

## COVID-19 TEMPORARY SAFE HARBOUR TO PROTECT DIRECTORS FROM PERSONAL LIABILITY FOR INSOLVENT TRADING

Written by Victor Hamit

The Australian Parliament, on 23 March 2020, passed in to legislation the [Coronavirus Economic Response Package Omnibus Act 2020](#) (“the COVID Act”) which was accompanied by a 239 page Explanatory Memorandum. The COVID Act deals with a range of economic matters, one of which is the temporary relief to protect Directors from personal liability for insolvent trading.

The COVID Act amends the [Corporations Act](#) by adding a “Safe Harbour” from Director personal liability for insolvent trading where debts have been incurred by the company “in the ordinary course of business” during the next six (6) months, commencing from 25 March 2020 (“the COVID Safe Harbour”). However, egregious or unlawful behaviour will not be protected. The stated intention was to provide financially distressed companies with some assistance. The COVID Act does allow for regulations to be made which may extend the relief period beyond six (6) months.

As the COVID Safe Harbour stands at the moment, we consider it to be of limited practical effect for Directors of distressed companies. The following are, in our view, some of the limitations:-

1. Other Director’s duties in the Corporations Act and at general law still apply;
2. Six (6) months may be a very short period of time (unless extended) for a financially stressed company;
3. In financially distressed times, “ordinary course of business” may have limited or no application to restructures or refinancing;
4. Directors will still need to make plans to evidence their intentions and monitor those plans; and

5. The onus of establishing the application of the COVID Safe Harbour rests with the Director seeking to rely upon it.

Accordingly, we consider it is not only advisable but necessary for Directors to make, implement and monitor plans which may include:-

1. Plans (survival and turnaround);
2. Expenditure reviews;
3. Income reviews (including alternative revenue streams);
4. Workforce;
5. Restructure;
6. Refinance; and
7. Conditions under which a company would appoint an Administrator or Liquidator.

Whilst the COVID Safe Harbour may offer some “breathing space” for Directors to consider options rather than move immediately to administration or liquidation, the timeframe currently of six (6) months is not long in financially stressed organisations.

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