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## Insolvency Solutions Guide for 2022

The last couple of years have been chaotic for many businesses. With the direct and indirect impacts of COVID, along with varying levels of government assistance, many businesses are now facing 2022 with uncertainty as to what the future may hold for them.

In the latter end of 2020, with the expectation that a potential wave of business insolvency was approaching, the government began work on new legislation to simplify liquidation and restructuring processes.

Given these new laws, what could your options be as a business in 2022 if you are potentially insolvent? This guide will help you to figure that out.



## How did insolvency law change in 2021?

### • COVID protections were wound back in January 2021

The Government's COVID-19 protections for business were slowly being wound back. One of the key protective measures was a moratorium on Insolvent Trading laws. Originally announced for 6 months, it was extended to the end of December 2020 and has now expired.

This now means if a company is insolvent, its directors can be held personally liable for any debts it incurs, regardless of whether the pandemic caused the insolvency.

The other major protective measure was if a debtor wanted to put a creditor company into liquidation, they had to serve a statutory demand for payment that gave a six-month notice period before it could be enforced at court. That notice period has now reverted to the pre- COVID standard of 21 days.

### • New Insolvency Regime for Small Business introduced

The Federal Government made sweeping changes to the insolvency industry in January 2021. The key

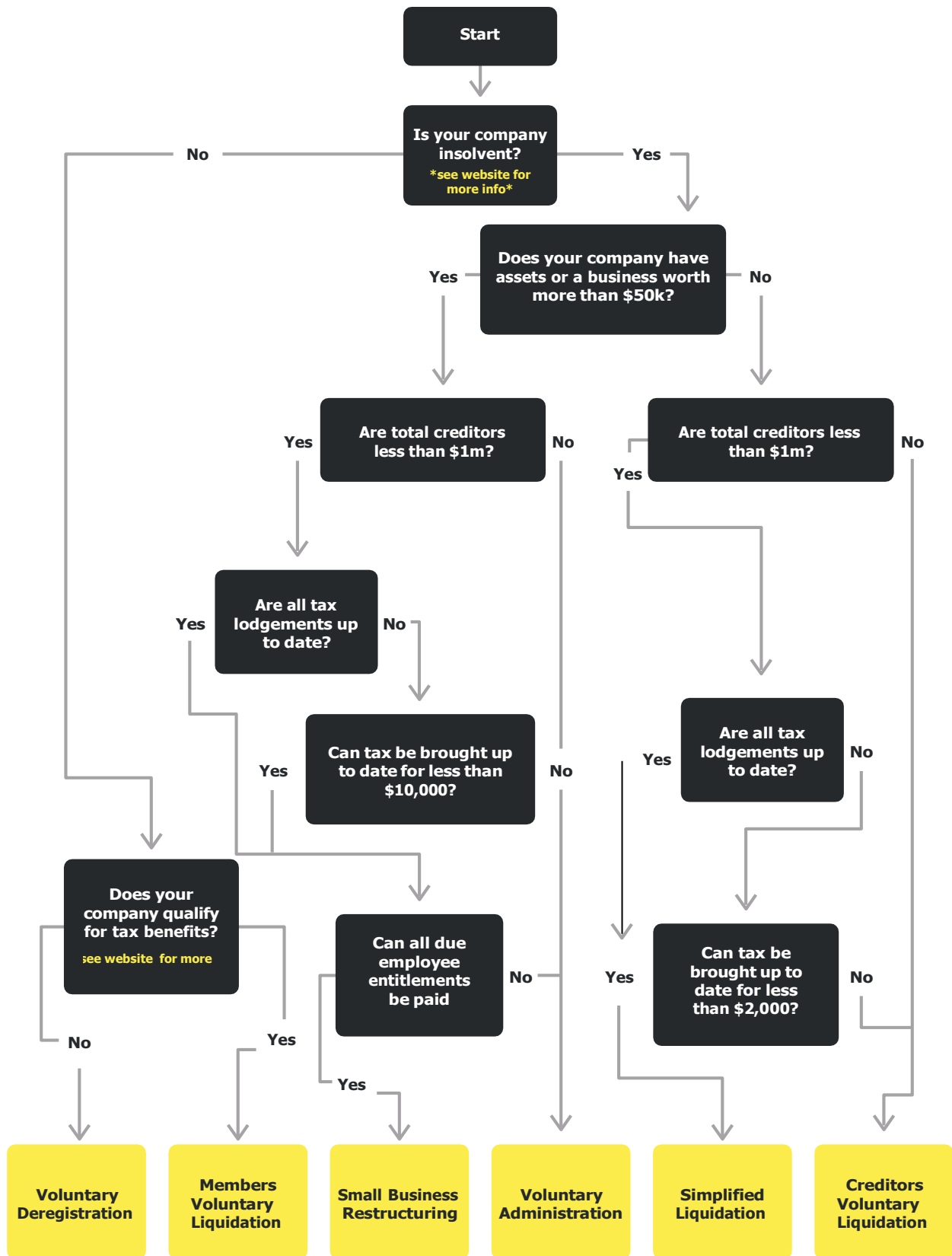
changes were a new Restructuring Process and a new Liquidation Process designed for Small Business.

