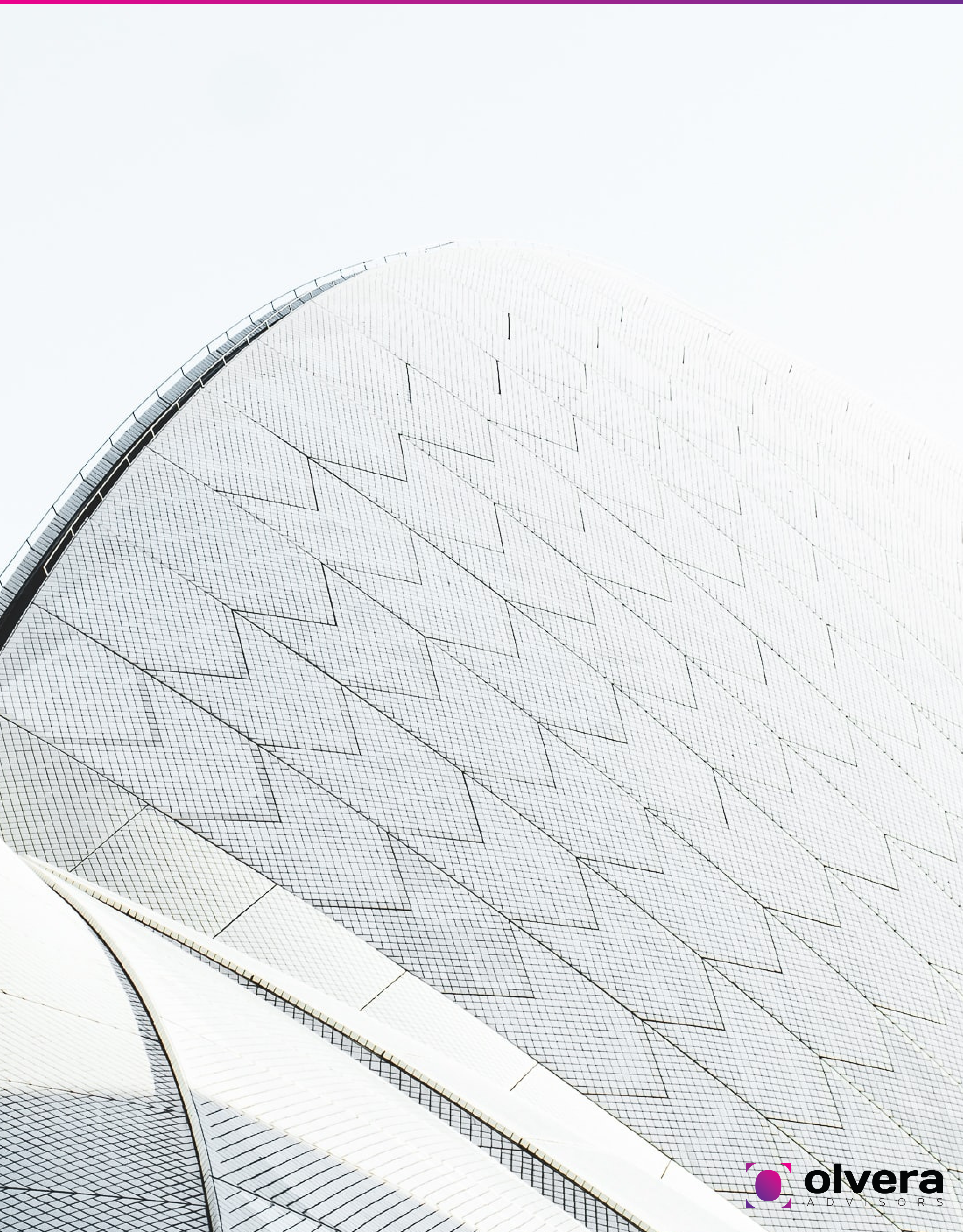
safe harbour guide for directors



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director's duty to prevent insolvent trading

It is a director's duty to prevent the insolvent trading of a company. Section 588G of the *Corporations Act 2001* (The Act) sets out obligations for a company's directors to prevent the company trading whilst insolvent. It is therefore the directors' responsibility to ensure that there are no incurred debts after a company is insolvent. Failing to comply with s588G could result in directors being held personally liable of those debts, if they are unable to be repaid.

Until recently, the only option available to directors of a company in such situation was appointing a voluntary administrator a liquidator. However, this changed with the Australian insolvency law reform in 2017, which introduced a new section, s588GA to The Act.

what are 'safe harbour' provisions?

Safe Harbour provisions are designed to allow directors to address a company's financial difficulties behind-the-scenes, whilst under the supervision of a qualified advisor. The term 'Safe Harbour', to an extent, provides protections for directors against the statutory duty to prevent a company from trading while insolvent.

The amendments aim to protect directors from personal liability for debts incurred by an insolvent company if they take a course of action that is reasonably likely to lead to a better outcome for the company and its creditors, compared to the appointment of an administrator or a liquidator.

Essentially, s588GA allows directors to incur company debts during a 'restructure/turnaround period', without being at risk of personal liability for those debts if they cannot be repaid.

how can directors gain access to 'safe harbour'?

To be eligable to rely on the 'safe harbour' provisions outlined in s5888GA, directors need to:

- continue meeting their employee entitlements (including superannuation) and tax reporting obligations;
- have the ability to provide assistance and/or documentation if requested by an external administrator;
- start developing one or more courses of action that are reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator; and
- engage appropriate advice from a qualified advisor or insolvency firm.

What factors are considered to determine the course of action's likelihood in leading to a better outcome?

- Obtaining appropriate advice.
- Maintaining proper financial records.
- Keeping informed of the financial position of the company.
- Taking steps to prevent misconduct by officers and employees of the company.

how Olvera can help?

Olvera works with organisations to successfully navigate through situations of distress. We provide directors with important 'safe harbour' support that enables clear conversations with creditors and the presentation of restructuring plans that work. The role of our safe harbour advisor is to provide expert advice and counsel to the board and to provide comfort that restructure will provide a better outcome.

Typically, the advisor is appointed during periods of change such as:

1. restructures
2. divestments
3. acquisitions
4. refinancing processes

It is important to remember to be proactive and seek advice early. In order to have the best chance of relying on the protection in a situation of corporate distress, it is crucial that directors act as soon as possible and implement the course of action within a reasonable time period. However, this can vary depending on the size and complexity of the company.

Questions?

Contact us and we can assist!

Book a free consultation

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