



## Corporations Act - Tips - June 2015

### Key Summary

The Corporations Act deals with all aspects of regulations of corporations and as a consequence is a voluminous piece of legislation. We explore a few of the lesser known sections below.

#### SECTION 560 CORPORATIONS ACT – RIGHT OF SUBROGATION

Section 560 of the *Corporations Act* can be of significant benefit in circumstances where a person advances or lends money to a company for the purpose of allowing that company to pay employee entitlement amounts (including the Superannuation Guarantee Charge amounts).

In the event of a subsequent winding up of the company, the lender is entitled to 'stand in the shoes' of the ultimate recipients of the monies. In this regard recipients of employee entitlement amounts enjoy a priority entitlement to any dividend which may be available in the winding up, thus enabling the lender to potentially achieve a repayment in advance even of other secured creditors.

In order to obtain the benefit of s560, its terms must be strictly complied with.

Critically, s560 requires that:

- the advance is made to the company (and not directly to employees) such that the debtor/creditor relationship is created; and
- the advance is actually used by the company to pay its employee entitlements.

Accordingly, the potential benefits of s560 should be carefully considered, and specialist advice taken, prior to the advance of any funds which are to be used for the payment of employee entitlements associated with a company.

#### SECTION 588FGA CORPORATIONS ACT – THE 'STING IN THE TAIL' OF ATO PREFERENCES

In the event that a company is wound up, it is common for it to have made payments to the ATO with respect to outstanding tax debts in the six months prior to its winding up. These, generally, are voidable preferences which are recoverable by a liquidator.

A significant risk for directors of such companies is the operation of s588FGA of the *Corporations Act*, which entitles the ATO to the benefit of an indemnity from each person who was a director of the company at the time that the preference amounts were paid to the ATO.

The relevant definition of director is that as set out in s9 of the *Corporations Act*, and includes alternate, executive and non-executive directors, as well as persons commonly known as 'shadow' or 'deemed' directors (who are not recorded as being a director, but can still be liable).

Thus, a company debt has the potential to become a personal liability, for the amount of the debt plus interest and any costs that the ATO has to pay to a liquidator.

*This article was written by Colin Brown a partner in our insolvency and reconstruction team. We invite you to contact [Colin](#), should you have any questions or require any further information about the matters discussed in this article.*

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