YOUR KNOWLEDGE

Alert: What you need to tell the ATO about your SMSF

The 1 July 2017 superannuation reforms introduced a new reporting regime for funds. Funds now need to advise the ATO of key events within the fund that impact on retirement income streams (pensions):

- When you start a pension
- When you stop a pension or take a lump sum
- When the fund accepts a structured settlement contribution such as personal injury compensation.

Superannuation funds are also required to report the value of existing superannuation income streams at 30 June 2017. While reporting of these events to the ATO does not formally start until 1 July 2018 for SMSFs, event based reporting still needs to be completed if these events occur from 1 July 2017 – that is, you have a reprieve from the compliance but not the actual reporting.

If we are managing your SMSF's accounting and compliance, we will track most of these events for you electronically where you have enabled us to access feeds from your SMSF's bank accounts. If we see any transactions that could meet the reporting criteria, we will be in touch with you to confirm the nature of these events. Where electronic feeds are not available - if your bank does not support them or where you have opted not to enable the feeds, you will need to let us know about these events at the time they occur.

In addition to the new events based reporting regime, SMSFs are also obliged to report any of the following changes to the ATO within 28 days.

- Fund name
- Fund address
- contact person for the fund
- fund membership
- fund trustees, and
- the directors of the fund's corporate trustee

Safe harbour for directors of struggling companies

Australia's insolvent trading laws impose harsh penalties on directors of companies that trade where there are reasonable grounds to suspect that the company is insolvent.

Criminal and civil penalties can apply personally including penalties of up to $200,000, compensation proceedings by creditors or liquidators, and where dishonesty has been involved, up to 5 years in prison. You can understand why directors might choose to place a company into administration rather than face personal risk.

Section 588G(2) of the Corporations Act imposes personal liabilities if a person is a director at the time the company incurs a debt, and the company is insolvent or becomes insolvent by incurring that debt, and, at that time, there are reasonable grounds to suspect that the company is or would become insolvent. It's all about timing.

The threat of Australia's insolvent trading laws, combined with uncertainty over the precise moment a company becomes insolvent have been widely criticised as driving directors towards voluntary administration even in circumstances where the company may be viable in the longer term. And, the very real personal risk is often cited as a reason why experienced directors are unwilling to engage with angel investors and start-ups.

New safe harbour provisions give directors some 'wiggle room' where they are attempting to restructure a company outside of a formal insolvency process. Under the new rules, directors will only be liable for debts incurred while the company was insolvent if they were not developing or taking a course of action that at the time was reasonably likely to lead to a better outcome for the company than proceeding to immediate administration or liquidation. The explanatory memorandum to the amending legislation however clearly states that "hope is not a strategy" when it comes to assessing the reasonableness of the actions taken by directors.

Tolerance levels of the new laws

The new laws give directors a safe harbour from the civil insolvent trading provisions of the Corporations Act but only where the company is up to date with employee entitlements including superannuation, and has met its tax obligations – normally the first thing to go in distressed companies. The amendments create a safe harbour for "honest and diligent company directors from personal liability for insolvent trading if they are pursuing a restructure outside formal insolvency."

Directors who merely take a passive approach or allow the company to continue trading as usual during severe financial difficulty, or whose recovery plans are "fanciful", will not be protected. Directors who fail to implement a course of action, or to appoint an administrator or liquidator within a reasonable time period of identifying severe financial difficulty will also lose the benefit of the safe harbour.

What does all this mean?