The new **Small Business Restructuring** process allows small businesses to restructure their debts while directors remain in control of their business. It is much much cheaper than the current Voluntary Administration process! An insolvent small business gets 20 days to come up with a restructuring plan, and creditors then vote on whether to accept it within 15 days after that. The process is accessible to incorporated businesses with liabilities of less than \$1 million. To be able to propose a deal the business must have paid all employee entitlements and made all tax lodgements.

The new **Simplified Liquidation** for small businesses is quicker, easier and cheaper. Simplified Liquidation is a streamlined version of the current more comprehensive Creditors Voluntary Liquidation (CVL) process. To be eligible a company must have creditors of less than \$1 Million and be up to date on all tax lodgements (not necessarily payments).

# Insolvency Solutions Chart

Use this diagram to understand the potential options for insolvency in 2022.



Give us a call if you need help.

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Call us on 1300 095 750

# Director Penalty Notice

The notice a company director should be most concerned about receiving is a Director Penalty Notice (DPN). The Tax Office uses a DPN to make the director of a company personally liable for company tax.

DPNs are confusing! They also have hidden tricks and traps that a non-expert will not detect or understand. Here is an infographic to help you understand your DPN:

PO BOX 920 ALBURY NSW 2640

Australian Government  
Australian Taxation Office

MR JOHN R DOE  
28 DOE STREET  
DOELAND QLD 4399

Our reference: 1234567890  
Client ID: 100 000 001  
Date of issue: 27 September 2019

### You have been issued with a director penalty notice for superannuation guarantee charge amounts

- Enclosed is a director penalty notice which describes amounts for which you are personally liable
- Take action immediately to address the outstanding amounts

Dear JOHN,

Please find enclosed a director penalty notice for amounts the company failed to pay.

This notice is for	superannuation guarantee charge
For this company	A COMPANY PTY LTD
With this ACN	100 000 001
Legislative reference	Section 269-25 of Schedule 1 to the Taxation Administration Act 1953.

You're receiving this notice because you are, or were, a director of this company. As the company failed to pay these amounts, you became personally liable to pay the penalties equal to the unpaid amounts.

If you're not sure why you've received this notice, please go to [ato.gov.au/dpn](http://ato.gov.au/dpn) for more information.

#### What you need to do

Within 21 days from the issue date of the notice, you need to:

- pay the outstanding amounts, or
- cause the penalties to be remitted as described in the enclosed notice.

If you do not take one of these steps you will continue to be personally liable for the penalties and we may start action to recover the penalties from you without further notice.

#### PAY NOW

Your payment reference number (PRN) is:  
0000 1111 2222 333333

**BPAY\***

Biller code: 75556

#### CREDIT CARD

Pay online with your credit card at [www.optusmartpay.com/governmenteasypay-ato](http://www.optusmartpay.com/governmenteasypay-ato) or phone **1300 898 089**.  
A card payment fee applies.  
For other payment options, visit [ato.gov.au/howtopay](http://ato.gov.au/howtopay)

#### NEED HELP?

Visit us at [ato.gov.au/contactus](http://ato.gov.au/contactus) Or  
Contact us on **1300 303 570** between 8.00am and 6.00pm, Monday to Friday.  
Set up a payment plan using our 24 hour automated self-service. Phone **13 28 65**

**When you call**  
Please have your tax file number with you when you call. It will also be helpful if you can tell us the 'Our reference' number at the top of this letter.

