

Creditor Information Sheet

Offences, Recoverable Transactions and Insolvent Trading



Offences

A summary of offences under the *Corporations Act 2001* that may be identified by an administrator or liquidator.

| Section | Offence |
|---------|---|
| 180 | Failure by officer to exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties |
| 181 | Failure to act in good faith |
| 182 | Making improper use of position as an officer or employee, to gain, directly or indirectly, an advantage |
| 183 | Making improper use of information acquired by virtue of his position |
| 184 | Reckless or intentional dishonesty in failing to exercise duties in good faith for proper purpose. Use of position or information dishonestly to gain advantage or cause detriment |
| 206A | Contravening an order against taking part in management of a corporation |
| 206A, B | Taking part in management of corporation while being an insolvent under an administration |
| 206A, B | Acting as a director or promoter or taking part in the management of a company within five years after conviction or imprisonment for various offences |
| 209(3) | Dishonest failure to observe requirements on making loans to directors or related companies |
| 254T | Paying dividends out of net assets, which are fair and reasonable to members as a whole and not materially prejudicial to creditors |
| 286 | Failure to keep proper accounting records |
| 312 | Obstruction of auditor |
| 314-7 | Failure to comply with requirements for financial statement preparation |
| 437C | Performing or exercising a function or power as officer while a company is under administration |
| 437D(5) | Unauthorised dealing with company's property during administration |
| 438B(4) | Failure by directors to assist administrator, deliver records and provide information |
| 438C(5) | Failure to deliver up books and records to administrator |
| 590 | Failure to disclose property, concealed or removed property, concealed a debt due to the company, altered books of the company, fraudulently obtained credit on behalf of the company, material omission from Report as to Affairs or false representation to creditors |

Voidable transactions

Preferences

A preference is a transaction such as a payment between the company and one or more of its creditors, in which the creditor receiving the payment is preferred over the general body of creditors. The relevant time period is six months before the commencement of the liquidation. The company must have been insolvent at the time of the transaction, or become insolvent as a result of the transaction.

Where a creditor receives a preferred payment, the payment is voidable as against a liquidator and is liable to be paid back to the liquidator subject to the creditor being able to successfully maintain any of the defences available to the creditor under the *Corporations Act 2001*.

Uncommercial transaction

An uncommercial transaction is one that it may be expected that a reasonable person in the company's circumstances would not have entered into having regard to:

- the benefit or detriment to the company
- the respective benefits to other parties, and
- any other relevant matter.

To be voidable, an uncommercial transaction must have occurred during the two years before the liquidation.

However, if a related entity is a party to the transaction, the time period is four years and if the intention of the transaction is to defeat creditors, the time period is ten years.

The company must have been insolvent at the time of the transaction, or become insolvent as a result of the transaction.

Unfair loan

A loan is unfair if and only if the interest or charges were extortionate when the loan was made or have since become extortionate. There is no time limit on unfair loans – they only have to have been entered into any time on or before the day when the winding up began.

Arrangements to avoid employee entitlements

If an employee suffers loss because a person (including a director) enters into an arrangement or transaction to avoid the payment of employee entitlements, the liquidator or the employee may seek to recover compensation from that person. It will only be necessary to satisfy the court that there was a breach on the balance of probabilities. There is no time limit on when the transaction occurred.

Unreasonable payments to directors

Liquidators have the power to reclaim 'unreasonable payments' made to directors by companies prior to liquidation. The provision relates to transactions made to, on behalf of, or for the benefit of, a director or close associate of a director. To fall within the scope of the section, the transaction must have been unreasonable, and have been entered into during the 4 years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred.

Voidable charges

Certain charges are voidable by a liquidator:

- Circulating security interest created with six months of the liquidation unless it secures a subsequent advance
- Unregistered charges, and
- Charges in favour of related parties who attempt to enforce the charge within 6 months of its creation.

Insolvent trading

In the following circumstances, directors may be personally liable for insolvent trading by the company:

- a person is a director at the time a company incurs a debt
- the company is insolvent at the time of incurring the debt or becomes insolvent because of incurring the debt
- at the time the debt was incurred, there were reasonable grounds to suspect that the company was insolvent
- the director was aware such grounds for suspicion existed, and
- a reasonable person in a like position would have been so aware.

The law provides that the liquidator, and in certain circumstances the creditor who suffered the loss, may recover from the director, an amount equal to the loss or damage suffered. Similar provisions exist to pursue holding companies for debts incurred by their subsidiaries.

A defence is available under the law where the director can establish:

- there were reasonable grounds to expect that the company was solvent and they actually did so expect
- they did not take part in management for illness or some other good reason, or
- they took all reasonable steps to prevent the company incurring the debt.

The proceeds of any recovery for insolvent trading by a liquidator are available for distribution to the unsecured creditors before the secured creditors.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances