

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, and subsections 588GAB(1) and (2) and 588GAC(1) and (2) do not apply in relation to a person and a disposition, 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, or the disposition is made, 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), 588GAB(1) or (2) or 588GAC(1) or (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 either a debt or a disposition if:
- (a) when the debt is incurred, or the disposition is made, 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 either a debt or a disposition if:

(a) after the debt is incurred, or after the disposition is made, the person fails to comply with paragraph 429(2)(b), or subsection 438B(2), 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.