

# The Tax Summit

## Session 11.1: My client has tax debts – Is insolvency or bankruptcy their best or only option

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# 1. Overview

There is no ambiguity in the ATO's current stance on tax debt. The Commissioner of Taxation, Rob Heferen, has publicly stated that the ATO will be "moving more urgently to deploy the full powers available to us".<sup>1</sup> Further, that the ATO has "tightened up on payment plans and general interest charge remissions, and will be looking closely at lodgement deferrals and penalty remissions".<sup>2</sup> Some flexibility and support avenues remain as evidenced in the Commissioner's recent release of a vulnerability framework. But for those that can afford to pay the expectation is that payment will be made. It is a far cry from the stance of the COVID years. The change is being felt amongst both taxpayers and tax professionals.

It is in that light that the main objective of this paper is to outline for tax professionals what the full ambit of the Commissioner's powers are and the review mechanisms that are available. Within that this paper looks to the problems that insolvency and bankruptcy do resolve. But also those that they do not. And the other options that do exist for problems not resolved by insolvency and bankruptcy.

This paper is also a plea for change – legislative change if necessary – to modernise procedural aspects and support fairness in the system. To that end this paper also highlights some of the practical consequences that are being felt amongst the taxpayer community, especially amongst the more vulnerable in our society, and includes some suggestions for change.

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<sup>1</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

<sup>2</sup> <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2023>.

## 2. Current landscape

### 2.1 Relevant statistics

As at 8 May 2025, the ATO's debt book, that is, stock of tax debt that is owed to the Commonwealth Government, was over \$105 billion.<sup>3</sup> ATO estimates are that of the \$105 billion, \$46.4 billion is collectable tax debt.

To contextualise those numbers:

- the 2023-24 total tax revenue collectable by the Commonwealth Government was \$649 billion.<sup>4</sup>
- in 2019 the collectible debt book was \$26.5 billion.<sup>5</sup>
- the \$46.4 billion is down almost \$4 billion from the \$50.2 billion reported in September 2023 and even more from the \$51.3b collectable at 31 March 2025.<sup>6</sup>

The 31 March 2025 figures included breakdown by market segment and tax type. As at that date \$34 billion (66%) of the collectable debt was small business debt, \$5.1 billion (10%) individuals, \$10.1 billion (19.6%) privately owned and wealthy groups and \$1.5 billion (less than 3%) public was public and multi-national businesses. With respect to tax type \$34.4 billion (67%) was GST, 14.5 billion (\$28%) income tax and \$2.1 billion (4%) superannuation guarantee charge. 22,000 taxpayers, being 1% of the total debtors, are responsible for \$11 billion of the total tax collectable debt value.<sup>7</sup> Further, that the 22,000 represent 1% of the total debtors responsible for 20% of what's owed.<sup>8</sup> That puts the total number of tax debtors around 10% of the total taxpaying community based on active registered TFN numbers.<sup>9</sup>

### 2.2 ATO policies and stance

The ATO has for more than two years now been spotlighting that addressing collectable debt is amongst its highest priorities and that a shift to firmer debt collection actions will result.<sup>10</sup>

Within the collectable debt book the Commissioner does have debts that are being prioritised over others. In recent public addresses, the Commissioner has identified those categories as:<sup>11</sup>

- unpaid superannuation guarantee charge (**SGC**), pay as you go withholding (**PAYG**) – that is, tax that is withheld from employees' pay but not passed on to the government – and goods and services tax (**GST**) that is collected from customers but not passed on to the government;
- taxpayers who exhibit the most non-compliant behaviour in avoiding their obligations; and

<sup>3</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

<sup>4</sup> <https://www.abs.gov.au/statistics/economy/government/taxation-revenue-australia/latest-release>.

<sup>5</sup> <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2023>.

<sup>6</sup> <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2023>.

<sup>7</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

<sup>8</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

<sup>9</sup> <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/research-for-individuals-and-families/tax-and-individuals-not-in-business>

<sup>10</sup> See eg. <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2023>;

<https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Annual-report-and-other-reporting-to-Parliament/Annual-report>;

<https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

<sup>11</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

- the 22,000 with the highest tax debts noted in the 1% statistic above.

The ATO has simultaneously “tightened up on payment plans and general interest charge remissions, and will be looking closely at lodgement deferrals and penalty remissions”.<sup>12</sup>

The message overall – lodge and pay on time and correctly or we will pursue recovery using all powers available to us.

Across the same two year period the ATO’s law administration practice statement for collection of disputed tax debts, PS LA 2011/14, has been revised three times, with a fourth revision foreshadowed. To emphasise how unusual that is, the last revision of the PS LA 2011/14 prior was in the 2015 year and there have been just six versions in total since its original release in 2011. Principles expressed in the current version of PS LA 2011/14 are instructive of the shifts that are occurring. Those include:

- “[w]hile we expect tax debts to be paid on time, we recognise that taxpayers have the right to dispute their liability through the objection, review and appeal processes. This means that additional considerations apply in managing the collection of disputed debts over and above those that apply when a debt is not disputed, and we tailor our approach accordingly.”<sup>13</sup>
- “[w]e require large business and wealthy group taxpayers with a disputed debt to either pay their debt in full or enter into a 50/50 arrangement... Where a large business or wealthy group taxpayer with a disputed debt does not pay their debt in full or enter into a 50/50 arrangement, we may take action to secure payment of the disputed debt before the dispute is resolved.”<sup>14</sup>
- “[f]or other taxpayers, where there is a dispute about a taxpayer's liability, any recovery action we take is based on an assessment of the risk the case poses to the revenue, taking into account the taxpayer's individual circumstances. This risk assessment is a fundamental part of the disputed debt process and continues during the various stages of a dispute, while a disputed debt remains unpaid.”<sup>15</sup>
- “[i]t is rare for us to initiate recovery action for a disputed debt. However, in a small number of cases, based on a careful risk assessment, action to recover all or part of a disputed debt may be taken. This will typically happen in high-risk cases where there are links to organised crime, phoenixing or other fraudulent activity, or where there is a serious concern about the dissipation of assets or the ability to pay in the event that the taxpayer is unsuccessful in the dispute. It may also happen where the taxpayer's objection is frivolous or without merit and the dispute is being used to inappropriately delay or frustrate the recovery of tax.”<sup>16</sup>

Other factors identified as ones that the ATO will consider in PS LA 2011/14 as ones that will be considered in deciding whether to pursue debt collection where there is a tax dispute on foot include:<sup>17</sup>

- the taxpayer's compliance history
- the size of the disputed debt and any other tax debts that remain unpaid
- the taxpayer's willingness to provide information necessary for the resolution of the dispute
- the taxpayer's willingness to cooperate with us

<sup>12</sup> <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2023>.

<sup>13</sup> PS LA 2011/14 at [5].

<sup>14</sup> PSLA 2011/14 at [6] – [7].

<sup>15</sup> PSLA 2011/14 at [9].

<sup>16</sup> PS LA 2011/14 at [13].

<sup>17</sup> PS LA 2011/14 at [18].

