Deloitte Submissions

Safe Harbour

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| **Issue:**  **General comments** | **Comment** |
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| 1. i. It is noted that the draft legislation provides for a defence to insolvent trading rather than a “carve out” against liability. Also the protection against debts incurred only extends to debts incurred in connection with the “course of action”. | In our view consideration should be given to a “carve out” rather than a defence to give directors the confidence they need to continue to trade whilst the company’s affairs are restructured. Also Directors may consider the examination of the “course of action” at a later date, where it might be determined was not likely to lead to better outcome could expose them to a liability for insolvent trading. |
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| 1. ii. The protection starts for debts incurred when the director commences the “course of action” and ceases when the course of action ends. | In our view, this definition will in practice be difficult to apply and give rise to many disputes as to where the liability falls that is before or after. A better definition of where a liability falls is required that is incurred in the ordinary course of the “course of action”. This might be better resolved by a definition that includes all debts incurred in the course of action budget/plan. |
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| **Specific comments** |  |
| Section 588GA (2) (c) |  |
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| 1. i. This section requires directors to obtain appropriate advice from an appropriately qualified entity who has been given sufficient information to give appropriate advice. | In our view, greater clarity must be given as to the qualifications of the entity. For example, the entity must be qualified to give accounting insolvency advice, and have qualifications in insolvency, also the distinction between legal and accounting advice is also necessary. It may be useful for ASIC to issue a guidance note as to the required qualifications we consider that the Law should specify qualifications such as recognised accounting body, registered liquidator, details regarding professional indemnity insurance. Insurance is of course necessary to protect all Stakeholders. |
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| **Issue:**  **Specific comments continued** | **Comment** |
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| 1. We are concerned regarding section 588V regarding potential liabilities for holding companies for failing to prevent insolvent trading. This seems at odds with the legislation being proposed. That protection is not provided. | In our view, consideration should be given for protection in these circumstances. |
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| 1. In our view, we consider that a standard set of documents e.g. balance sheet, profit and loss, cash flow, should be mandatory and be a fundamental requirement before Safe Harbour can commence, and should be signed off as part of the Safe Harbour processes and controls. | It may also be relevant for a Report As To Affairs or a similar document to be prepared as part of the documents required for a Safe Harbour to be initiated. |
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| **Issue:**  **Specific comments continued** | **Comment** |
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| Section 588GA (4) (a) (b) |  |
| 1. i. This section deals with a requirement to provide for employee entitlements and giving information etc as required by Taxation Laws to a particular standard. If this is not done then the protection against insolvent trading is not available. | In our view, a better definition is required about the steps and actions that directors should take to follow a standard in relation to these matters that would reasonably be expected of a company. Does this for example mean the funds should be placed into a separate bank account? |
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| Section 588GA (2) (c) |  |
| 1. ii. In engaging an appropriately qualified entity, if the directors follow to the letter the “course of action” plan, they can still be second guessed by a Liquidator that they were not taking a course of action that would lead to a better outcome, or that the “course of action” might be considered fanciful. | In our view, consideration should be given to greater protection for directors who have followed the plan, yet the outcome is for various reasons not optimal or did not lead to a better outcome. |
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| Section 588GA (3) |  |
| 1. iii. This section deals with the requirement for directors to bear the evidential burden of the “course of action”. | In our view, the “course of action” must continue to be documented at all times and “signed off” by the appropriately qualified entity and directors. In this sense, the evidential burden is achieved as the restructure continues. By doing this, there is a documented plan which discharges the evidential burden and would also be a requirement for the “course of action” to continue. |
| Section 588GB |  |
| 1. iv. The process does not anticipate any involvement by creditors via a committee or an elected creditor. We anticipate this is due to the fact that the process will not be public. | In our view, consideration should be given to the involvement of creditors. |
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| **Issue:**  **General comments** | **Comment** |
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| **Ipso Facto** |  |
| 1. i. The draft legislation currently only works in the circumstances of a scheme or voluntary administration. | In our opinion, consideration should be given to the extension of the stay to creditor voluntary Liquidations or provisional Liquidations. Finally, we consider that Ipso Facto protection should also be considered for managing controllers e.g. Receivers and managers. This will also benefit all Stakeholders in these appointments. |
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| 1. ii. The explanatory memorandum at paragraph 2.10 notes that a counterparty maintains the rights to terminate or amend the agreement with the debtor company for any other reason, including for a breach involving a non-payment or non-performance. | In our view, there should be a 7 day rectification period before the counterparty can terminate. |
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