

Annexure A to the Other Matters Grant Guidelines: Allegations of possible misconduct—Substantiation guide

This annexure is intended to serve as a guide for liquidators on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC. It is set out as a series of tables, each listing the elements of a contravention or offence under the *Corporations Act 2001* (Corporations Act) and the likely sources of evidence or information that will need to be considered to prove each element, if ASIC commences a formal investigation into the possible misconduct.

Section	Offence or contravention	Table
180	Failure to exercise due care and diligence	Table 1
181(1)	Absence of good faith or proper purpose	Table 2
182	Improper use of position	Table 3
183	Improper use of information	Table 4
184	Reckless or intentional breach of duty	Table 5
206A	Managing a corporation while disqualified	Table 6
286/344	Failure to maintain adequate financial records	Table 7
198G	Unauthorised exercise of powers while company under external administration	Table 8
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By providing guidance on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC, ASIC is not asking the liquidator to form or obtain a legal opinion as to whether an offence or other misconduct has occurred. The guidance in this annexure is simply to alert the liquidator to the evidence that may be useful in supporting formal action over a possible offence that the liquidator reports. If the liquidator does not possess or is unaware of *any* available evidence to support an allegation, the liquidator should consider whether it does, in fact, appear that an offence or other misconduct may have been committed and whether the allegation should, in fact, be made.

This annexure is provided solely for the purpose of providing information to assist the liquidator and his or her staff and is not intended to serve as a definitive list of:

- (a) the facts that may amount to an offence or other misconduct;
- (b) the sources of material that may support allegations of offences or misconduct; or
- (c) the searches, inquiries or sources of information that ASIC may rely on in the conduct of an investigation.

Liquidators are encouraged to make their own inquiries into any possible misconduct from the material available to them.

The most credible and useful sources of evidence will generally be the books and records that a company is required to keep under the Corporations Act. A list of the books and records that a company is required to keep can be obtained from ASIC's website at www.asic.gov.au/companyrecords. These documents may provide a contemporaneous record or account of the relevant act or matter. In relation to each possible offence or contravention, liquidators should identify persons who will be able to give evidence of relevant events or documents that they sent or received. If no witnesses are identified then this may result in ASIC taking no further action.

Liquidators should note that if criminal proceedings are commenced and the results of their investigation are relied on, then it is likely that their reports to ASIC will be required to be disclosed to the Defence. Liquidators should use language that is neutral and factually based.

Table 1: Possible contravention of s180—Failure to exercise due care and diligence

Section 180: Elements of a contravention	Suggested information/sources of evidence
<p>The relevant person is a director or officer of a corporation.</p>	<p>If the person was appointed as a director or an officer</p> <p>Historical company extracts, including notification of appointment forms, certificate of incorporation.</p> <p>Company records, including the statutory file, minutes of meetings and other relevant records obtained from the company.</p> <p>If the person was not appointed as a director or officer (i.e. de facto or shadow directors/officers)</p> <p>Information demonstrating:</p> <ul style="list-style-type: none"> • the relevant person, although not appointed as director or officer, acted in the position of a director or officer; • the directors of the company were accustomed to acting in accordance with the wishes or instructions of the person (although not appointed as a director); • the relevant person had the capacity to affect significantly the company's financial standing; or • the person made or participated in making decisions that affected the whole, or a substantial part of, the business of the company, <p>may emerge from sources including:</p> <ul style="list-style-type: none"> • transcripts or records of examinations and interviews with company officers and other persons (e.g. suppliers, customers and the company's bankers) concerning the relevant person's role in the company, by reference to matters such as: <ul style="list-style-type: none"> – the nature of the transactions involved; – the size of the company and its business; – whether the relevant person acted with full discretion; – how the other persons (if they were outsiders) perceived the relevant person, i.e. whether they perceived the relevant person to be acting as a director or officer; – the dates of the transactions; and – the nature of the relevant person's involvement in the transactions; • board minutes; • board papers; • internal company documents dealing with the authority of employees; or • other documents such as memoranda that were generated contemporaneously with any decision taken by the board. These may include correspondence (by way of letter, fax or email) between: <ul style="list-style-type: none"> – any of the directors; – any of the directors and the relevant person; – any of the directors and any third party; or – the relevant person and any third party.