- the extent to which the taxpayer's rights are being genuinely pursued so as to advance the dispute in a timely manner
- the merits of the taxpayer's case, including whether the subject matter of the dispute has been decided by a court or tribunal in our favour in a substantially similar case
- the age of the debt in dispute
- the growth of the debt by accumulation of general interest charge (**GIC**)
- whether the taxpayer's case is frivolous or without merit
- whether there are reasonable grounds to think that the dispute is being used to inappropriately delay or frustrate the recovery of tax
- whether the action of a taxpayer may be prejudicial to their ability to pay or our recovery position (for example, restructuring of affairs)
- whether the taxpayer is otherwise up to date with their tax lodgement and payment obligations
- whether the taxpayer has the financial capacity to meet their tax-related liabilities or to comply with an ongoing payment arrangement, and
- whether the dispute has been commenced at the later stages of recovery, as this may indicate a risk to collection.

More broadly, as to the role of the Commissioner, Rob Heferen, has observed that:<sup>18</sup>

- “As an administrator, part of our role is to take the complexity of the system and do what we can to make it as easy to use as we can. That is, be a ‘complexity broker’.”; and
- “Only human intervention can determine what constitutes fairness and reasonableness in those taxpayer circumstances where complex communication, compassion or empathy are needed to make decisions with the taxpayer.”

## 2.3 Observations

ATO initiated formal debt collection activity has been extensive over the last 24 months with all powers available being utilised and that is expected to continue.

As a go-forward stance and for tax debts accumulated in recent years, assuming an implementation that does take individual circumstances and the totality of a taxpayer's position into consideration, the firmer action policy being adopted by the ATO is to be applauded. The more real time any tax risk assessment can be undertaken, of which tax debts are one, the better off we as a community. That approach allows consideration whilst recollections are still current, available evidence exists, contact points to obtain third party information to the extent relevant are still known and before significant interest has accrued. In doing so, early action minimises business and personal disruption and increases certainty and confidence in the system. It is also an approach that ensures that those who do not comply with their tax obligations, especially if deliberately, do not obtain an advantage over others.

But in its historic application there is pain and it is unfortunately the more vulnerable in our society that are being disproportionately impacted. Those who cannot pay. Or can pay the primary tax debt but not the interest

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<sup>18</sup> <https://www.ato.gov.au/media-centre/commissioners-address-at-the-atax-international-conference>.

and penalty components. Those who got poor tax or legal advice upfront and made unintentional errors in their tax treatment as a result. Who do not have the financial literacy and acumen to distinguish between the good and bad tax advisors within the tax profession or to know that their tax advisor's failure to lodge on time can leave them personally exposed to liabilities. Those who relied in good-faith upon the Commissioner's representations during the COVID years of support and flexibility to continue to trade and operate in the uncertain circumstances and times they faced where otherwise they may not have done so. And individuals who have moved on and made financial and life decisions on the understanding that historic tax debts have been long since resolved, and even if incorrectly having done so are being disadvantaged by the delay. And the laws engaged – especially those around director penalty notices (**DPNs**) and SGC – are complex.

Presently, those in the above categories are facing a debt collection system where human interaction is minimal. Most correspondence issued has no contact person listed. Most phone numbers included are general call lines where a different person answers each time. And responses to written correspondence are mostly being received by way of final decision without any verbal or other engagement prior and with significant delays of up to 12 months in between.

For those able to afford legal advisors there remain pathways through. But many with tax debts cannot afford to pay for advice and pro-bono services are limited.

It is not the first time we have faced these types of settings. The most recent comparable time period in which a similar shift toward firmer enforcement action was experienced was in the 2007-08 year and in the global financial crisis years that followed. During the 2007-08 year alone the ATO:<sup>19</sup>

- processed over 10 million individual income tax returns (to be compared to the 14.1 million processed in 2023-24 for comparisons of scale);
- finalised 1.8 million collectable debt cases;
- wrote off more than 240,000 debt cases; and
- re-raised over 7,000 debts totalling almost \$105 million that had previously been categorised as uneconomical to pursue.

The Commonwealth Ombudsman undertook a review of the practice of re-raising tax debts at that time.<sup>20</sup> Amongst the observations in that report were that:<sup>21</sup>

*As an agency under section 47 of the Financial Management and Accountability Act 1997 (FMA Act), the Australian Taxation Office (ATO) is enabled and expected by the Australian government to actively and appropriately manage debt cases. This includes the use of its legislative discretion to decide when and in what circumstances it is not economical to pursue a debt. The decision that a debt is uneconomical to pursue is termed 'write-off' and reduces the amount owing on a taxpayer's debt account...*

*Although not expressly required in the FMA Act, it can be implied that the consideration about whether a debt is economical to pursue is an ongoing one and may be reversed if circumstances change. ...*

*There is a tension on the one hand between the ATO's guiding principles for its collection activities which are considering each case on its merits, assisting taxpayers to move on, being fair and equitable in the application of the law and, on the other hand, its processes and policy for re-raising debt. It is not easy to determine where the line should be drawn between allowing taxpayers to move on from debts and not rewarding taxpayers for being non-complaint or disengaged from the tax system.*

<sup>19</sup> Commonwealth Ombudsman Australian Taxation Office Re-Raising Written-Off Tax Debts March 2009

<sup>20</sup> Commonwealth Ombudsman Australian Taxation Office Re-Raising Written-Off Tax Debts March 2009

<sup>21</sup> Commonwealth Ombudsman Australian Taxation Office Re-Raising Written-Off Tax Debts March 2009

*The ATO advised that the outcome of consultation with Finance about this indicated that ... The automatic re-raise of debt is not an FMA Act requirement. The FMA Act would only require debt previously determined to be uneconomic to pursue to be re-raised if it was effective, efficient and ethical to do so....*

A number of recommendations were made by the Commonwealth Ombudsman in that report. Amongst them:<sup>22</sup>

- Information about tax debts classified as uneconomical to pursue should “be provided on all notices of assessment related to the tax account.”
- “The ATO should provide further information to taxpayers when a debt is re-raised. This information should include the source of the debt (including how much interest has been charged), the circumstances which caused the debt to be re-raised and how to obtain further information.”;
- “The ATO should not re-raise debts which pre-date the introduction of the ATO Integrated System (AIS) to avoid problems with archival of older account postings on legacy systems”; and
- “Consideration should be given to the reasonableness of seeking to recover debts which have not been pursued for many years, taking into account the period of time for which taxpayers could be expected to retain relevant tax records.”

The report is admittedly now more than 15 years old and there has been a lot of law change since. But the messaging at least around how communication can influence a persons experience and understanding of the system and what it is reasonable to expect of taxpayers in terms of records available (especially third party records) remain very relevant.

More front-ended proactive engagement with affected taxpayers in advance of formal recovery action being undertaken to seek to understand their present circumstances would go a long way to alleviating the pain that is being experienced presently and in facilitating more effective, efficient and ethical application of limited resources. This is happening in some spheres with letters being sent in advance. And perhaps for most taxpayers that is sufficient. Although some letters lack details of a point of contact through which to engage, a general call line being of limited utility for the more complex or documentation heavy matters. And for some taxpayers the information mismatch between what the ATO has available to it and the information the taxpayer has is very real. Former directors in receipt of DPNs, especially DPNS for default assessments raised by the ATO based on estimates (which has only been possible since 2019) are the most obvious category of taxpayer falling into this bucket. In some instances, within the current legislative settings given the limitations that do presently exist around review mechanisms once the formal action has been taken and/or the irreversible reputational and relational harm caused in advance of that review mechanism being enlivened – thinking of DPN, garnishee notices and credit bureau reporting in particular – such front ended enquiry is the only mechanism that can ensure that those objectives of effectiveness, efficiency and ethical decision making are achieved.

