Don't Go Chasing Waterfalls - COVID-19 Safe Harbour is (still) not Safe

Date : December 17, 2020

DANGEROUS
Waterfall Ahead
DO NOT Proceed
Take All Craft Out Here

The temporary safe harbour protection from director liability for insolvent trading expires 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 .

The temporary protection is found in section 588GAAA of the *Corporations Act 2001* (Cth) . There has been some recent debate about whether the words "before any appointment during that period" of an external administrator, mean what they appear to say, namely that any appointment must take place "during that period" of the temporary safe harbour expires.

Our Stephen Mullette has recently responded to the alternative view - that an appointment can be delayed until the new year. Unfortunately, the conclusion is that the better view is still that to take advantage of the safe harbour defence, the directors must have appointed an external administrator before 1 January 2021. You can read the further consideration here, and make up your own mind.

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.

Even more unfortunately, the Government has totally failed to respond to genuine concerns raised by industry bodies, professionals and academics, to fix this uncertainty. In their recent amendments to 588GAAA(1)(c) as part of the small business reforms, although the section was amended, the offending words "during that period" remain, to cause at the very least confusion and for some, real exposure to risk for liability for insolvent trading, come 1 January 2021.

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:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au

Image by Judith Houlding from Pixabay