

## **SAFE HARBOUR**

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Amendments 1 July 2018.

Under section 588G of the Corporations Act a director of a company is personally liable for debts incurred by the company if they suspect the company is or could become insolvent.

Safe Harbour (section 588GA) - encourages directors to stay in the saddle when a business is in financial difficulty

A director can take reasonable steps to restructure and / or trade out of difficulties hoping that this action will achieve a better outcome for the company

Provisions encourage directors to closely monitor the financial position of the business, engage early with financial distress and actively take steps to either restructure the business or, move quickly to formal insolvency.

A director is given a safe harbour against breaching section 588G(2) of the Corps Act (allowing a company to incur a debt whilst it is insolvent) if, after the director starts to suspect the company may become or be insolvent, one or more courses of action are developed that are reasonably likely to lead to a better outcome for the company and the debt was incurred directly or indirectly in connection with that course of action.

Better outcome is defined as an outcome that is better for the company than immediate appointment of an administrator or liquidator of the company.

Insolvent trading safe harbour applies where the directors start developing one or more courses of action that are reasonably likely to provide a better outcome for the company than an immediate liquidation or administration.

The safe harbour protects directors from insolvent trading liability arising from debts incurred directly or indirectly in connection with any such course of action.

a director will enter safe harbour once the director starts developing one or more courses of action reasonably likely to lead to a better outcome, rather than only being available once a director has taken a course of action,

They have the benefit of safe harbour while exploring and developing a range of turnaround strategies, rather than needing to immediately select and pursue one particular strategy;

Direct and indirect debts included: the safe harbour is available in respect of all debts incurred directly or indirectly in connection with any such course of action, rather than only those incurred in connection with the course of action.

### **WHAT ARE THE REQUIREMENTS FOR A DIRECTOR TO OBTAIN THE SAFE HARBOUR PROTECTION?**

Be properly informed about the company's financial position.

Take appropriate steps to prevent any misconduct by company officers and employees that could adversely affect the company's ability to pay all its debts.

Ensure the company is keeping appropriate financial records.

Ensure employee entitlements are being paid.

Ensure compliance with the Income Tax Assessment Act 1997 (Cth).

Put in place a course of action to address the company's financial circumstances reasonably likely to lead to a better outcome than proceeding to administration or liquidation.

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## **WHAT ARE THE LIMITATIONS OF THE SAFE HARBOUR DEFENCE?**

"Hope is not a strategy" – directors need to be proactive

Write up "minutes" of meeting for the record

Have a checklist:

- Be properly informed about the company's financial position.
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