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<sup>22</sup> Commonwealth Ombudsman Australian Taxation Office Re-Raising Written-Off Tax Debts March 2009

### 3. Tools within the ATO's armoury

#### 3.1 Overview

The tools within the ATO's armoury to collect tax debts include:

- Director penalty notices (**DPNs**) for companies goods and services tax (**GST**), pay as you go withholding (**PAYG**) and superannuation guarantee charge (**SGC**) debts
- Retention and application of tax refunds
- Garnishee notices
- Credit reporting bureau disclosures
- Directions to pay SGC
- Legal action including forcing bankruptcy and wind-up.

Each is considered below.

#### 3.2 DPNs

##### 3.2.1 Overview, legislative history and policy rationale

A DPN is a notice that the ATO can send to a director of a company making them personally liable for a tax debt and allowing the ATO to take action against the director personally. Importantly the director becomes personally liable upon the issue of the DPN. The type of tax debts of a company for which a notice can currently be issued are:

- Pay as you go (**PAYG**);
- Superannuation guarantee charge (**SGC**); and
- Goods and services tax (**GST**).

For completeness, and because it is one facet of the regime that is frequently misunderstood, SGC includes not just the superannuation contribution that would have been required to be paid had it been paid to the employee on time but also an administration charge of \$20 per employee and nominal interest calculated at a flat 10% rate from the time that payment was due until an SGC statement is lodged. The ATO does not have discretion to remit the administration charge or nominal interest.

The DPN regime was introduced in 1993.<sup>23</sup>

Prior to 30 June 1993 the ATO had priority over all other unsecured creditors with respect to many taxes.<sup>24</sup> The priority in wind up and bankruptcy include pay as you earn deductions which had not been remitted. The DPN regime was introduced as a substitute for these former provisions giving the Commissioner priority with one of

<sup>23</sup> *Insolvency (Tax Priorities) Legislation Amendment Act 1993*.

<sup>24</sup> *Income Tax Assessment Act 1936*, ss 221P, 221YU, 221YZD, 221YHJ.

the rationales for that replacement being that the priority ahead of employee claims and other creditors for wages was unfair to those employees and other creditors.

The 1993 change also included measures to enable the Commissioner to recover debts more quickly through an estimation process with the aim of encouraging directors to “face emerging problems as soon as possible.”<sup>25</sup>

The need to deter fraudulent phoenix activities resulted in further changes to the DPN regime, those changes taking effect from 30 June 2012.<sup>26</sup> Whilst these changes were enacted to deter fraudulent phoenix activities, they impact all directors. It was these changes that introduced for the first time DPNs where there was no action the director could take at the time of issue other than payment in full to avoid personal liability. At that time the DPN regime was limited to SGC and PAYG liabilities.

In 2019 again with the stated objective of curbing fraudulent phoenix activities, but in effect impacting all directors, further changes were made to the DPN regime for SGC and PAYG debts.<sup>27</sup> The changes then effected were most significant in their consequence for estimates of tax liabilities. Prior to that time a director’s personal liability for tax debts that arose from estimates initiated by the Commissioner only arose from the time that the company was given notice of the estimate by the Commissioner with there remaining options to put a company into liquidation or administration after the notice of estimate was given to avoid personal liability as a director. After the amendments, and for periods prior to the amendments if the estimates related to those periods directors obligations were deemed to arise at the same time as the companies being the date that the underlying liability was payable by the company had it been reported on time. As such, the options to avoid personal liability of placing the entity into liquidation or administration were taken away. From this time forward directors have been able to be held personally liable (without option to avoid that liability) not just for tax debts they knew the company to have and had made an active choice not to pay, but also in circumstances where they had done what they could to comply with tax obligations but through honest mistake or inadvertent omission had made an error leading to a tax shortfall.

Those changes also amended the defence in section 269-35 of schedule 1 to the *Taxation Administration Act 1953 (TAA)*. Of the changes to the reasonable steps defence also made amongst those amendments, which was to add subsections (3AA) and (3AB), the explanatory memorandum stated as the objective that (emphasis added):<sup>28</sup>

*The new conditions on the defence are designed to protect current or former directors **if during their tenure or their management and control of the company, the director can show they took all reasonable steps to ensure their company discharged the obligation in respect of both the estimate and the actual underlying liability, or alternatively show that there were no reasonable steps for the directors to take for both obligations.***

The provisions that it informs the interpretation of are what it means to take reasonable steps to ensure the directors caused the company to comply with its obligation and the further explanation of that, being that in determining whether reasonable steps are taken it is relevant to consider “(a) when, and for how long, you were a director and took part in the management of the company; and (b) all other relevant circumstances”.<sup>29</sup> The timeframe for SGC liabilities to be locked down was also shortened to align with the companies obligation to pay – having been three months prior to that.

From 1 April 2020 the DPN regime was further expanded to include GST and also including GST estimates.<sup>30</sup>

The objectives of DPNs as presently stated in section 269-5 of the TAA is (emphasis added):

<sup>25</sup> Second Reading Speech, Hansard Senate, 19 May 1993 at pp 879, 880.

<sup>26</sup> *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth); *Pay as You Go Withholding Non-compliance Tax Act 2012* (Cth).

<sup>27</sup> Treasury Laws Amendment (2018 Measures No. 4) Act 2019.

<sup>28</sup> Explanatory Memorandum to Treasury Laws Amendment (2018 Measures No. 4) Act 2018.

<sup>29</sup> *Taxation Administration Act 1953*, sch 1 s 269-35(3).

<sup>30</sup> Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020.

*to ensure that a company either: (a) meets its obligations under... [the PAYG provisions (both self-assessed and ATO estimates), SGC provisions and GST provisions for net amounts and GST Instalments] or (b) goes promptly into voluntary administration or restructuring under the Corporations Act 2001 or into liquidation.*

It is important to understand that directors for the purpose of DPNs include any current or former director that held that position for more than 30 days or more<sup>31</sup> and shadow directors.

It is also important to flag that notice of a DPN is given in hard copy form with the period to respond which is just 21 days set by the day that the Commissioner leaves or posts it. Further that receipt is deemed even if it does not occur. And that the address used for the giving of that notice is normally the address registered by the director with ASIC for the company, but can technically be any address registered by the director with any Commonwealth registry or the last address that the ATO has on record for the director.

With the decreased regulatory of postal services, the delay times between post and receipt. An example, Albury to Esperance (Albury being an ATO office from which correspondence regularly originates) standard delivery timeframe is 6-7 business days.<sup>32</sup> For a notice posted on a Friday that would mean receipt on a date that is already 11 days into the 21 day timeframe to respond.

### 3.2.2 Lockdown vs non-lockdown DPNs

It is important to identify the type of DPN issued immediately upon receipt in order to navigate the options for dealing with it as quickly as possible.

There are broadly two types of DPNs – a ‘non-lockdown’ DPN and a ‘lockdown’ DPN. These terms are not found in the legislation itself, they are the colloquial terms commonly used. Within the legislation “lockdown” amounts are those which are listed in column 3 of the table to TAA sch 1 section 269-30(2). The “non-lockdown” amounts are those which are not described in column 3 of the table to TAA sch 1 section 269-30(2).