Section 180: Elements of a contravention	Suggested information/sources of evidence
<p>The relevant person exercised a power and discharged their duties.</p>	<p>The person’s exercise of their powers and discharge of their duties</p> <p>Transcripts or records of examinations and interviews with company officers and other witnesses concerning the actions taken by the relevant person on behalf of the company, or actions not taken that ought reasonably to have been taken.</p> <p>Identify whether the relevant person took the necessary steps to enable them to effectively guide and monitor the management of the company.</p>
<p>The relevant person did not exercise the degree of care and diligence that a reasonable person would have exercised if they were a director or officer of a corporation in the corporation’s circumstances and had the same position and responsibilities as the director or officer: s180(1).</p>	<p>Degree of care and diligence</p> <p>Information demonstrating, for example, that the relevant person:</p> <ul style="list-style-type: none"> • did not have at least a general understanding of the company and the effect that a changing economy may have on that business; • did not bring an informed and independent judgement to bear on the various matters that came to the board for decision; • was not capable of understanding the company’s affairs, including its financial position; • did not take an active interest in the affairs of the company; or • did not guide and monitor the company’s affairs, including any delegation of responsibility, but rather relied blindly on the judgement of others, <p>may emerge from sources including:</p> <ul style="list-style-type: none"> • transcripts or records of examinations and interviews with the relevant person or company officers and other witnesses concerning the relevant person’s role in the company; • internal company documents or correspondence from the relevant person; or • the absence in company books and records of advice to the relevant person or board, or of any attempts to obtain advice in relation to a particular matter or transaction.
<p>The relevant person is unable to rely on the business judgment rule (s180(2)) if they:</p> <ul style="list-style-type: none"> • did not act in good faith for a proper purpose; • had a material interest in the matter; • did not inform themselves about the matter to the extent they reasonably believed to be appropriate; or • made no decision in relation to an issue, or made a decision that they did not rationally believe was in the best interests of the corporation. 	<p>Did not act in good faith for a proper purpose</p> <p>Information demonstrating, for example:</p> <ul style="list-style-type: none"> • the consideration given by the relevant person to the decision (and its effects) and to the purpose behind the decision; • whether the power has been exercised by the relevant person in accordance with the intention for which it was conferred; • whether the action was in the best interests of the company; or • whether the relevant person allowed the company to enter into transactions that produced no benefit for the company, <p>may emerge from sources including interviews and examinations of the relevant person and company officers, company records, correspondence, board papers and minutes.</p> <p>Had a material interest in the matter</p> <p>Identify whether the outcome of the transaction materially benefited</p>

**Section 180: Elements of a
contravention**

Suggested information/sources of evidence

the relevant person from an assessment of such matters as the parties to any transactions, their relationship with the relevant person and whether, but for the relationships, the transaction was likely to have been entered into in the first place.

Did not make reasonable inquiry

Identify and assess any legal, accounting or other advice received, or inquiry made, by the relevant person concerning the transaction and its effect.

Did not make a decision

Identify whether or not the circumstances show that the relevant person made a decision.

Table 2: Possible contravention of s181(1)—Absence of good faith or proper purpose

Section 181(1): Elements of a contravention of the civil obligation	Suggested information/sources of evidence
The relevant person is a director or officer of a corporation.	See Table 1.
The relevant person exercised their powers and discharged their duties.	See Table 1.
<p>The relevant person exercised their powers and discharged their duties in a manner that:</p> <ul style="list-style-type: none"> • was not in good faith in the best interests of the corporation; or • was not for a proper purpose. 	<p>In good faith in the best interests of the corporation</p> <p>Identify what were the company’s best interests at the relevant time.</p> <p>Information demonstrating whether the director’s or officer’s conduct served those interests may be sourced from interviews, examinations, company records and minutes showing the consideration given by the relevant person and the purpose behind the decision.</p> <p>Identify whether the action was in good faith and in the best interests of the company.</p> <p>Identify any detrimental effect on the company resulting from the actions of the relevant person.</p> <p>For a proper purpose</p> <p>Information that may elicit the purpose for which the relevant power was conferred may emerge from sources including:</p> <ul style="list-style-type: none"> • the company’s constitution; • internal memoranda; or • company operating procedures. <p>Information that may demonstrate the authorised roles, powers, functions, delegations and duties of the relevant person may emerge from a review of company operating procedures and job descriptions and from interviews and examinations of company personnel and third parties (e.g. suppliers).</p> <p>Identify whether the power has been exercised by the relevant person in accordance with the purpose for which it was conferred.</p>

