

ADVISOR DAY 2020

NAVIGATING CORPORATIONS THROUGH COVID-19
| DIRECTOR'S DUTIES, INSOLVENCY AND SAFE
HARBOUR PROTECTIONS

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“The only function of economic forecasting is to make astrology look respectable”.

John Kenneth Galbraith

(Quoted by Chairman of the United States Federal Reserve, Jerome Powell, in a speech on 21 May 2020, in the context of what he saw as “a whole new level of uncertainty, as questions only the virus can answer complicate the outlook...”)

“First, fiscal and monetary support has been stunning. We are in a whole new world of state support of what were once capitalist economies. Morgan Stanley notes that the central banks of the G4 countries – US, Japan, Europe and the UK – will collectively expand their balance sheets by 28 per cent of gross domestic over this cycle. The equivalent number during the 2008 financial crisis was 7 per cent.”

Then, later, at the concluding paragraph of the article:

“Morgan Stanley, which has a positive model on the go, reckons that economic output globally will return to pre-COVID levels by the end of the year.”
Excerpts from article “Hail the dawn of a V-shaped recovery” authored by Merryn Somerset Webb and published by the Australian Financial Review on 28 June 2020.

“When forecasting the outcomes of risky projects, executives too easily fall victim to the planning fallacy. In its grip, they make decisions based on delusional optimism rather than on a rational weighting of gains, losses and probabilities. They overestimate benefits and underestimate costs. They spin scenarios of success while overlooking the potential for mistakes and miscalculations. As a result, they pursue initiatives that are unlikely to come in on budget or on time or to deliver the expected returns- or even to be completed.”

(Optimist bias)

Daniel Kahnemann, Nobel prize winning author of “Thinking, Fast and Slow”

TOPICS

1. DIRECTORS' DUTIES & INSOLVENT TRADING
2. SAFE HARBOUR PROVISIONS
3. COVID-19 ADDITIONAL SAFE HARBOUR PROVISIONS
4. WORKSHOP

Care & Diligence

Good Faith

Director's Duties Generally

Not to improperly
use position

Not to improperly
use information

Director's Duty in relation to Insolvent Trading

A company is insolvent if it is unable to pay all its debts as and when they are due.

Penalties for Civil Offences

1. Compensation Order
2. Pecuniary Penalty Order – up to \$200,000
3. Disqualification

Penalties for Criminal Offences

1. Penalty Order – up to \$420,000
2. Imprisonment

Safe Harbour Provisions

1. WHAT ARE THEY?
2. WHEN CAN DIRECTORS RELY ON SHP?
3. BETTER OUTCOME
4. WHAT IS 'REASONABLY LIKELY' IN THE EYES OF A JUDICIAL OFFICER

Overarching Steps



Relying on Safe Harbour Provisions

acknowledge the financial position of the company and carefully document same.

ensure employee entitlements and taxation reporting obligations are being met at all times

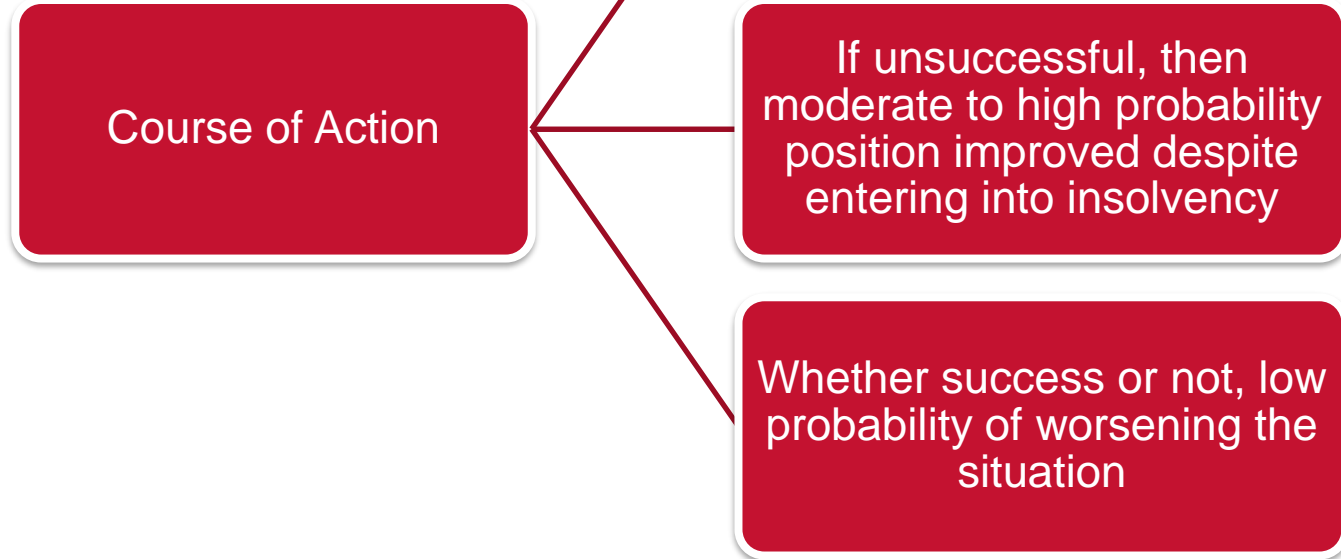
review internal processes to ensure the director is operating on correct data.