Broadly, a non-lockdown DPN is issued when a company has lodged its activity statements for GST and PAYG within 3 months of the due date or it lodges the SGC Charge statement within 28 days of the due date that includes the debt amount but the debt remains unpaid.<sup>33</sup> For PAYG debts reporting through single touch payroll (**STP**) is a mechanism for reporting obligation compliance. For SGC debts it is not. The debt may not be paid, but importantly, notice has been given to the ATO of the existence of tax debt within the specified period.

A non-lockdown DPN enables a director, within 21 days, to take any of the following actions to discharge the personal liability:<sup>34</sup>

1. Pay the debt in full;
2. Appoint a voluntary administrator;
3. Appoint a small business restructuring practitioner; or
4. Appoint a liquidator.

It is not sufficient to simply enter into a payment arrangement to discharge the non-lockdown DPN.

<sup>31</sup> TAA sch 1 s 269-20(3).

<sup>32</sup>[https://www.google.com/search?q=Australia+Post+delivery+timeframe&oq=&gs\\_lcrp=EgRIZGdIKgYIARBFGDsBggAEEUYOTIGCAEQRg7MgYIAhBFGDzSAQg0MTk0ajBqNKgCALACAQ&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=Australia+Post+delivery+timeframe&oq=&gs_lcrp=EgRIZGdIKgYIARBFGDsBggAEEUYOTIGCAEQRg7MgYIAhBFGDzSAQg0MTk0ajBqNKgCALACAQ&sourceid=chrome&ie=UTF-8)

<sup>33</sup> TAA sch 1 s 269-30(2).

<sup>34</sup> TAA sch 1 s 269-30(1), s 269-15(2).

Failure to take one of the above actions within 21 days of the issuance of a non-lockdown DPN will mean the personal liability of the director cannot be thereafter remitted other than by paying the debt in full, or establishing a defence (which are limited).

A lockdown DPN can be issued by the ATO when the company has not notified the ATO of the debt owing within the required timeframes (three months for PAYG and GST, 28 days for SGC) and it has not made payment of the liability. Lockdown DPNs can issue in respect of estimates of PAYG, GST and SGC debts also, and to the extent they are the amount of said estimate that exceeds the reported amount is a lockdown component.

The only way the lockdown DPN can be complied with is if the company to which the debt relates, the director who received the DPN, or another director of the same company in receipt of a parallel DPN pays the debt in full within 21 days of the notice being issued. The failure to comply with the DPN means the liability is “locked down” on the director and cannot be avoided in absence of a defence being established.

Another issue that directors should be aware of is that in addition to commencing a proceeding to recover the debt claimed in a DPN, the ATO may also offset the debt against refunds, or retain funds from the taxpayer by garnisheeing funds in their bank account or owed to them by third parties. These powers are elaborated upon below.

There is one limitation on the taking of enforcement steps which is that “the Commissioner must not commence, or take a procedural step as a party to, proceedings to enforce an obligation, or to recover a penalty, of a director under this Division if an arrangement that covers the company’s obligation is in force under section 255-15 (Commissioner’s power to permit payments by instalments” [effectively a payment arrangement].<sup>35</sup> That proviso does not prevent the ATO issuing a DPN it only limits taking steps to recover the liability. Further, being in negotiations with the ATO for a payment arrangement is not sufficient to delay enforcement actions, the restriction only applies from the time that the payment arrangement is finalised and formalised.

### 3.2.3 Defences

There are defences to DPN’s where the 21 day period has passed. However these are limited and will very much depend on the facts of each individual case.

There are three defences (one only applicable to SGC and GST) available to directors who have been issued with a DPN.<sup>36</sup> They are:

1. That because of illness or for some other good reason it would have been unreasonable for the director to take part in the management of the business. The director does not need to have suffered the illness personally, the illness may be of a close family of the director. It must be shown that the illness or other reason prevented the director from being able to participate in the company’s business for the whole of the period not just part.
2. The director has taken all reasonable steps to ensure that the company did one of the following:
  - a. complied with paying its tax obligations;
  - b. appointed an administrator;
  - c. appointed a small business restructuring practitioner; or

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<sup>35</sup> TAA Sch 1 s 269-15(3)

<sup>36</sup> TAA Sch 1 s 269-35.

- d. commenced winding up.
- 3. For SGC and GST debts only, having taken reasonable care and treating the superannuation or GST legislation as applying to a matter or identical matters in a way that was reasonably arguable.

For the purpose of determining what are reasonable steps for the second of those defences the ATO is directed to have regard to:<sup>37</sup>

1. when, and for how long, a director was a director and took part in the management of the company; and
2. all other relevant circumstances.

As the law currently stands, directors cannot themselves dispute the correctness of the underlying tax debts. That action must be taken by the company. This is extremely limited for companies that have already been liquidated and is a facet that in extreme circumstances has led to the company being reinstated simply to have the DPN debts addressed and dealt with. To do so is possible but is itself and an involved and costly process.

The defences noted above can be relied upon in proceedings before a Court to recover the debt the subject of the DPN, the Commissioner issuing a garnishee notice to recover the DPN debt or otherwise giving written notice that the Commissioner has recovered any of the DPN debt.<sup>38</sup> In each instance the onus is on the director to prove the defence exists.

### 3.2.4 Observations

The delivery method for DPNs whilst a legislated one and therefore one that does have to be followed means that many directors are simply not receiving DPNs within the 21 day timeframe to respond. That is not solely because of failure to update and keep their address with ASIC accurate. For many, especially those in regional locations it is most often the consequence of postal delays combined with short holiday periods. Modernisation of delivery methods, even if just in duplicate in absence of law change would go a long way to ensuring that receipt of DPNs occurs and that those in regional locations are not disadvantaged.

The current wide spread use of DPNs as a mechanism to recover unpaid company tax is probably in line with the laws as enacted. But it has moved well beyond the policy objectives for which those measures were enacted, being:

- to not have the ATO rank in priority to employee's wage entitlements and other creditors in all instances in a winding up;<sup>39</sup>
- encouraging directors to "face emerging problems as soon as possible";<sup>40</sup>
- to ensure that a company either meets its obligations or goes promptly into voluntary administration or restructuring under the Corporations Act 2001 or into liquidation;<sup>41</sup> and
- deferring fraudulent phoenix activity.<sup>42</sup>

The proviso in subsection 269-35(3) of Schedule 1 to the TAA on the reasonable steps defence that in determining what are reasonable steps regard is to be had to:

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<sup>37</sup> TAA Sch 1 s 269-35(3).

<sup>38</sup> TAA Sch 1 s 269-35(4), (4A).

<sup>39</sup> Second Reading Speech, Hansard Senate, 19 May 1993 at pp 879, 880.

<sup>40</sup> Second Reading Speech, Hansard Senate, 19 May 1993 at pp 879, 880.

<sup>41</sup> TAA Sch 1 s 269-5.

<sup>42</sup> Explanatory Memorandum to Treasury Laws Amendment (2018 Measures No. 4) Act 2018.

- (a) when, and for how long, a director was a director and took part in the management of the company; and
- (b) all other relevant circumstances,

is being interpreted very narrowly. There is some case law to support that. But the body of case law that exists has not fully considered the effect of the changes made in 2019 and 2020 that did include specific amendments to the defence in section 269-35 of sch 1 to the TAA. Further, the older cases relied upon do not factor in or take into account more recent amendments to directors duties and obligations under the *Corporations Act 2001*. For example, the September 2017 amendment to include section 588GA of the *Corporations Act 2001* which provides a safe harbour defence to protect directors from personal liability for debts incurred by an insolvent company if they take a course of action that is reasonably likely to lead to a better outcome for the company and its creditors, compared to the appointment of an administrator or a liquidator.

