Danger - COVID-19 Safe Harbour STILL Requires Early External Administrator Appointment

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DANGEROUS
Waterfall Ahead
DO NOT Proceed
Take All Craft Out Here

The Government has recently extended COVID-19 business protection measures introduced in March, including the temporary safe harbour protection from director liability for insolvent trading. These protections will now expire on **31 December 2020**. However the Government has not corrected a critical timing issue which exists in the COVD-19 safe harbour legislation. This means directors **must** appoint an external administrator to their company **on or before 31 December 2020**, if they wish to take advantage of the COVID-19 safe harbour protection from insolvent trading.

In March Parliament passed a raft of legislative reforms in an attempt to provide protections for businesses an ameliorate the economic effects of the coronavirus in Australia. One of these amendments was temporary legislation to protect directors from liability for insolvent trading during the global COVID-19 pandemic. This temporary protection is found in section 588GAAA of the *Corporations Act 2001* (Cth). This safe harbour protection from insolvent trading will mean that directors will **not** be personally liable for debts incurred in the 'ordinary course of business', provided those debts were incurred during the operation of the temporary legislation, presently which will now expire at the end of 31 December 2020.

The Omnibus bill was passed with considerable haste as businesses, states and countries were going into lockdown. The reforms were also only ever intended to be temporary, and not permanent, protections. These considerations may help explain why there appears to be a drafting issue which significantly reduces the protection offered by section. This drafting issues arises in respect of section 588GAAA(1)(c) of the Corporations Act, which says that the protection from insolvent trading liability protection will only apply to debts incurred "before any appointment **during that period**" of an external administrator (either a voluntary administrator or a liquidator). This means the practitioner **must have been appointed before the legislation expires** at the end of 31 December 2020, if the debts incurred are to be excluded from a liquidator's claim for insolvent trading.

So - if you or your clients are in any doubt about whether or not you might need to rely upon the COVID-19 safe harbour protection; or if there is any risk that you or your clients' company might be placed into external administration in the future, you **must** consider whether or not an appointment of a voluntary administrator or liquidator should be made on or before 31 December 2020.

We raised this issue some time ago - read a detailed article published in Lexis Nexis Insolvency Law Bulletin on the COVID-19 safe harbour problem by Matthews Folbigg Principal, Stephen Mullette here. The article considered this issue before the expiry date of this provision was extended to 31 December 2020 however the timing issue discussed in the article is still very relevant.

If you would like more information or advice in relation to COVID-19 safe harbour, insovent trading or insolvency, restructuring or debt recovery , contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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