

New rules to help directors save their company

The Government changed the Corporations Act in September 2017 to provide, so called, 'safe harbour' rules to help directors rescue their company if they are concerned that it can't or may not be able to pay its debts when they fall due. The new rules soften the subsisting insolvent trading regime which sheets home to directors the personal liability for the debts a company incurs whilst trading at a time that it is insolvent and place a responsibility on directors to put their company into administration or liquidation.

Personal responsibility for a company's insolvent trading debts applies:

- to someone who is a company director at the time the company incurs a debt
- where the director doesn't prevent the company action that causes the liability to arise
- where the company is insolvent, at the time, or becomes insolvent through the new debt(s)
- where there were reasonable grounds for suspecting that the company was insolvent at that time and
- where the director knew or should have known of the grounds for suspecting insolvency
- but not where one of a few, limited defences apply to that director.

Now, directors have a much better 'safe harbour' from that personal liability for insolvent trading debts, if they:

- act quickly to determine the company's true financial position and seek appropriate advice
- develop plans that are reasonably likely to better the company's position as compared to the expected results that would arise after the immediate appointment of a liquidator, administrator or receiver
- cause the company to only incur debts reasonably soon after starting to develop the plans, directly or indirectly relating to plan implementation and only for so long as the improvement in the company's position remains reasonably likely
- maintain all necessary books and records
- pay employee entitlements
- keep up with tax reporting, and
- keep satisfactory evidence of meeting these criteria.

The 'safe harbour' will come to an end if the director does not take the planned course of action to improve the position of the company within a reasonable time, the course of action ceases or becomes unlikely to improve the position of the company or an insolvency professional is appointed.

Where a company has had a pretty good record with paying employee entitlements, lodging activity statements and tax returns, the new 'safe harbour' rules may allow leeway for one or two late payments/reports in a twelve-month period.

If the plan does not work out and the company does proceed into administration, liquidation or receivership, the director must furnish the books and records required by the insolvency practitioner or else the 'safe harbour' will not be available to them.

Where a company director begins to suspect that their company may be insolvent they should act quickly and seek immediate advice about these new rules and the formulation of such a course of action to improve the company's position.

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