That the Commissioner is applying the provisions in a manner where director's review rights are extremely limited, applying an interpretation where directors effectively have no avenue to independent review until a garnishee notice is issued, a refund is offset or the Commissioner initiates Court proceedings to recover the debt – is also causing many directors in receipt of DPNs significant stress and anxiety.

And there are many DPN liabilities that are being shown to be incorrect when challenged. Especially, but not only, those which are based on estimates. Many are SGC arising from late superannuation payments (mostly nominal interest) where directors did not have knowledge of having been late due to oversights or errors on the account of superannuation clearing houses, or in some instances just lack of understanding of the time delay between paying to a superannuation clearing house and remittance to the employee's superannuation fund. And whilst technically a SGC statement is required to stop that nominal interest accruing and to have the payments made allocated there has been much misleading publicly accessible information around about that. Indeed, even at the date of writing this article the ATO's own website states:<sup>43</sup>

*"[L]ate payments will be used automatically to pay any super obligation you may have in the current quarter. This may mean late payments are applied to a quarter that is different to when you intended."*

But that has not been occurring. Or at least it has not been consistently occurring. As a result there are many late payments of superannuation contributions that the Commissioner or superannuation funds have received and remitted to employees superannuation accounts many years ago – in many instances just a matter of days after the due date – that either remain unallocated toward any tax debt in the ATO system at the time of issue of a DPN and in respect of which nominal interest has continued to accrue even though no-one is actually out of pocket simply because of the absence of a piece of paper (a SGC statement or late payment offset request).

In other instances, initial proofs of debt provided by the ATO in administration or liquidation processes indicating there are no historic tax debts have been relied upon by companies, directors, administrators and liquidators to come to voluntary but binding agreement with other creditors, only for those administrators and liquidators to later in the day receive assessments from the ATO based on estimates for much larger amounts. And it is on the larger amounts that directors are receiving DPNs for even though the company's ability to object to and dispute the same has been limited by the time at which the assessment is raised. This is an example where directors would not have been liable prior to the 2019 amendments.

These applications are probably consistent with the scope of the powers and the law as it currently stands. But whether it is the right place to put the line when balancing the need to consider each case on its merits, assisting taxpayers to move on and being fair and equitable in the application of the law must depend on the facts of each case.

The real world consequences of DPNs being received extend well beyond the directors. Especially non-lockdown DPNs. Many directors in receipt of the same are electing to go into administration or insolvency even when their assessment of the present financial circumstance of the company is that it is solvent. The reason is

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<sup>43</sup> <https://www.ato.gov.au/businesses-and-organisations/super-for-employers/missed-and-late-super-guarantee-payments>

the limited 21 day period to do so to avoid the personal liability. The flow on result being loss of jobs for employees and revenue for the economy. And it is hard to advise them not to take that action, indeed possibly even negligent not to highlight the risk and consider the option, especially in the uncertain economic times that we are facing.

In the authors view there are mechanisms within the law to permit the line to be drawn elsewhere. In particular more front ended enquiry around whether to issue a DPN prior to issuing the DPN and/or wider interpretation of the phrase “or some other good reason” in the subsection 269-35(1) of Schedule 1 to the TAA defence or of the subsection 269-35(3) of Schedule 1 to the TAA proviso on the reasonable steps defence.

But whether that is the case or not perhaps it ought not be left to discretion. Perhaps it is a matter better suited to further law change.

### 3.3 Retention of refunds

Section 8AAZLGA of the TAA affords the Commissioner the power to retain refunds while the Commissioner verifies the information in the notice given.

There are ten factors the ATO must weigh in making a decision to retain a refund. Those are:

1. the likely accuracy of the notified information.
2. the likelihood that the notified information was affected by: fraud or evasion, intentional disregard of a taxation law or recklessness as to the operation of a taxation law.
3. the impact of retaining the amount on the entity's financial position.
4. whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the notified information were found to be incorrect after the amount had been refunded.
5. any complexity that would be involved in verifying the notified information.
6. the time for which the Commissioner has already retained the amount.
7. what the Commissioner has already done to verify the notified information.
8. whether the Commissioner has enough information to make an assessment relating to the amount (including information obtained from making further requests for information).
9. the extent to which the notified information is consistent with information that the entity previously provided.
10. any other relevant matter.

There are notification requirements that must be met too and failure to meet those within specified timeframes can invalidate a decision to retain a refund. But no formality is required. Verbal notification is sufficient.

The Commissioner does have a practice statement on how the power is exercised. That is PS LA 2011/21.

Whilst there have been some attempts to do so, and whilst there is a review avenue to provide for it, it is a power the scope of which remains largely untested before the Courts. The reason is that once an assessment is raised that review mechanism often falls away. Further, there is significant time delay from when the power is exercised to when that power is enlivened – as one must wait at least 60 days from when the retention occurs (and that is 60 days where there are no information requests outstanding for the taxpayer to respond to) before

an objection can be initiated, a further 60 days (with the same proviso about information requests outstanding) before appeal to a Court can be initiated and is then at the liberty of the Court as to timeframe to progress from there.

As a result there are a number of open questions about its proper scope and application. For example, whether:

- the power is limited to verifying information contained in the notice triggering the potential refund entitlement (such as a BAS statement) or whether it can extend to retaining the amount reported in the notice to offset against another foreshadowed but as yet not due tax debt (for example, a BAS refund to be offset against an income tax liability).
- the power is limited to verifying facts or extends to issues of law interpretation also; and
- what the total timeframe is that the power can be reasonably relied upon to retain a refund, noting that section 8AAZLGA is not a once in time decision but requires continual revisiting and review.

Certainly, in the current administration and exercise of the power the ATO utilises it for all of the above purposes. In some instances retaining amounts for multiple years.

But views amongst tax professionals as to whether that is its breadth or not do differ and it is a matter upon which all would benefit from judicial guidance. Amongst the cases initiated but ultimately undecided was one that included grounds of negligence and whether the ATO owed the taxpayer a common law duty of care to taxpayers in making refunds. In that case in circumstances where there was information known to the Commissioner that the taxpayer's tax agent was likely acting without the taxpayer's authority. The argument was entertained by the Court and found to have at least reasonable prospects, therefore not being dismissed at that interlocutory stage.<sup>44</sup> Of section 8AAZLGA in that case, in obiter, the Court observed:<sup>45</sup>

*The evident purpose of s 8AAZLGA of the Administration Act was to give the Commissioner a discretion to retain an amount that he would otherwise have to refund for a period that would enable him to verify the information provided by the entity which had generated the refund.*

### 3.4 Garnishee notices

The Commissioner has the power to issue garnishee notices.<sup>46</sup>

These notices can be issued to third parties that hold money or may hold money for the taxpayer in the future. The issue of the notice requires that third party to instead pay the money to the ATO directly to reduce tax debts.

For individuals notices can be issued to:

- the individual's employer or contractor;
- banks, financial institutions and building societies where the individual has accounts; and
- people who owe money to the individual from the sale of real estate, such as purchasers, real estate agents and solicitors

For businesses garnishee notices can be issued to:

<sup>44</sup> *Farah Custodians Pty Ltd v Commissioner of Taxation (No 2)* [2019] FCA 1076.

