

CORPORATIONS ACT 2001 - SECT 588GA

Safe harbour--taking course of action reasonably likely to lead to a better outcome for the company

Safe harbour

(1) Subsection 588G(2) does not apply in relation to a person and a debt if:

(a) at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and

(b) the debt is incurred directly or indirectly in connection with any such course of action during the period starting at that time, and ending at the earliest of any of the following times:

(i) if the person fails to take any such course of action within a reasonable period after that time--the end of that reasonable period ;

(ii) when the person ceases to take any such course of action;

(iii) when any such course of action ceases to be reasonably likely to lead to a better outcome for the company;

(iv) the appointment of an administrator, or liquidator, of the company.

Note 1: The person bears an evidential burden in relation to the matter in this subsection (see subsection (3)).

Note 2: For subsection (1) to be available, certain matters must be being done or be done (see subsections (4) and (5)).

Working out whether a course of action is reasonably likely to lead to a better outcome

(2) For the purposes of (but without limiting) subsection (1), in working out whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the person:

(a) is properly informing himself or herself of the company's financial position;
or

(b) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or

(c) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or

(d) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or

(e) is developing or implementing a plan for restructuring the company to improve its financial position.

(3) A person who wishes to rely on subsection (1) in a proceeding for, or relating to, a contravention of subsection 588G(2) bears an evidential burden in relation to that matter.

Matters that must be being done or be done

(4) Subsection (1) does not apply in relation to a person and a debt if:

(a) when the debt is incurred, the company is failing to do one or more of the following matters:

(i) pay the entitlements of its employees by the time they fall due;

(ii) give returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the *Income Tax Assessment Act 1997*); and

(b) that failure:

(i) amounts to less than substantial compliance with the matter concerned;
or

(ii) is one of 2 or more failures by the company to do any or all of those matters during the 12 month period ending when the debt is incurred;

unless an order applying to the person and that failure is in force under subsection (6).

Note: Employee *entitlements* are defined in subsection 596AA(2) and include superannuation contributions payable by the company.

(5) Subsection (1) is taken never to have applied in relation to a person and a debt if:

(a) after the debt is incurred, the person fails to comply with paragraph 429(2)(b), or subsection 475(1), 497(4) or 530A(1), in relation to the company; and

(b) that failure amounts to less than substantial compliance with the provision concerned;

unless an order applying to the person and that failure is in force under subsection (6).

(6) The Court may order that subsection (4) or (5) does not apply to a person and one or more failures if:

(a) the Court is satisfied that the failures were due to exceptional circumstances or that it is otherwise in the interests of justice to make the order; and

(b) an application for the order is made by the person.

Definitions

(7) In this section:

"better outcome", for the company, means an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company.

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

CORPORATIONS ACT 2001 - SECT 588GB

Information or books not admissible to support the safe harbour if failure to permit inspection etc.

When books or information not admissible for the safe harbour

(1) If, at a particular time:

(a) a person fails to permit the inspection of, or deliver, any books of the company in accordance with:

(i) a notice given to the person under subsection 438C(3), section 477 or subsection 530B(4); or

(ii) an order made under section 486; or

(iii) subsection 438B(1), 477(3) or 530A(1); or

(b) a warrant is issued under subsection 530C(2) because the Court is satisfied that a person has concealed, destroyed or removed books of the company or is about to do so;

those books, and any secondary evidence of those books, are not admissible in evidence for the person in a relevant proceeding.

Note: For subparagraph (a)(i), a liquidator could give such a notice if this is necessary for winding up the affairs of the company and distributing its property (see paragraph 477(2)(m)).

(2) If, at a particular time, a person fails to give any information about the company in accordance with:

(a) a notice given to the person under section 477; or

(b) paragraph 429(2)(b) or (c) or subsection 438B(2) or (3), 475(1), 497(4) or 530A(1) or (2);

that information is not admissible in evidence for the person in a relevant proceeding.

Exceptions

(3) However, subsection (1) or (2) does not apply to a person, and a book or information, if:

(a) the person proves that:

(i) the person did not possess the book or information at any time referred to in that subsection; and

(ii) there were no reasonable steps the person could have taken to obtain the book or information; or

(b) each entity seeking to rely on the notice, order, subsection, paragraph or warrant referred to in that subsection fails to comply with subsection (5) in relation to the person; or

(c) an order applying to the person, and the book or information, is in force under subsection (4).

(4) The Court may order that subsection (1) or (2) does not apply to a person, and a book or information, if:

(a) the Court is satisfied that the failures by the person as mentioned in that subsection were due to exceptional circumstances or that it is otherwise in the interests of justice to make the order; and

(b) an application for the order is made by the person.

