

Providing directors 'safe harbour' from insolvent trading



The new 'safe harbour' laws commenced on 19 September 2017 and provide opportunities for directors to turn around their financially distressed company without the risk of insolvent trading.

The reforms stem from the Government's innovation agenda and attempt to create a culture of entrepreneurship and innovation.

Under section 588G of the *Corporations Act 2001*, a director of a company may be personally liable for debts incurred by the company if at the time the debt is incurred there are reasonable grounds to suspect that the company is insolvent. Breaching the insolvent trading provisions may result in civil and criminal penalties against an insolvent company's directors.¹

The safe harbour protection is based on the action taken by a director **prior** to liquidation as part of a turnaround or restructure.

There are however strict requirements and directors can only avail themselves of this protection if they:

- sought professional advice from an 'appropriately qualified entity' to develop a restructuring plan;
- documented and implemented a plan that was reasonably likely to lead to a better outcome for the company than immediate administration or liquidation;
- continued to meet payment obligations for employee entitlements and taxes;
- maintained appropriate financial records and continued to discharge their duties as directors; and,
- met their obligations to assist with records and information once the company entered external administration.

The Australian Restructuring Insolvency and Turnaround Association (ARITA) has produced a fact sheet for directors on safe harbour, available at the [ARITA website](#).

¹ The Parliament of the Commonwealth of Australia Treasury Laws Amendment (2017 Enterprise Incentives No2.) Bill 2017 Explanatory Memorandum