpaid amount of the SGC obligation is reported by the due date for the SGC statement, the penalty can be remitted by 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*).

If the unpaid amount of the SGC obligation is reported after the due date, the only way to remit the penalty is to pay the debt.

For any portion of the underlying liability that is reported outside of the due date or remains unreported, the director penalty for that portion can only be remitted by payment.

Your director penalty may be remitted any time before a DPN is given, however once it is given, a director only has 21 days from the date of that notice to try and remit any director penalties stated on that particular DPN.

If the company enters into and maintains a satisfactory arrangement to pay the entire company debt, we will not seek to recover the penalty from you personally; however, we may offset your personal tax credits. If the entire company debt is no longer under a payment arrangement, we may commence or recommence action to recover the director penalty.

Example 5

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

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

Estimates

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

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.

If we have estimated the companies PAYG withholding, net GST or SGC liabilities it is treated as an unreported amount.

Example 6

Kerry and Claire are directors of ABC Pty Ltd (the company), which is required to pay amounts withheld under the PAYG withholding provisions 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 PAYG withholding for the January to March quarter 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 PAYG withholding issued 21 September 2020.

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

Example 7

Kerry and Claire are directors of ABC Pty Ltd (the company), 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 issued 21 October 2020.

As the unpaid amount was not reported within three months of the due date of the underlying 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 provides a number of statutory defences that outline circumstances in which a director is not liable to director penalties.

You may request that we 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 four things 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:

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).

The courts have 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.

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 they 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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