Notice of effect of this section must be given

(5) An entity that seeks to rely on a notice, order, subsection or warrant referred to in subsection (1) or (2) must set out the effect of this section:

(a) for a notice under subsection 438C(3), section 477 or subsection 530B(4)--in that notice; or

(b) for an order under section 486 or for subsection 438B(3), 477(3) or 530A(2)--in a written notice given to the person when the entity seeks to rely on that order or subsection; or

(c) for a warrant issued under subsection 530C(2)--in a written notice given to the person when the entity seeks to exercise the warrant.

This subsection does not apply to an entity that seeks to rely on paragraph 429(2)(b) or (c) or subsection 438B(1) or (2), 475(1), 497(4) or 530A(1).

(6) A failure to comply with subsection (5) does not affect the validity of the notice, order, subsection or warrant referred to in subsection (5).

Definitions

(7) In this section:

"relevant proceeding" means a proceeding:

- (a) for, or relating to, a contravention of subsection 588G(2); and
- (b) in which a person seeks to rely on subsection 588GA(1).

Example: A proceeding under section 588M.

CORPORATIONS ACT 2001 - SECT 588H

Defences about reasonable grounds, illness or reasonable steps

(1) This section has effect for the purposes of proceedings for a contravention of subsection 588G(2) in relation to the incurring of a debt (including proceedings under section 588M in relation to the incurring of the debt).

(2) It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

(3) Without limiting the generality of subsection (2), it is a defence if it is proved that, at the time when the debt was incurred, the person:

(a) had reasonable grounds to believe, and did believe:

(i) that a competent and reliable person (the ***other person***) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and

(ii) that the other person was fulfilling that responsibility; and

(b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

(4) If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.

(5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.

(6) In determining whether a defence under subsection (5) has been proved, the matters to which regard is to be had include, but are not limited to:

(a) any action the person took with a view to appointing an administrator of the company; and

(b) when that action was taken; and

(c) the results of that action.

CORPORATIONS ACT 2001 - SECT 588G

Director's duty to prevent insolvent trading by company

(1) This section applies if:

(a) a person is a director of a company at the time when the company incurs a debt; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

(d) that time is at or after the commencement of this Act.

(1A) For the purposes of this section, if a company takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3.

When debts are incurred		[operative table]
Action of company	When debt is incurred	
1 paying a dividend	when the dividend is paid or, if the company has a constitution that <u>provides</u> for the declaration of dividends, when the dividend is declared	
2 making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the <u>cancellation</u> of a share or shares for no consideration)	when the reduction takes effect	
3 buying back shares (even if the consideration is not a sum certain in money)	when the buy-back agreement is entered into	

When debts are incurred		[operative table]
	Action of company	When debt is incurred
4	redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are <u>issued</u>
6	financially assisting a <u>person</u> to <u>acquire</u> shares (or units of shares) in itself or a holding company	when the agreement to <u>provide</u> the assistance is entered into or, if there is no agreement, when the assistance is <u>provided</u>
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court <u>orders</u> , or a <u>prescribed</u> agency directs, the company to enter into	when the transaction is entered into

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or

(b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Note: This subsection is a civil penalty provision (see subsection 1317E(1)).

(3) A person commits an offence if:

(a) a company incurs a debt at a particular time; and

(aa) at that time, a person is a director of the company; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and

(d) the person's failure to prevent the company incurring the debt was dishonest.

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a).

Note: For ***absolute liability*** , see section 6.2 of the *Criminal Code* .

(3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

Note: For ***strict liability*** , see section 6.1 of the *Criminal Code* .

(4) The provisions of Division 4 of this Part are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

CORPORATIONS ACT 2001 - SECT 588M

Recovery of compensation for loss resulting from insolvent trading

(1) This section applies where:

(a) a person (in this section called the ***director***) has contravened subsection 588G(2) or (3) in relation to the incurring of a debt by a company; and

(b) the person (in this section called the ***creditor***) to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency; and

(c) the debt was wholly or partly unsecured when the loss or damage was suffered; and

(d) the company is being wound up;

whether or not:

(e) the director has been convicted of an offence in relation to the contravention; or

(f) a civil penalty order has been made against the director in relation to the contravention.

(2) The company's liquidator may recover from the director, as a debt due to the company, an amount equal to the amount of the loss or damage.

(3) The creditor may, as provided in Subdivision B but not otherwise, recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage.

(4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.