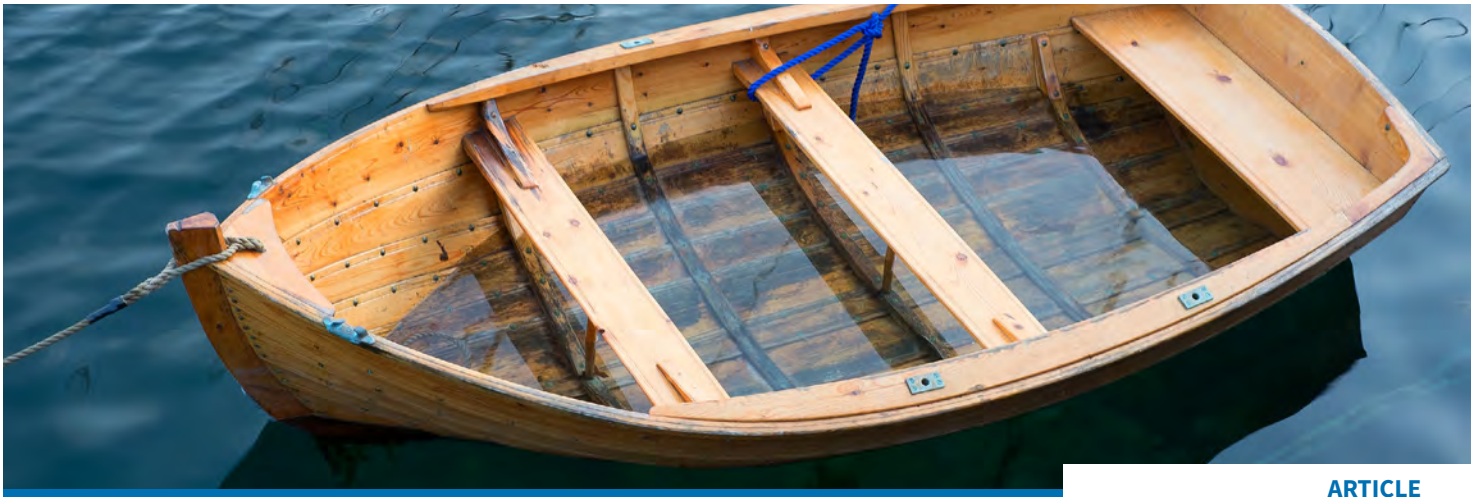

ARTICLE

COVID-19 Safe Harbour – I just spent six months in a leaky boat...

No one expected these immortal words by Split Enz to be so relevant during the COVID-19 pandemic. However, that is exactly how some directors may be left feeling regarding the requirements to qualify for protection from trading while insolvent under the COVID-19 Safe Harbour provisions.

NAVIGATING COVID-19

When COVID-19 hit Australia, it created a crisis requiring urgent and extraordinary action by Federal and State Governments to protect the health of the Australian people and economy.

The most significant economic policy was the Coronavirus Economic Response Package Omnibus Bill 2020 ("Bill"), which received Royal Assent on 24 March 2020. The Bill provided unprecedented support and protection to businesses and directors in response to the COVID-19 pandemic.

A TEMPORARY HARBOUR FOR UNCERTAIN TIMES

The Bill, amongst other things, inserted section 588GAAA into the Corporations Act 2001 ("Act"). This provided temporary protection for directors by relieving them of liability for insolvent trading as they navigated the unprecedented uncertainties facing businesses during the legislated relief period ("COVID-19 Safe Harbour"). But just how clear is the COVID-19 Safe Harbour?

ARE THE HABOUR WATERS CLEAR?

As always, the devil is in the detail. To qualify for COVID-19 Safe Harbour protection, debts must be incurred:

- In the ordinary course of the company's business;
- During the relief period – being from 25 March 2020 and now extended to 31 December 2020; and
- Before any appointment ***during that period*** of an administrator, or liquidator.

The words "***during that period***" require specific consideration. Their effect may be to require the appointment of a liquidator or administrator prior to the expiry of the relief period, being 31 December 2020, for directors to avail themselves of protection from trading whilst insolvent and thus not potentially being personally liable for debts incurred during the relief period. Put another way, directors could still be liable for an insolvent trading claim for debts incurred during the COVID-19 Safe Harbour period unless they appoint an administrator or liquidator before 31 December 2020. Clarity from the Government or future Court decision may be required.

CAN I JUST CHANGE HARBOURS?

Equally significant, Section 588GAAA only makes reference to appointing "an administrator, or liquidator". It does not refer to the pre existing Safe Harbour protection available to directors under Section 588GA of the Act ("Traditional Safe Harbour"). This means directors may be liable for an insolvent trading claim for debts incurred during the COVID-19 Safe Harbour period up until the date they enter Traditional Safe Harbour, unless they appoint an administrator or liquidator prior to 31 December 2020. Albeit, Traditional Safe Harbour may still be a reasonable option going forward.

PLOTTING A NEW COURSE

In considering the way forward, directors should be taking a number of steps now including:

- Assessing current and future company viability under different assumptions and worse and best case scenarios.
- Particularly, they should review their cash needs and prepare short (13 week), medium and long term integrated forecasts supported by a coherent post COVID-19 business recovery plan in assessing ongoing solvency.
- Engaging with financiers, key creditors, landlords and other stakeholders to secure support in order to satisfy long term viability. This may include implementing standstill deeds, restructuring finance facilities, or agreeing new lease terms, which support the forecasts and future plans.
- Using disruption as a positive opportunity for change, including "right sizing" the business, with a focus on cash optimisation.
- Making the most of available Government stimulus and support packages. They are there to help.
- If doubt as to whether viability and solvency exists, seek qualified independent legal and commercial advice, particularly regarding the requirements for protection under COVID-19 Safe Harbour.

TIME TO SET SAIL

With the COVID-19 Safe Harbour protection due to expire on 31 December 2020, and other Government support initiatives eventually being unwound, directors must act now and consciously determine whether:

1. There is a reasonable expectation that a company can continue to trade in the ordinary course, and meet its debts as and when they fall due; or
2. Steps are required to avail the directors of one of the forms of Safe Harbour protection, being either:
   a. Commencing the development of a plan for Traditional Safe Harbour protection. Critically, Traditional Safe Harbour only protects a director in a subsequent insolvency from the date a qualifying plan is implemented, not from debts incurred before that time. Irrespective, there are a number of conditions required for protection under Traditional Safe Harbour.
   b. If directors are not confident with a company's ongoing solvency, and a plan that satisfies Traditional Safe Harbour is not feasible, then they may need to appoint an administrator or a liquidator on or before 31 December 2020 to avoid potential personal liability for company debts and receive COVID-19 Safe Harbour protection.

SEEK ADVICE AND ACT QUICKLY

FTI Consulting is able to assist directors in rapidly assessing viability, preparing forecasts and plans, and engaging with financiers and other stakeholders, whilst guiding them through all available transformation and restructuring options, including the planning and implementation of impactful Safe Harbour, administration and liquidation strategies.

Other resources

For further information on Traditional Safe Harbour, download our Safe Harbour Protection for Boards and Management Service Sheet.

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