

CORPORATIONS ACT 2001 - SECT 588G

Director's duty to prevent insolvent trading by company

(1) This section applies if:

- (a) a [person](#) is a [director](#) of a [company](#) at the time when the [company](#) incurs a debt; and
- (b) the [company](#) is [insolvent](#) at that time, or becomes [insolvent](#) by incurring that debt, or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the [company](#) is [insolvent](#), or would so become [insolvent](#), as the case may be; and
- (d) that time is at or after the [commencement](#) of [this Act](#).

(1A) For the purposes of this section, if a [company](#) takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3.

When debts are incurred		[operative table]
Action of company	When debt is incurred	
1	paying a dividend	when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared
2	making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration)	when the reduction takes effect
3	buying back shares (even if the consideration is not a sum certain in money)	when the buy-back agreement is entered into
4	redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are issued

When debts are incurred		[operative table]
Action of <u>company</u>	When debt is incurred	
6	financially assisting a <u>person</u> to <u>acquire</u> shares (or <u>units</u> of shares) in itself or a <u>holding company</u>	when the <u>agreement</u> to <u>provide</u> the assistance is entered into or, if there is no <u>agreement</u> , when the assistance is <u>provided</u>
7	entering into an <u>uncommercial transaction</u> (within the meaning of <u>section 588FB</u>) other than one that a <u>court orders</u> , or a <u>prescribed agency</u> directs, the <u>company</u> to <u>enter into</u>	when the <u>transaction</u> is entered into

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or

(b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Note: This subsection is a civil penalty provision (see subsection 1317E(1)).

(3) A person commits an offence if:

(a) a company incurs a debt at a particular time; and

(aa) at that time, a person is a director of the company; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and

(d) the person's failure to prevent the company incurring the debt was dishonest.

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a).

Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.

(3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

(4) The [provisions](#) of Division 4 of [this Part](#) are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

Penalty dealt with at Item 138 of Schedule 3 of the Corporations Act:

138	Subsection 588G(3)	2,000 penalty units , or imprisonment for 5 years, or both.
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