<sup>45</sup> *Farah Custodians Pty Ltd v Commissioner of Taxation (No 2)* [2019] FCA 1076, [60].

<sup>46</sup> TAA sch 1 s 260-5.

- financial institutions
- trade debtors
- suppliers of merchant card facilities.

Third parties that pay amounts in accordance with garnishee notices are indemnified for the payment, and the payment is deemed to be authorised by both the tax debtor and other persons entitled to all or part of the amount. Third parties that fail to comply can have monetary penalties imposed as a consequence.

The ATO must send copies of garnishee notices to impacted taxpayers also.<sup>47</sup> But usually there is no advance warning given prior to the third party receiving the notice.

There are limited grounds to dispute a garnishee notice, mostly limited to circumstances where severe financial hardship would be caused.

The issue of these notices does cause relational and reputational harm, with the author aware of circumstances where they have led to banks ceasing to provide banking services to the taxpayer, and taxpayer's clients ceasing their service relationships with that taxpayer.

There is presently very poor communication within the ATO between different arms of debt enforcement especially in relation to issue of garnishee notices with the author aware of numerous instances where garnishee notices have issued where there has been commitment not to take that step – such as days (or day) before a payment arrangement is formally agreed and where there had been agreement to permit business sale to be pursued. In numerous instances this action taken by the ATO has caused the taxpayers impacted to lose key customer contracts or for business sales to fall over – with the consequence that payment arrangements and/or continuing to trade at all cease to be viable. Whether this is a circumstance in which a common law duty of care is owed – similar to that agitated before the Court in the context of retention of refunds – would be an interesting area to explore especially where express commitments have been made.

### 3.5 Credit reporting bureau disclosures

Per section 355-72 of sch 1 of the TAA the ATO can report tax debts to credit reporting bureaus if the entity is within a class of entities defined for by legislative instrument for the purposes of that section.<sup>48</sup>

TDID2019/1 is the relevant instrument made for that purpose. Section 6 of TDID 2019/1 defines the class of entities as:

*Declared class of entities - taxpayers carrying on a business or similar venture with total tax debts of \$100,000 or more for more than 90 days and who fail to effectively engage with the Commissioner.*

Further details and limitations are contained following. For example, limitations that prevent reporting include:

- having an active compliant with the Inspector General of Taxation.
- having entered into a payment arrangement under s 255-15 of the TAA for the debt – that action excluding the amounts subject to such payment arrangement from the \$100,000 threshold.
- having made an application for release of tax debt under s 340-5 of the TAA that is undecided.

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<sup>47</sup> TAA s 260-5(6).

<sup>48</sup> TAA sch 1 s 355-72(5).

- having objected to the tax debt under Part IVC of the *Income Tax Assessment Act 1997* that is ongoing (**ITAA 1997**) or sought review of a reviewable decision under the *Superannuation Industry (Supervision) Act 1993*.
- having applied to the Administrative Review Tribunal or Federal Court for review of an objection decision or reviewable decision of the nature noted in the previous dot point that is ongoing.
- Another is that a tax debt is not included toward the \$100,000 amount if the entity has a payment arrangement under s 255-15 of the TAA with the Commissioner for that amount.

The Commissioner does sent a written notice of intent to disclose prior to disclosure. There is a 28 day period to respond. In addition to the above circumstances, basis for responding to request that it not occur can also include exceptional circumstances such as family tragedy, serious illness or impacts of natural disasters.<sup>49</sup>

It is critical that taxpayers do respond if at the time of receipt of notice to report they are in negotiations about a payment arrangement but have not finalised the same. The reason is that whilst TDID2019/1 includes a note the exact wording of which is “Tax debts are disregarded where the entity is effectively engaging with the Commissioner to manage the debt or is taking action in accordance with the law to dispute the debt” the ATO takes the view that just being in negotiation for a payment arrangement is not sufficient to fall within that criteria.<sup>50</sup> To that end, the author is aware of circumstances in which tax debts have been reported to credit reporting bureaus as close as one day prior to a formal payment arrangement that had been under negotiation for months being finalised and agreed.

If a report to a credit reporting bureau has been made, once any of the steps noted above is taken the ATO must give notice for the report to be removed. However, often the relational damage is already done and cannot be undone.

### 3.6 Direction to pay SGC

The ATO can issue employers with a director to pay outstanding SGC (or estimates of SGC) within a specified period. Failure to comply with such a direction is a criminal offence that can result in penalties and imprisonment.

### 3.7 Legal action

The ATO may also take legal action to recover outstanding tax and super debts. These legal actions can include:

- **Filing a claim or summons:** These are claims filed in the relevant court for the entities State or Territory – the relevant Court depending on the quantum and nature of the debt and the entity. Those Courts can also imposed judgment debt interest which is not deductible. Defences once this step is taken do exist but are very limited. In most instances there being an undecided objection, or Court appeal under Part IVC is not a defence. Circumstances in which stays or delays will be granted by the Courts are also limited.
- **Bankruptcy notices:** A taxpayer that receives a bankruptcy notice, must pay their ATO tax debt or make a payment plan with the ATO within 21 days. If unable to do this, the ATO may file a creditor's petition to

<sup>49</sup> [https://www.ato.gov.au/individuals-and-families/paying-the-ato/if-you-don-t-pay/disclosure-of-business-tax-debts?=redirected\\_disclosurebusinesstaxdebt](https://www.ato.gov.au/individuals-and-families/paying-the-ato/if-you-don-t-pay/disclosure-of-business-tax-debts?=redirected_disclosurebusinesstaxdebt).

<sup>50</sup> [https://www.ato.gov.au/individuals-and-families/paying-the-ato/if-you-don-t-pay/disclosure-of-business-tax-debts?=redirected\\_disclosurebusinesstaxdebt](https://www.ato.gov.au/individuals-and-families/paying-the-ato/if-you-don-t-pay/disclosure-of-business-tax-debts?=redirected_disclosurebusinesstaxdebt).

make the individual bankrupt. Often filing a statement of claim or summons is a preliminary step toward taking this action.

- **Creditors petition:** A creditor's petition is essentially an application to the Federal Court or Federal Magistrates Court to declare a person bankrupt.
- **Statutory demand:** A notice issued to a company that has not paid its debts. This requires the company to pay the entire debt or enter into a payment plan with the ATO within 21 days. Non-compliance can be used as evidence that the company is insolvent to initiate a wind-up application.
- **Wind-up action:** The ATO can initiate wind-up actions. If approved a Court appointed liquidator sells the companies assets and distributes the resulting funds to the companies creditors. At the point a wind-up application is initiated there remains opportunity to seek to negotiate payment plans. Defences are otherwise very limited, and as with summons in most instances there being an undecided objection, or Court appeal under Part IVC is not a defence. Circumstances in which stays or delays will be granted by the Courts are also limited.

Whilst each matter must be evaluated and decided on its own facts, most taxpayers in financial distress are better off if they act voluntarily before the ATO initiates the above steps. There are other options available. Proactively engaging with insolvency professionals and lawyers at earlier times can help to mitigate the fall out even if the end result is an insolvency or bankruptcy.