**1** This date is important. The 21 days (see below) counts from this date, not the date you received it. You must take action early

**2** When you see "director penalty notice" then this is unlike any of the other Demands you have received. This one will make you **PERSONALLY LIABLE** for the Company's tax debt

**3** This example is for superannuation. It could also be for PAYG deductions not paid, and as of April 2020 GST as well.

**4** The Law is a little weird in that the Company still owes the tax debt. Directors are made personally liable by way of a "Penalty" of an equivalent amount.

**5** So, yes, the ATO can pursue you and your house is at risk. The ATO may even bankrupt you.

## Need Free, Confidential Advice?

Solutions for insolvency are often dependent on your business situation and constraints. At Insolvency Solutions Group we run an insolvency hotline to provide advice for businesses struggling with insolvency. **Give us a call if you need help.**

**Call us on 1300 095 750**

# Notice of director's liability to pay a penalty to the Commissioner of Taxation

## Superannuation guarantee charge amounts

TO: MR JOHN R DOE  
28 DOE STREET  
DOELAND QLD 4399

In exercise of the powers and functions conferred on me as a Deputy Commissioner of Taxation by a delegation from the Commissioner of Taxation (**the Commissioner**) under the provisions of the *Taxation Administration Act 1953 (TAA)*, I give you notice under section 269-25 in Schedule 1 to the TAA that you, as a director of A COMPANY PTY LTD, ACN 100 000 001 (**the company**), failed to discharge an obligation you have pursuant to section 269-15 of Schedule 1 to the TAA and are therefore liable to pay the Commissioner by way of penalty an amount equal to the unpaid amount of each liability of the company for superannuation guarantee charge in accordance with the *Superannuation Guarantee (Administration) Act 1992*, details of which are set out in the following table:

Column 1	Column 2	Column 3	Column 4	Column 5
Particular withholding period	Amount withheld	Amount the Commissioner thinks is the unpaid amount of the company's liability	Unpaid amount of the company's liability notified on or before the end of 3 months after the due day	Unpaid amount of the company's liability not notified on or before the end of 3 months after the due day
	\$	\$	\$	\$
01 OCT 2015 to 31 DEC 2015	4,070.00	4,070.00	4,070.00	0.00
01 JAN 2016 to 31 MAR 2016	4,104.00	4,104.00	4,104.00	0.00
01 APR 2016 to 30 JUN 2016	3,656.00	3,656.00	3,656.00	0.00
01 JUL 2016 to 30 SEP 2016	3,816.00	3,816.00	0.00	3,816.00
01 OCT 2016 to 31 DEC 2016	3,522.00	3,522.00	3,522.00	0.00
01 APR 2017 to 30 JUN 2017	3,780.00	3,780.00	0.00	3,780.00

The penalty in respect of each unpaid amount of the company's liability as detailed in Column 4 of the above table will be remitted if, **within 21 days after the date of this notice**:

- (a) the company complies with its obligation to pay the unpaid amount to the Commissioner; or
- (b) an administrator of the company is appointed under section 436A, 436B or 436C of the *Corporations Act 2001*; or
- (c) the company begins to be wound up (within the meaning of the *Corporations Act 2001*).

The penalty in respect of each unpaid amount of the company's liability as detailed in Column 5 of the above table will be remitted if, **within 21 days after the date of this notice** the company complies with its obligation to pay the unpaid amount to the Commissioner.

Dated this 27<sup>th</sup> day of September 2019

**Robert Ravanello**  
Deputy Commissioner of Taxation and  
Delegate of the Commissioner of Taxation

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If your notice has this wording then act immediately - definitely within 21 days of the notice. By taking specific actions, you can AVOID PERSONAL LIABILITY for the amounts in this column.

