



EVERSOL'S weekly law

Contributed by Terry Robinson

Directors and Insolvent Trading

The Corporations Act 2001 imposes a duty upon a Director to prevent a Company from incurring debts while it is insolvent.

'Insolvent' is defined in the Act as being unable to pay all of a company's debts as and when they become due and payable.

In these uncertain economic times, liquidators are specifically directing their attention to determine whether there has been insolvent trading.

A liquidator or a creditor, (with the liquidator's consent), may bring proceedings **personally** against a Director for insolvent trading. An insolvent trading claim is equal to the loss suffered by the creditor from the date the company was or is deemed to be insolvent.

Where a company is deemed to be insolvent, the Court may order a Director to be personally liable to compensate a creditor for the loss suffered. A company can be deemed to be insolvent where it does not keep proper records.

ASIC (Australian Securities and Investments Commission) are also increasing their efforts to prosecute Directors who breach insolvent trading provisions. You should be aware that ASIC also have the ability to bring criminal proceedings against a Director for insolvent trading, potentially resulting in a Director being liable for a fine of up to \$220,000.00 or up to 5 years imprisonment.

Directors and their advisors should consider the financial position of their company on a regular basis in order to determine whether the company may be trading whilst insolvent. If there is insolvency or a suspicion of insolvency, immediate action is needed to protect the company's directors.

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