# Part A

1. Is the duty to prevent insolvent trading a fiduciary duty? Why or why not? You must give detailed reasons

Yes, under Section 588G of the Corporations Act, it is a fiduciary duty to prevent insolvent trading of a company. This is because the fiduciary or the Director is aware of the company’s financial position. It is the responsibility of the Director or the Fiduciary to keep the company protected from all sort of financial risks, and for this purpose the person must ensure that all debts are paid on time. In case, the company is unable to pay the debts, then Director must take accounting and legal advice timely, and must find an appropriate way to deal with the challenges faced to pay its debts when fall due. Director’s such efforts reduces the risks faced by the company, and help it to deal with its all financial matters. Also, if required, the Directors may also peruse ASIC’s National Insolvent Trading Program. The program was established in June 2003 by the government of Australia. The principle objective of this program is to identify the possible insolvent trading of the company, before it occurs. The Director may then discuss the financial risks faced by the company, through which s(he) may get suggestions of how to deal with company’s debts on time, otherwise the Director may face penalty (Bird, 2009).

1. How does the safe harbour defence s588GA operate?

 S588GA imposes criminal and civil liability on the fiduciary of the company, who is responsible to ensure that all debts of the company have paid on time. Thus, the safe Harbour Defence s588GA addresses a concern the Directors of the company are not only responsible to deal with the risks of potential insolvent trading instead they must be provided with a second chance to restructure the company’s financial administration to deal with all debts related challenges. In this way the government of Australia has struck a better balance between encouraging the honest directors and the protection of company’s credits. This amendment in Corporations Act was very important to motivate the Directors for their better performance and positive behavior towards company’s financial progress, otherwise Act blamed the Director for all sort of financial losses and they had to pay penalty up to $200,000 to help the company in its recovery. Also, according to the Act, the Directors were banned to perform their duties for a number of years as a result of which they were discouraged to stay in the course. The Safe Harbour Amendments enabled the directors to think differently and prove their worth by restructuring the financial administration of the company. It helped the directors to try to turn the company’s financial situation than just focusing on the risk mitigation and solvency of the company (KNOBLANCHE, 2018).

1. Who does it (s588GA) protect, and is this different to the business judgment rule s180 (2)? Give reasons.

 Section 588G of the Corporation Act protects the Directors of the company, who are responsible to ensure that all debts of the company have paid on time. Specifically, the safe Harbour amendment of the Act addresses a concern the Directors of the company must show a positive behavior towards company’s financial progress and must not take any decision for the sake of personal benefits. The decision, taken by the Directors, must be for the better future and financial structure of the company. In this way, the Safe Harbour Amendments enables the directors to think differently and prove their worth by restructuring the financial administration of the company. It helps the directors to try to turn the company’s financial situation than just focusing on the risk mitigation and solvency of the company (KNOBLANCHE, 2018). When comparing the Act to the business judgment rule s180, then there exist no difference between both regulations. As, business judgment rule s180 is established to restrict the Directors for thinking positive for the Company and to take decision for the sake of Company’s future without considering their personal interests. In this way, both regulations are same and are focused on the positive attitude and highly responsible behavior of the Director, while restricting them to think about their personal interests (Anon, 2019).

1. Are there any restrictions on the operation of the s588GA defence? If so, what are they?

 Under Section 588G of the Corporations Act, the Director of the Company is responsible to prevent insolvent trading of a company. This is because the Director is aware of the company’s financial position, and thus keep the company protected from all sort of financial risks. It is his/her responsibility to ensure that all debts are paid on time, otherwise the Director must take accounting and legal advice timely, and must find an appropriate way to deal with the challenges faced to pay its debts when fall due (Bird, 2009). However, in this all process, the Director cannot take any action without maintaining an evidentiary record (ICAEW, 2013). Thus, the Act restricts the Directors to maintain an evidentiary record in the form of files or book of information regarding all debts, being paid or need to be paid when fall due. In this way, the court or audit team can evaluate how does the Directors manages all finance related matters of the organization. Through such restrictions, the Government of Australia maintains a balance between encouraging the honest directors and the protection of company’s credits. Though, the Safe Harbour Amendments enabled the directors to think differently and prove their worth by restructuring the financial administration of the company but their each concern and the action in the favor of the company must be supported by proper documentation. This documentation or the book of information is further used at the time of inspection to evaluate if the person was involved in unethical activities or have been performing his/her duties with honesty (Harris, 2017).

1. Do you think the changes to Division 3 will have an effect on the number of voluntary insolvencies in Australia in the future? Why or why not?

 Yes, the changed to Division 3 will have a significant impact on the of voluntary insolvencies in Australia in future, as it will strengthen the capabilities of the Directors and will let them to think differently for the company’s better financial future. This is crucial to motivate the directors, as they are the key role players of any organization or the company. They have complete command over finance related dealings and information regarding the financial matters. Thus, motivating them to show their worth and to do something for the better future of the company means keeping the company under protected zone. Furthermore, the change Act was very important to encourage Director’s positive intentions towards company’s financial progress, otherwise previously Directors of the companies were responsible for all sort of financial losses and they had to pay penalty up to $200,000 to help the company in its recovery. Also, according to the Act, the Directors had to be banned to perform their duties for a number of years as a result of which they were discouraged to stay in the course. The change simply protected the directors and enabled them to restructure the company’s financial profile. In this way, the companies become stronger to meet all their debt requirements and show better financial progress in future (KNOBLANCHE, 2018; Government, 2019).

# Part B

1. Did Mr Daly breach any directors’ duties? If so, which ones and how?

Yes, Mr Daly breached the director’s duties. He was working in the company, in which several investors were interested to invest their thousands of dollars. He borrowed money from the investors, misleading clients, violating Corporation Act, and misappropriation of funds. According to the Corporation Act, it is the responsibility of the Director of the Company to keep the company protected from all sort of financial risks, and for this purpose the person must ensure that all debts are paid on time and for that he has access to all assets of the company. The same is the case here, Mr Daly had access to all financial dealing and information of the investors of the company. According to Corporation Act, Mr Daly was responsible to take strong and effective decisions in the favor of the company, but he took all decisions in the favor of his personal interests and got indulged in unethical breaching activities, such as misleading the clients and borrowing thousands of dollars from the investors. The Act clearly states that in case of financial issues to the company, the Directors are responsible to find an appropriate way to deal with the challenges faced to pay its debts when fall due. Mr. Daly not only violated the regulation but also used company’s funds in an unethical and misappropriate way. As a result of his this act, the company became unable to pay the debts. In such situation, instead of taking accounting and legal advice timely, Mr. Daly through about his personal benefits and continued breaching the duties. This resulted in financial loss to the company.

1. Did any of the other directors breach their duties? If so, who, which duty and how?

Yes, Peter Daly’s fellow director also breached the director’s duties. Daly and his fellow directors showed that they were having some financial difficulties at their home and so they used the company’s personal finance to deal with all their financial matters. They used company’s funds in a misappropriate way and used the funds for their personal investments. The Daly and his fellow Directors violated the Corporation Act, as a result of which they brought the company in a risky position, where every investor was worried and asked about will they get their money back or not? It was a challenging situation for the company, where the directors had used company’s funds in an unethical ways. When the investigators asked Daly and his fellow director regarding misappropriate usage of the funds, the Daly revealed that he used the funds to meet all his family financial matters, as he was going through several financial challenges. However, the other director revealed that he had to attend an expensive wedding in few weeks, for that he borrowed company’s funds from the investors, and used company’s money for his personal interests. No matter how did they use the money, the concern is that they breached their duties and used company’s funds in a misappropriate way. Also, they violated Corporation Act by considering their personal interests.

1. Do you think the company was trading while insolvent? Give reasons.

 The company was trading while insolvent because Mr. Daly and his Fellow director has used the investor’s money. Now, the company has to deal with all investor’s expectations, as they brought the money to keep it going. Also, the investors had no idea of what had happened in the company and they were not aware of the tricks played by Daly. Mr. Daly misguided the investors and used some of the funds to keep the company trading going, while invested other invested amount in his unregistered funds. Daly was aware that he is violating the Corporation Law, and so he did not want the investors to discover what is going on in the company. He was also aware that with such trick he can have more investors’ amount and can enjoy better profit on his unregistered funds. Though, Mr. Daly tried to defend him by claiming that his efforts brought the company in a strong position, where it can meet all its financial requirements, but still his great efforts cannot allow him to breach his duties (Nzinga, 2019).

1. If the company was trading while insolvent – are there any defences available to Mr Daly and/or other directors? If so, what are they? Give reasons.

The trading of the company is dependent on the availability of the funds. In this way Mr Daly and other Directors can be defended. As the company was trading, this simply means that company had enough funds, and some of the amount was taken by Mr. Daly and his fellow Director to meet their financial requirements. They borrowed the money from the client’s investments and thought to pay back after a short time. In this way, they did not actually harmed the company’s financial progress, but violated the Corporation Law. However, when analyzing the situation from other perspective, Mr. Daly got indulged in increasing his unregistered funds, and to think about his personal interest, which is not allowed according to Corporation Act. Also, , business judgment rule s180 is established to restrict the Directors for thinking positive for the Company and to take decision for the sake of Company’s future without considering their personal interests. Thus, the investigation revealed that Daly stored funds to his unregistered company and his fellow director used millions of dollars on weeding, which was not part of company’s activity. Thus, both were found guilty but as the company was trading while it was insolvent so the directors can be defended.

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