9

If your notice has this wording then the ATO thinks you are ALREADY PERSONALLY LIABLE for the amounts in this column. The ATO may be right, but they could also be wrong - seek expert advice.

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Taking any of these three actions will avoid personal liability for the amounts in Column 4, as long as you act within 21 days. But NOT for the amounts in Column 5.

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## Disputing the director penalty

You may not be liable for a director penalty if one of the defences under the relevant legislation is available to you. These are defined in section 269-35 of Schedule 1 to the *Taxation Administration Act 1953*.

Go to [ato.gov.au/dpn](http://ato.gov.au/dpn) for information on the defences available to you.

For us to consider your defence, you must provide enough information to satisfy us that you have a valid defence. Please phone us, or send your details to:

Attention: Debt Case Leadership  
GPO Box 9977  
Brisbane QLD 4001

Yours sincerely,

**Robert Ravanello**  
Deputy Commissioner of Taxation

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You've probably read that the ATO is very aggressive in debt recovery. That can be true. But it is also true that the ATO can be very reasonable. Yes, really! The specific defences in the Law are:

- illness or some other good reason prevented you from managing the Company;
- you tried, but failed, to cause the Company to pay the tax debt; you tried, but failed, to appoint a Voluntary Administrator or Liquidator to the Company.

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We recommend that you seek expert advice if you want to object to the penalty - it's a tricky and complicated area of the Law.

### HOW TO PAY

#### BPAY®



Bill code: 7556  
Reference no. (PRN):  
0000 1111 2222 3333 33

Make a payment from your cheque or savings account at your financial institution's local branch or using their phone or internet banking service.

#### CREDIT CARD

Pay online with your credit card at [www.optussmartpay.com/governmenteasypay-ato](http://www.optussmartpay.com/governmenteasypay-ato) or phone **1300 898 089**.

A card payment fee applies.

You need a current Visa, MasterCard or American Express card. The service accepts payments of \$10 or more. You can make multiple payments.

PRN: 0000 1111 2222 3333 33

#### OTHER PAYMENT OPTIONS

For other payment options, visit [ato.gov.au/howtopay](http://ato.gov.au/howtopay)

Your payment reference number (PRN) is: 0000 1111 2222 3333 33

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# Frequently Asked Questions

- Q How is Insolvency defined?**  
Insolvency is a financial situation whereby an individual or company is unable to pay all their debts when they fall due for payment. It is a very complicated area of the law.
- Q How do I know if my company is insolvent?**  
Take our interactive test at: <https://www.dissolve.com.au/information-centre/is-my-company-insolvent/>
- Q What does total creditors mean?**  
Total Creditors is all debts owed by your company. This could include tax (whether reported or not), employee wages and entitlements, rent and any remaining term of a lease, court judgments, incomplete jobs for clients and more.
- Q What does all tax lodgements mean?**  
All Tax lodgements refers to having all tax reporting up to date. You can be behind on payment, but must have completed all reporting. The law reads: the company has given returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 10 1997). This includes Business Activity Statements, Company Tax Returns and Superannuation Guarantee Statements among others.
- Q What tax benefits can a Members Voluntary Liquidation provide?**  
When a company has sold a Pre-CGT Asset or meets the Small Business Entity criteria, a liquidator can make a distribution of funds to company members with reduced tax – sometimes tax free! See our pages on Pre-CGT and SBE for more details.
- Q Why do tax lodgements need to be up to date for simplified liquidation?**  
The law requires the liquidator to apply an eligibility test to the company before commencing a simplified liquidation, part of that test is if all tax lodgements are complete.
- Q I think my business can be saved, but the flow chart indicates a liquidation, are there other options?**  
This can happen if your company has a viable business, but the value of the business or assets is less than \$50,000. The cost of the process to save a business only becomes worthwhile if there is significant value to protect. If this applies to your situation, give us a call with your specific circumstances and we can give you free, personalised advice.
- Q What's the difference between 2020 and 2022 insolvency options?**  
On January 1 2021, Simplified Liquidation and Small Business Restructuring became available. These new types of formal appointment were introduced by the Government to help small business navigate the recession caused by the COVID-19 Pandemic.

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