## 4. Insolvency and bankruptcy

### 4.1 Overview

For businesses and individuals encountering financial distress it is worth speaking to restructuring and insolvency practitioners early. For many there are steps that can be taken to turn a business around and return to profitability. For others, liquidation or bankruptcy may be the only option but there are still various available avenues to take control of that process and to mitigate the damage for the business or individual and their creditors.

### 4.2 Insolvency

There are a number of insolvency procedures available to insolvent companies, including small business restructure, voluntary administration and receivership and liquidation. The processes can be initiated by the directors or by creditors including the ATO.

Whether mechanisms for insolvency are the best option, and which of those is the best option, is a matter that ought to be discussed in each individual entities circumstances with insolvency practitioners and specialists. But at a high level, in so far as there is interplay with tax:

- the type of tax debts owing can influence the available insolvency pathways – for example, small business restructure is not possible where there are outstanding SGC liabilities.
- non-lockdown DPN debts can be extinguished by placing an entity in an insolvency event within 21 days of issue of the notice – but other than in rare circumstances lockdown DPN debts are unaffected by the insolvency event and can still be pursued against directors.
- director loans can be called in, and director payments and distributions recalled also if made out of funds that are not company profits or if there have been breaches of director duties impacting directors personal tax and financial position.
- where the insolvency event is ATO initiated other avenues for resolution such as payment arrangement remain possible but difficult to negotiate.

The insolvency event is also recorded against the directors personal record as a director with there being limits on how many such events directors can have before they are banned from acting as director.

#### 4.2.1 Small business restructure

A small business restructure is a type of external administration under the *Corporations Act 2001* and that does become a matter of public record and requires consultation with licensing bodies for those in some professions, including tax practitioners, to confirm that they can continue to practice subsequent. But subject to those limitations it can be an attractive option for many. The small business restructure process allows directors to retain control of the business, property, and affairs of the company while it develops a plan to restructure the company's affairs with the assistance of a restructuring practitioner and to enter into a restructuring plan with creditors. There are eligibility criteria. Those include:

1. total liabilities of the company must not exceed \$1 million

2. no current director of the company, and no person who has been a director of the company within the prior 12 month period, has been the director of another company that has been through small business restructure or subject to the simplified liquidation process within the preceding seven year period, unless a specific exemption applies one of those being near simultaneous (within 20 days) appointment to related entities.
3. the company has not been subject to a small business restructure or simplified liquidation process within the preceding seven year period.
4. the tax debts the subject of the restructuring plan cannot include outstanding SGC liabilities.
5. the company must be up to date with its tax lodgement obligations.

#### **4.2.2 Voluntary administration**

Voluntary administration tries to resolve a company's insolvency through appointment of a voluntary administrator who takes control of the company.

The administrator reviews the company's situation and reports to and provides recommendations to creditors. The recommendation may be:

- the voluntary administration ends, and the company be returned to the directors
- enter into a deed of company arrangement – a binding agreement between the creditors and the company usually involving creditors agreeing to less than full payment of outstanding debts or longer timeframes to give the company a chance to continue and trade out.
- go into liquidation.

The creditors make the decision.

This is an option commonly chosen where there is perceived opportunity for turnaround with more experienced persons involved, temporary cash flow constraints causing insolvency risk that can be alleviated with time or where there are disputed debts and the outcome of the dispute has bearing on solvency (often tax debts).

#### **4.2.3 Liquidation**

Liquidation is when a liquidator takes control of a company so that its affairs can be wound up in an orderly and fair way for creditors. There are various different forms including court orders and creditors voluntary liquidation.

In a liquidation it is the liquidators role to sell the company's assets/or business to get a return for creditors in so far as is possible. This does include calling in loans and debts owed to the business. Where there are director loans it includes powers to enforce those against the directors personal assets – such as the directors home.

The liquidators role is also to investigate and take a view on whether there has been insolvent trading or other breach of director duties before the liquidation commenced. In circumstances where there has been the liquidator is empowered to take action to treat transactions as ineffective and in some instances again enforce debts against directors personally.

## 4.3 Bankruptcy

For individuals that are insolvent procedures available include bankruptcy and personal insolvency agreements.

Bankruptcy normally lasts for three years and one day. For certain assets it can be longer. In a bankruptcy a personal trustee is appointed. During bankruptcy:

- the bankrupt must provide details of their debts, income and assets to the bankruptcy trustee
- the trustee notifies creditors
- the trustee can sell certain assets to help pay the debts – there are limited exceptions for superannuation, motor vehicles and some shared homes.
- a portion of the bankrupt's income that exceeds minimum thresholds is paid to the bankrupt estate for distribution toward creditors for the three year period.

Bankruptcy also impacts ability to get credit and undertake travel overseas and gain certain types of employment – including as tax agent or tax lawyer.

## 5. Other options

### 5.1 Overview

There are some other options available to taxpayers experiencing financial distress in some instances. These include:

- payment arrangements;
- remission of general interest charge (**GIC**) and shortfall interest charge (**SIC**);
- release of tax debts;
- declaring tax debts non-economic to pursue; and
- small business restructure (as above).

### 5.2 Payment arrangements

Payment arrangements to pay by instalments remain an option for entities with tax debts.<sup>51</sup> The arrangement does not vary the time at which the debt is due and GIC does continue to accrue whilst the payment arrangement is in place. There is an online tool that can be used to estimate the GIC that will accrue over the period of a payment arrangement – however it cannot be used for SGC as SGC has different interest settings applicable being nominal interest (that cannot be remitted) at a flat 10% rate instead of compounding.<sup>52</sup>

Standard conditions for payment arrangements include:

- commitments to lodge future obligations and pay future tax liabilities on time – with any failure to do so bringing to an end a payment arrangement that is in place.
- in most instances all tax debts need to be included within the payment plan.
- provision for refunds and offsets to be applied to reduce the tax debts rather than paid out.
- for longer term plans, or those assessed as higher risk by the ATO, they may also include provisions around security – the preferred form of security being mortgage over real property or unconditional bank guarantees from an Australian bank.

For payment arrangements of \$200,000 or less there are online services that can be used by taxpayers and registered tax agents. These services include recommendations around upfront payments and suggested instalments, with those recommendations being strong indicators of what the ATO will accept.

That noted, it is important not to overcommit as missing instalments and future tax payments causes the payment arrangement to come to an end and can lead to other enforcement actions being undertaken. Further, repeated failures to comply with payment arrangements are seen as an indicator of non-compliance. The best time to negotiate and set the parameters correctly is therefore the time of entry into the payment arrangement.

For payment arrangements above \$200,000 or those which do not fit within set parameters for online approval there are phone lines and there are methods to engage through written communication. When utilising those

<sup>51</sup> TAA sch 1 s 255-15.

<sup>52</sup> <https://www.ato.gov.au/calculators-and-tools/payments-payment-plan-estimator>

services it is necessary to provide details of the amount payable, the entities TFN or ABN, details of why they can't pay on time, details of bank accounts including current balances and lines of credit, income, expenses and assets. Further information is likely to be requested for those that have received warning of other enforcement actions, defaulted or cancelled two or more payment plans within the last 12 months or requested additional support due to significant financial hardship. Sometimes supporting financial documentation will also be required – this is frequently financial statements for the last three years and projected cash flows for six to twelve months looking forward.