implement measures to ensure the company is keeping appropriate financial records and be able to demonstrate such measures are in place.

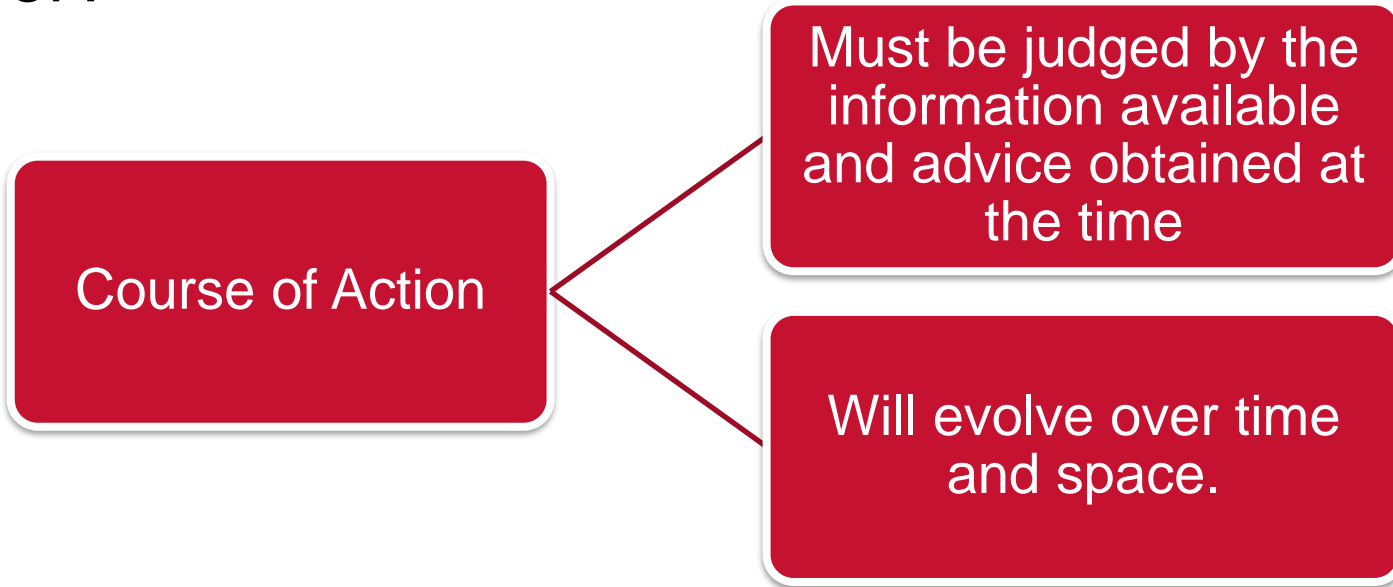
clearly identify the course of action (if available) and obtain 'time stamped' third party professional advice on the probabilities of success.

continually review and assess the course of action and the status of the company.

Better Outcome



What is 'reasonably likely' in the eyes of a judicial officer?



What is 'reasonably likely' in the eyes of a judicial officer?

