

Piercing the Corporate Veil

Insolvent Trading

s 588G

1. Person was a director at the time the debt was incurred
 - Director includes directors, shadow directors and de facto directors but not officers: s 9
 - s 588G(1A) set out when a debt is incurred
2. Company must be insolvent or become insolvent due to that debt or that debt along with others
 - Insolvent: Cannot pay debts as they become due and payable: s 95
 - Presumptions of insolvency: s 588E
 - Must not be a temporary lack of liquidity
3. At the time of incurring the debt there must be reasonable grounds for suspecting that the company is insolvent or will become insolvent as a result of the debt or combination
4. Must be after commencement of the Act

s 588(2): Civil provision applies when director is aware at time debt incurred that there are reasonable grounds for suspecting company is insolvent or reasonable person in similar position in companies circumstances would be aware

s 588G(3): Criminal provision - persons failure to prevent company from incurring debt was dishonest

s 588V

Holding company can be liable for the insolvent trading of its subsidiary:

1. Corporation is holding company of the subsidiary at time when the company incurs the debt;
2. Company is insolvent at that time or becomes insolvent by incurring that debt
3. Reasonable grounds for suspecting that the company is insolvent or would so become insolvent
4. The corporation or one or more of its directors are aware that there are such grounds for suspecting or it is reasonable to suspect that a holding company in corporations circumstances or its directors would be so aware
5. After commencement of act
 - If parent company breaches s 588V the liquidator of the subsidiary which is being wound up can sue the parent company in order to have the parent company contribute to paying the debts of the subsidiary

Consequences

- Compensation order for amount of creditors loss or damage: s 588J or 1317H
- Liquidator can recover from the director: s 588M
- Creditor may be able to pursue director directly (s 588M) with either consent of liquidator (s 588R) or leave of the court (s 588T)

- Procedure required to notify liquidator: s 588S
- Subsidiaries liquidator can recover from holding company: s 588W

Defences: s 588H or s 588X

- Director had reasonable grounds to expect company was solvent and would remain solvent
- Directed relied on information provided by another person, director had reasonable grounds to believe the person was fulfilling their responsibility and was competent and reliable in performing role; information provided allowed director to expect company was solvent and remain solvent
- Director did not take part in the management of the company for illness or another good reason
- Director took all reasonable steps to prevent company from incurring debt

Voidable Transactions

- Liquidators reclaim money or property previously disposed of by the company in the lead up to the liquidation and increases pool of assets available to creditors
- Only occurs at liquidation
- Court can make various orders relating to voidable transactions to set them aside and hold director liable to repay the money: s 588FF

Types

Unfair Preferences: Creditor receiving higher rate repayment than they would receive if the company were in liquidation. Has to occur at time when company was insolvent or would become insolvent because of such: s 588FA

Uncommercial transactions: Reasonable person in company's circumstances would not have entered into having regard to the benefits and detriments involved. Has to occur at time when company was insolvent or would become insolvent because of such: s 588FB

Insolvent Transactions: Unfair preferences or uncommercial transactions that occur when the company is insolvent: s 588FC

Unfair Loans: Where the interests or charges on a loan are extortionate. Does not require insolvency: s 588FD

Unreasonable director-related activities: Company entered into transaction with a director or close associate of director and a reasonable person in the company's circumstances would not have entered into such having regard to benefits and detriments involved. Doesn't require insolvency: s 588FDA

Defences

- s 588FG(1)(a): Not party to transaction and did not receive any benefit
- s 588FG(1)(b): Received benefit in good faith, had no reasonable grounds for suspecting insolvency and no reasonable person in similar circumstances would have
- s 588FG(2): Were part to transaction, gave valuable consideration or has changed their position in reliance on the transaction and same requirements as above (not apply to unfair loans or unreasonable director-related activities)

s 260D Offences

- Offence to provide financial assistance to a person to acquire shares in the company or in a holding company unless:
 - Assistance does not materially prejudice the interests of the company or shareholders or company's ability to pay creditors: s 260A
 - Assistance is approved by shareholders: s 260B
 - Special resolution passed at GM or resolution agreed to at a GM by all ordinary shareholders
 - Before notice of meeting is sent out ASIC must be given notice
 - Assistance is exempted: s 260C
- s 260D(2): Civil penalties
- s 260D(3): Criminal offence if breach is dishonest

General Law

Avoid existing legal duty

- Company is formed for the sole or dominant purpose of avoiding an existing legal duty or doing something that one of the participants is prevented from doing in its personal capacity through an existing legal obligation
 - *Gilford Motor Co Ltd v Horne*

When the law requires it

- Needed to give proper effect to a law, some policy underlying a law or express requirement in statute
 - *Re Darby; Re Bugle Press Ltd*

Tortious Liability

- Negligence of the subsidiary is due to the control and dominance of the holding company
 - *Briggs v James Hardy and Co Pty Ltd*

Agency or implied partnership

1. Profit of subsidiary must be treated as profit of parent
 2. People running the business must be appointed by the parent
 3. Parent must be the head and brain of the operation
 4. Parent must make all decisions regarding the business venture
 5. Profits were made because of the skill of the parent
 6. Parent is effectual and constant control of the operation
- Parent company will be liable for debt of subsidiary

- *Smith, Stone and Knight Ltd v Birmingham Corp*, affirmed in *Spreag v Paeson*