For directors it is important to be aware that entry into a payment arrangement does not prevent director penalty notices issuing. It does prevent enforcement action being taken in respect of a director penalty notice whilst the payment arrangement is being complied with. Critically, for non-lockdown DPNs the 21 day timeframe to pay, place the entity into administration or liquidation to avoid personal liability still runs from the date the director penalty notice is issued. As such, DPNs should not be offered or used in routine course as security for payment arrangements, and any director that receives a DPN whilst a company has a payment arrangement in place needs to undertake a personal risk assessment and determine the risk that they are willing to bear in relation to that, and whether to take one of those steps to avoid personal liability.

Ordinarily taxpayers are required to be up to date with their tax lodgements for the ATO to entertain discussions about payment arrangements. This can be a challenge for taxpayers mid ATO audit/objection/litigation in terms of the position to report for years subsequent to that under review. That is largely due to the potential penalty exposures of incorrectly reporting but also the ambiguity that exists in that period as to what the final agreed position will be, or early on even just what the areas of difference are. One option for those in this position is to lodge in accordance with ATO views but then object to the assessment that results. Although this option still has limitations. It can result in a higher tax liability hitting an account than a taxpayer considers themselves to have and affords the ATO powers to pursue recovery of that larger amount. The larger amount can also inhibit ability to enter into a payment arrangement.

## 5.3 GIC and SIC remissions

### 5.3.1 GIC ceases to be deductible from 1 July 2025

GIC is imposed on tax liabilities that remain unpaid after the date when they should have been paid. This includes where there is a tax shortfall because of an amendment or correction, an instalment of tax is underestimated or a return is lodged late or assessed tax liability paid after its due date. SIC is imposed on most tax shortfalls arising from amended assessments arising from review activities. It is imposed at a lower rate than GIC as it generally relates to tax debts that taxpayers were unaware of until receipt of the assessment.

The current GIC rate is 11.17% but it moves quarterly being determined by adding a 7% uplift to the 90-day bank bill rate. The current SIC rate is 7.17% but moves quarterly being determined by adding a 3% uplift to the 90-day bank bill rate.

Historically GIC and SIC could be claimed as a deduction on tax returns. However, that changes from 1 July 2025. GIC and SIC incurred from 1 July 2025 will no longer be deductible. That includes GIC and SIC for earlier income years assessed after that date.

### 5.3.2 GIC and SIC remissions

Laws regarding GIC and SIC remissions have not changed. The circumstances in which GIC can legally be remitted continues to be defined by section 8AAG of the TAA, with there being three different tests – each slightly different – depending on whether:

- the circumstances are within the taxpayers control;
- the circumstances are outside of the taxpayers control; or
- there are otherwise special circumstances because of which it would be fair and reasonable to remit all or part of the GIC.

By way of example of the differences for the first two categories (circumstances within/outside taxpayer control) whether “the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances” is a consideration that must be analysed and considered. For the special circumstances test it is not. Rather the test for that is whether “it is otherwise appropriate to do so”.

Courts have consistently held that it is a highly individualised, fact intensive enquiry that is required. Further that factors that are of relevance to exercise of the discretion do include the taxpayer’s capacity to pay. They also include: illness, natural disaster, access to relevant records (including foreign records) and delays caused by government departments including the ATO. They do not generally include circumstances impacting the whole of the community – for example economic downturn or the COVID pandemic – although Courts have held such factors relevant where taxpayers have been able to demonstrate direct impact over and above what the majority of the community have experienced.

To get remission it is not sufficient to just allege circumstances – the burden of proof to establish reasons put forward does sit with the taxpayer and it is the taxpayer that has the onus of discharging that burden. Doing so can involve requiring sensitive documents such as medical records in some instances. Strict privacy obligations do apply to protect taxpayers where such records are provided to the ATO.

There is no doubt amongst the tax advisor community that the ATO has “tightened up on … general interest charge remissions” as Commissioner Rob Heferen has stated. Circumstances that have historically been assessed as qualifying for remission are frequently been turned down now. The settings have changed. But unless very actively involved in the space it is difficult to determine where the lines are now drawn. The relevant ATO guidance products, PS LA 2011/12 for GIC and PS LA 2006/8 for SIC, are yet to be updated to reflect the changed approach. Relevantly, PS LA 2011/12 was last updated in 2020. PS LA 2006/8 in 2019.

For those that are repeat advisors in the space it is clear that response letters are based on a templated approach. There is common wording appearing across many and most are less than a page, some as little as one paragraph and with minimal analysis of individualised facts or how the same have been weighted. This is a shift to decisions of the past have had more detailed reasoning.

In the author’s experience, most taxpayers in receipt of the short decisions feel unheard and unseen.

Even as an advisor, the extent of reasons provided makes it very difficult to determine whether the ATO has assessed the application as one that is finely balanced or completely outside of the parameters that could warrant remission. In such circumstances, and noting the recommendation to apply having been based on review of case law and ATO public guidance, the authors recommendation in receipt of such a decision has been to take the next step in the review process. Many have elected to do so. The next step is to apply under the *Administrative Decisions (Judicial Review) Act 1977* to have their circumstances independently considered by a Court. There is a 28 day period from receipt of a decision to make such an application, with limited powers to grant an extension. But having made a GIC remission decision prior, does not prevent reapplying, especially if there are updated or additional facts and circumstances that can be included in the request.

## 5.4 Debt waivers

Individuals experiencing severe financial hardship can apply to the ATO for release from paying some tax debts. The tax debts for which this type of relief exists are limited to:

- income tax;
- PAYG;
- fringe benefits tax (FBT) and FBT instalments;
- medicare levy and medicare levy surcharge;
- withholding taxes on dividends, interest and royalties;
- mining withholding tax;
- managed investment trust withholding tax; and
- some penalties and interest associated with those taxes.

It does not apply to GST, PAYG withholding, SGC, excess contributions tax, Div 293 liabilities (additional tax on superannuation contributions for those earning more than \$250,000) or DPNs.

Where the discretion is exercised the relief from tax is permanent. But the range of circumstances where that discretion is exercised is limited. The individual must be suffering financial hardship is severe enough that paying the tax debt would leave them without means to provide food, accommodation, clothing, medical treatment and education for themselves and their family members. But it cannot be so severe that even with grant of the discretion they would still be in those circumstances.

There is a standard form to apply. Details of income, expenses and assets must be included in the application made. There is also a guidance document – PS LA 2011/17 – that provides further guidance.

## 5.5 Declaring tax debts non-economic to pursue

The ATO also has discretion not to pursue a debt if satisfied that the debt is not economic to pursue, or irrevocable at law.<sup>53</sup> A decision made not to pursue a debt on this basis is not permanent. The debt can be re-raised or pursued at a later time. Relevant considerations in making these decisions include:<sup>54</sup>

- whether the anticipated cost of future recovery is likely to exceed the amount of the debt.
- the age of the debt.
- the type of debt involved, for example, SGC is more likely to be pursued.
- whether the taxpayer can be located.
- the asset position of the taxpayer.
- whether a levy under a writ or warrant of execution has been unsuccessful and it is not possible or intended to pursue bankruptcy action.

<sup>53</sup> *Public Governance, Performance and Accountability Rule 2014* s 11.

<sup>54</sup> PS LA 2011/17, 3.

- whether a company has ceased to trade.
- advice from a trustee or administrator of a deceased estate that the estate has insufficient assets to satisfy the debt.

The ATO may still pursue a debt even if the above circumstances exist. A factor that would make it more likely that the ATO would do so is a taxpayer having a poor compliance history.