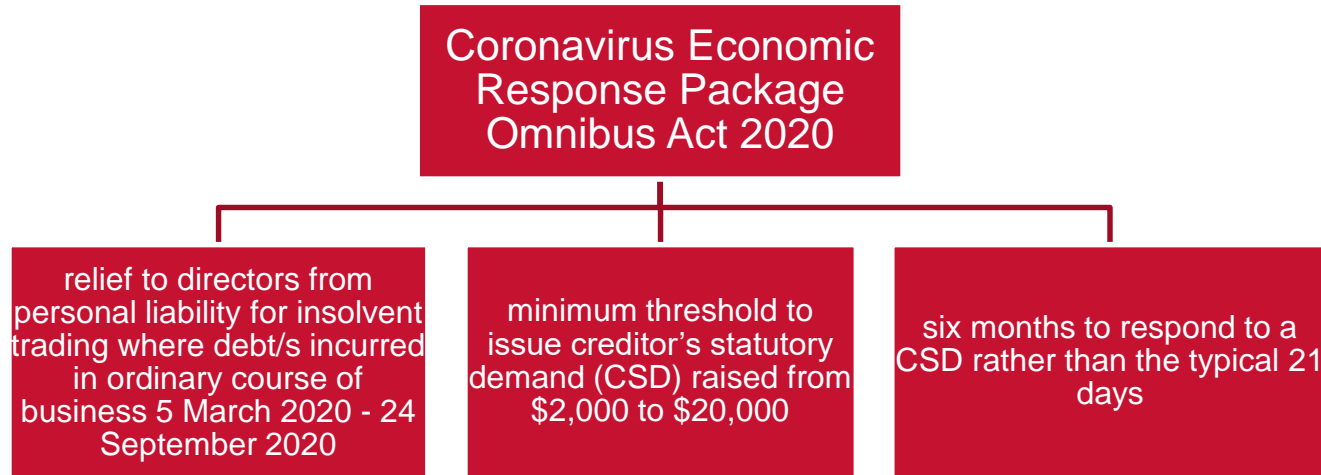
Evidential Burden



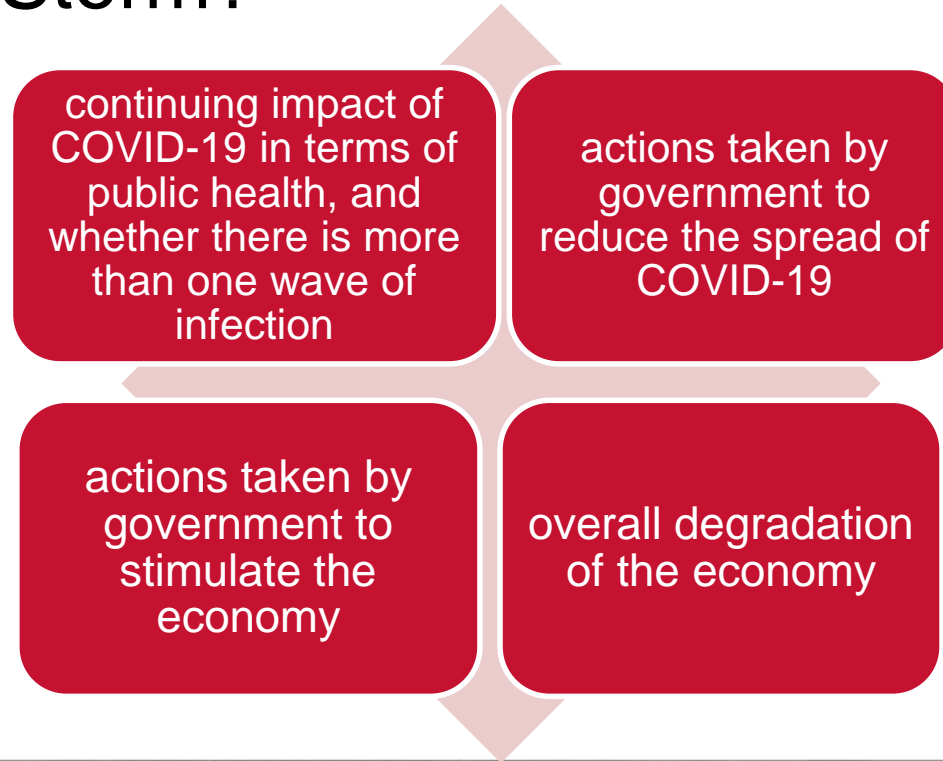
Director

= Document,
document,
document!

COVID-19 Additional Safe Harbour Provisions



A Coming Storm?



Workshop – ASIC Process of Investigation

1. ASIC HAS LIMITED RESOURCES
2. THE LIQUIDATOR IS THE MOST LIKELY PERSON TO NOTIFY ASIC
3. ASIC MUST INVESTIGATE AND THEN SATISFY ITSELF THAT THERE IS SUFFICIENCY OF EVIDENCE AND IT IS IN THE PUBLIC INTEREST TO PROSECUTE
4. IF THE DIRECTOR CAN CLEARLY REASON HIS OR HER ACTIONS, THEN HE OR SHE IS MORE LIKELY TO BE AFFORDED SAFE HARBOUR

CONCLUSION

1. CONSIDER COURSE/S OF ACTION NOW
2. QUESTIONS?
3. HOUSEKEEPING

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