The new rules do not soften the requirement for directors to stay informed about the welfare of the company. It merely provides protection where there is a reasonable chance of a turnaround from insolvency. To utilise the safe harbour, directors will need to demonstrate that they took action that "could lead to a better outcome" such as:

DGL Accountants (Mackay) Pty Ltd
Certified Practising Accountants
Address: 71 Victoria Street, Mackay QLD 4740
PH: 07 4944 0449 FAX: 07 4957 3793
Email: dgl@dglaccountants.com. au

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- **Accessing the right information to make timely and informed decisions** – engage professional advice to assess the company's solvency and provide the right information at meaningful time periods. As soon as the company's solvency is questionable, steps should be taken to ensure further debts are not incurred. The result of this assessment might be that the company is not able to reasonably turnaround its financial position.
- **Assess if the safe harbour could apply** - A decision to utilise the safe harbour provisions should be taken at Board level. Professional advice should be taken to review eligibility and viability of accessing the safe harbour provisions.
- **Develop a plan** – document a plan with measurable and realistic targets. You need to demonstrate that the plan is "reasonably likely to lead to a better outcome" for the company. Any contracts the company has entered into also need to be reviewed as part of that plan.
- **Measure and adjust** – The plan should not only be followed but also regularly assessed and amended where required for changing circumstances. Directors have an obligation to understand the point at which the plan is not working and to work co-operatively with liquidators or administrators. The safe harbour does not protect directors who do not keep tight controls on the viability of a turnaround plan.
- **Keep informed and realistically assess the company's position.**

Can the company incur debt while insolvent?

The safe harbour provides protection for debts "incurred directly or indirectly in connection with" actions taken to turnaround the company. It includes debts taken on for the specific purpose of the restructure such as a professional adviser. Even in circumstances where a company's solvency is doubtful, incurring debts may be a reasonable course of action to lead to a better outcome, and it may remain in the interests of the company that some loss-making trade should be accepted - for example, incurring debts associated with the sale of assets which would help the business's overall financial position.

While hindsight might demonstrate that the path taken was the wrong one, directors are protected if they can demonstrate that the course of action was reasonably likely to lead to a better outcome at the time the decision was made. The safe harbour does not protect from debts incurred outside of the turnaround actions.
Solvency is an issue that arises for companies of all sizes; particularly those on a fast growth trajectory. It's essential that directors have the right information available to them to manage these periods of uncertainty. Employee and tax payments, and tax reporting should never be missed as these are the first sign of deeper problems and likely to trigger further investigation or audit by the regulators. If the company needs help, get help. Hope is not a strategy.

Tax benefits for investing in affordable housing

In the 2017-18 Federal Budget the Government announced a series of measures intended to improve housing affordability in Australia. To entice investors, the Government is providing an increase in the CGT discount for individuals who choose to invest in affordable housing. The draft legislation enabling this change has now been released so we can see the detail.

There are two aspects to these changes. Firstly, individuals who make a capital gain on residential dwellings that have been used to provide affordable housing can potentially qualify for an additional CGT discount of up to 10%, this could take the total discount percentage from the existing maximum level of 50% to 60%. While the additional 10% CGT discount applies if you meet the eligibility criteria, the 60% discount rate is not automatic – it's 'up to' and the final total discount could be less than 60%.

The increased discount will only be available if the dwelling has been used to provide affordable housing for at least 3 years after 1 January 2018. The 3 year period does need to have been continuous. The additional discount needs to be apportioned to take into account periods when the individual was a non-resident or temporary resident as well as periods when the property was not used to provide affordable housing over its ownership period. The second aspect to the rules allows individuals to also access an additional 10% CGT discount on their share of capital gains that are distributed by a certain trusts (e.g., managed investment trusts) where the gain is attributable to dwellings that have been used to provide affordable housing for at least 3 years.

Affordable housing is….
There are a few compliance hoops to jump through to be 'affordable housing'.

- The property must be residential (not commercial)
- the tenancy of the dwelling or its occupancy is exclusively managed by an eligible community housing provider;
- the eligible community housing provider has given each entity that holds an ownership interest in the dwelling certification that the dwelling was used to provide affordable housing;
- no entity that has an ownership interest in the dwelling is entitled to receive a National Rental Affordability Scheme (NRAS) incentive for the NRAS year; and
- if the ownership interest in the dwelling is owned by a Managed Investment Trust, the tenant does not have an interest in the MIT.

Quote of the month

"People don't want to buy a quarter-inch drill. They want to buy a quarter-inch hole."

Theodore Levitt, 1960s Marketing guru & Harvard Business School Professor

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Email: dgl@dglaccountants.com. au