Table 3: Possible contravention of s182—Improper use of position

Section 182: Elements of a contravention of the civil obligation	Suggested information/sources of evidence
The relevant person is a director, secretary, other officer or employee of a corporation.	<p>The person is a director, secretary or officer See Table 1.</p> <p>The person is an employee Extracts from company personnel and wage records (including taxation and superannuation records) to establish that the relevant person is, or was at the time of the transaction, an employee of the company.</p>
<p>The relevant person:</p> <ul style="list-style-type: none"> • improperly used their position... 	<p>Improper use of position</p> <p>Information demonstrating the authorised roles, powers, functions, delegations and duties of the relevant person from a review of company operating procedures and job descriptions and from interviews and examinations of company personnel and third parties (e.g. suppliers).</p> <p>Identify whether the power has been exercised by the relevant person in accordance with delegated authority and with the intention for which it was conferred.</p> <p>Consider file notes of interviews and examinations of the relevant person, company personnel and third parties (e.g. suppliers) about the purpose or purposes behind the conduct.</p> <p>Identify whether those purposes were improper.</p>
<ul style="list-style-type: none"> • to gain an advantage for themselves or someone else or cause detriment to the corporation. 	<p>Gain an advantage for themselves or others, or cause detriment to the company</p> <p>Information demonstrating the intended potential benefit or actual benefit to the relevant person or others, or detriment to the company, arising from the actions taken by the relevant person, may be sourced from company documents, banking records, financial accounts, diary notes of discussions with company officers and third parties, interviews and examinations of the relevant person and company officers.</p>

Table 4: Possible contravention of s183—Improper use of information

Section 183: Elements of a contravention of the civil obligation	Suggested information/sources of evidence
A person is or has been a director or other officer or employee of a corporation.	<p>The person is or has been a director, secretary or officer See Table 1.</p> <p>The person is or has been an employee See Table 3.</p>
The relevant person obtained the information by virtue of their position within the company, and not from some other unrelated source, and used the information.	<p>Possession of information through role in company and information use</p> <p>Information demonstrating that:</p> <ul style="list-style-type: none"> • the relevant person possessed and used certain information; or • the information was available to the relevant person by virtue of them fulfilling the duties associated with their engagement with the company, and not from an unrelated source, <p>may be sourced from records of interviews, minutes of meetings, diary notes, correspondence, company operating procedures and other company documents.</p> <p>Identify whether the use of that information was improper.</p>
The relevant person used the information to gain an advantage for themselves or someone else or to cause detriment to the corporation.	<p>Gain an advantage for themselves or others, or cause detriment to the company</p> <p>See Table 3.</p>

Table 5: Possible contravention of s184—Reckless or intentional breach of duty

Section 184: Elements of the offence	Suggested information/sources of evidence
<p>A director or officer was reckless or intentionally dishonest and...</p> <p>exercised their powers and discharged their duties in a manner that:</p> <ul style="list-style-type: none"> • was not in good faith in the best interests of the corporation; or • was not for a proper purpose. 	<p>The person is a director or officer</p> <p>See Table 1.</p> <p>Dishonesty</p> <p>‘Dishonesty’ in the ordinary sense is judged objectively by the standards of ordinary decent people. Has the person:</p> <ul style="list-style-type: none"> • engaged in deception (lies, mistruths and misleading statements); • made or relied upon representations or promises which they knew were false or would not be carried out; • concealed facts which they knew they had a duty to disclose; or • engaged in conduct which they knew they had no right to engage in? <p>Evidence of dishonesty may emerge from sources including:</p> <ul style="list-style-type: none"> • falsified records or incorrect record keeping (e.g. balance sheets, financial accounts, minutes of meetings); • statements of financiers/creditors/suppliers showing they have been misled or deceived; • valueless cheques and statements of recipients’ attempts to bank; • theft or misappropriation of company funds or property; or • attempts to cover up or conceal the misconduct. <p>Recklessness</p> <p>‘Recklessness’ in the ordinary sense means lacking caution, acting regardless of the circumstances, rash, heedless of danger, without thought to the possibility of risk, or having recognised the risk, blatantly disregarding it and acting anyway.</p> <p>Evidence of recklessness may emerge from sources including:</p> <ul style="list-style-type: none"> • acting contrary to advice warning against the conduct/transaction; or • failure to obtain advice or engage an expert in circumstances where a reasonable person would obtain such advice or engage an expert. <p>The person’s exercise of their powers and discharge of their duties</p> <p>See Table 1.</p> <p>In good faith in the best interests of the corporation</p> <p>See Table 2.</p> <p>For a proper purpose</p> <p>See Table 2.</p>

Section 184: Elements of the offence	Suggested information/sources of evidence
<p>A director, officer or employee used their position or information gained from their position dishonestly:</p> <ul style="list-style-type: none"> • with the intention of gaining for themselves or someone else an advantage, or causing detriment to the corporation; or • recklessly as to whether they may gain an advantage for themselves or someone else, or cause detriment to the corporation. 	<p>The person is a director or officer See Table 1.</p> <p>The person is an employee See Table 3.</p> <p>Improper use of position See Table 3.</p> <p>Improper use of information gained from their position See Table 4.</p> <p>Dishonesty See above.</p> <p>With the intention of gaining an advantage for themselves or others, or to cause detriment to the company See Table 3.</p> <p>Recklessly as to whether they may gain an advantage for themselves or someone else, or cause detriment to the company For recklessness, see above. See also Table 3.</p>

