

Navigating the return of the ATO's debt recovery efforts

Following a two-year moratorium on debt recovery during the pandemic, the ATO recommenced collection and enforcement activity. As a result, awareness letters about the disclosure of business debts and Director Penalty Notices (DPN) are being issued at an increasing rate. Businesses having difficulties meeting their tax obligations must consider the commercial and personal implications and understand that options are available to them.

Where the ATO is taking firm action

In a statement from the ATO, Deputy Commissioner Vivek Chaudhary said the preferred approach is always to work with taxpayers to resolve their situation through engagement rather than enforcement. Where businesses fail to do so or represent higher risks of non-payment, the ATO is undertaking a number of enforcement actions.

These include garnishees, Director Penalty Notices, disclosure of business tax debts, and legal actions including summons, creditors petition, wind-up, and insolvency action.

Pillars of ATO enforcement activity

The ATO wrote to businesses in March 2022 about two key awareness programs they were undertaking: disclosure of business tax debts and the use of Director Penalty Notices, noting they remain focused on taxpayers who have not responded to calls and letters and have significant tax obligations outstanding.



Director Penalty Notices

Under Section 269, Schedule 1 of the *Taxation Administration Act 1953 (Cth)*, the ATO may issue Director Penalty Notices to a company director, making them personally liable for unpaid tax.

There are two types of DPNs: A non-lockdown DPN is issued where businesses have lodged statements on time to the ATO, but debts remain unpaid. A lockdown DPN is where a company has not lodged statements with the ATO, and debts remain unpaid.



Credit reporting bureaus

Another enforcement step being taken by the ATO, where company directors haven't engaged, is the disclosure of business tax debts to credit reporting bureaus

The ATO may report a tax debt if there are one or more outstanding debts, the company is not an excluded entity under the Act (e.g., a registered charity), and at least \$100,000 overdue by more than 90 days.

The ATO will not report the outstanding debt if a company effectively engages, meaning compliance with a payment plan, among a number of other measures.

Understanding personal implications

The *Corporations Act 2001 (Cth)* sets out directors' duties and the duty to prevent insolvent trading. A director must act with reasonable care, skill and diligence, act in good faith in the best interests of the company, and must not improperly use their position to gain an advantage for themselves or cause detriment to the company

The Act finds that a director may breach directors' duties where there were reasonable grounds to suspect a company was insolvent when incurring new debts.

This is relevant in the context of the ATO recovery efforts because where a company is facing financial distress and cannot meet its liabilities, or is undertaking a restructuring, a director must also act in the interest of creditors. This includes early engagement with creditors.

Avenues available to companies

In relation to DPNs and disclosing to Credit Reporting Bureaus, the ATO has already said, "both programs focus on making taxpayers aware of their obligations, the actions we may take, and provide clear pathways for taxpayers to re-engage, work with us, and avoid escalation". The message remains that engaging early and transparently will help businesses to negotiate outstanding liabilities.

If a director receives a non-lockdown DPN, the steps they can take include paying the outstanding debt, placing the company into liquidation or voluntary administration, or appointing a small business restructuring practitioner. In the case of a lockdown DPN, the only option for directors to avoid personal liability is to pay the debt within 21 days.

What action should I take?



Accountants, lawyers and other advisers

- Clients need to keep tax lodgements up-to-date or risk automatic personal liability.
- Accountants can consider using the ATO portal to determine whether clients are up-to-date, and proactively engage them.
- Ensure there is a process operating in your office to capture receipt by mail of any DPNs. DPNs are still issued by mail, not email.



Company directors

- To avoid personal liability to ATO, ensure tax lodgements are up-to-date even if payment has not been made.
- If you receive any communication from ATO, contact an adviser to obtain a practical understanding of how best to respond to a communication or notice.
- If you are in arrears on superannuation, PAYG or GST then talk with your adviser to discuss the options.

Support from Levi Consulting

Levi Consulting can help develop the right strategy. We have recently engaged directly with ATO Deputy Commissioner Chaudhary, and intimately understand the ATO's expectations including issues relating to repayment arrangements. If you are in arrears on your obligations then we encourage you to discuss options with us, as we have helped clients extinguish significant debts with the right approach. Levi Consulting is currently working with a range of businesses navigating ATO debt recovery initiatives. As experts in insolvency and restructuring, we understand both the obligations of companies and their directors, how to engage creditors and find resolutions during times of financial distress.

Second opinion at no cost

Accountants, lawyers and other advisers are welcome to call David Levi for a 'second opinion', which will not incur a fee on 0418 602 466. Training for you and your staff in relation to these and other topics can also be arranged via videoconference. Levi Consulting services all Australian States and Territories.