Table 6: Possible contravention of s206A—Managing a corporation while disqualified

Section 206A: Elements of the offence	Suggested information/sources of evidence
<p>A person is disqualified from managing corporations under Pt 2D.6 of the Corporations Act.</p>	<p>Person is disqualified at the time of the conduct</p> <p>Information demonstrating that the person is disqualified, e.g. pursuant to the following provisions in Pt 2D.6:</p> <ul style="list-style-type: none"> • s206B(1)—a person is automatically disqualified upon conviction on indictment of specified offences, including: <ul style="list-style-type: none"> – one that concerns conduct significantly affecting the business or financial standing of a corporation; – one that involves dishonesty and is punishable by imprisonment for at least 3 months; or – a contravention of the Corporations Act that is punishable by imprisonment for a period greater than 12 months; • s206B(3)—a person is disqualified if the person is an undischarged bankrupt under the law of Australia, its external territories or another country; • s206B(4)—a person is disqualified if the person has executed a personal insolvency agreement under Part X of the <i>Bankruptcy Act 1966</i>, or under a similar law of an external territory or a foreign country, if the terms of the agreement have not been fully complied with; • s206C(1), 206D(1), 206E(1)—a person is disqualified by the court, on application by ASIC; • s206EA—a person is disqualified by court order under s86E of the <i>Trade Practices Act 1974</i>; or • s206F—a person is disqualified by ASIC, <p>may emerge from the following sources:</p> <ul style="list-style-type: none"> • a criminal history search; • ASIC banned person search (see www.fido.gov.au — Banned People List); • AFSA (Australian Financial Security Authority) search; or • file notes of interviews and examinations of the relevant person, company personnel and third parties.

Section 206A: Elements of the offence	Suggested information/sources of evidence
<p>The relevant person commits an offence if:</p> <ul style="list-style-type: none"> • they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; • they exercise the capacity to affect significantly the corporation's financial standing; or • they communicate instructions or wishes to the directors of the corporation: <ul style="list-style-type: none"> – knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or – intending that the directors will act in accordance with those instructions or wishes. <p>Note: Advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation is excluded.</p>	<p>Details of involvement in managing the corporation</p> <p>Documents, correspondence, diary notes of discussions and interviews with employees, creditors and other third parties in relation to the relevant person's ongoing involvement in the management of the company; including information about:</p> <ul style="list-style-type: none"> • the size and nature of the transactions involved; • the parties involved in the transactions; • the dates of the transactions; and • the relevant person's role and involvement in the transactions and within the company generally. <p>Minutes of meetings of the board disclosing the relevant person's involvement in decision making.</p> <p>Statements from third parties, documents and other correspondence signed by the relevant person disclosing their ability to direct the affairs of the company.</p> <p>Material that may show that the relevant person was a cheque signatory.</p>

Table 7: Possible contravention of s286/344—Failure to maintain adequate financial records

Section 286/344: Elements of the offence	Suggested information/sources of evidence
<p>Attempts have been made to recover or inspect all books of the company under s530B.</p>	<p>The person is a director</p> <p>See Table 1.</p> <p>Material showing attempts to recover records</p> <p>Material showing all attempts to gain possession of company books including:</p> <ul style="list-style-type: none"> • copies of all correspondence to all parties requesting delivery or inspection of company books under s530B; • copies of any responses to this correspondence and file notes of telephone discussions; and • material showing that this correspondence has been received and the parties are aware of the obligation to deliver all company books in their possession. <p>Material relating to the records received</p> <p>Material relating to the company books received from each party including:</p> <ul style="list-style-type: none"> • a listing of the records received by the liquidator and who delivered them; and • details of any reasonable excuses provided for not delivering the company books.
<p>The financial records delivered do not correctly record and explain the entity's transactions and financial position and performance, and are not adequate to enable true and fair financial statements to be prepared and audited.</p>	<p>An assessment as to the adequacy of financial records</p> <p>A statement as to what the liquidator considers would constitute the minimum financial records for the particular company to enable the company to prepare financial statements that correctly record and explain its transactions and financial position and performance, and that would enable true and fair financial statements to be prepared and audited.</p> <p>A statement by the liquidator as to why the financial records in their possession do not satisfy the requirements of the Corporations Act, namely why the financial records do not accurately record and explain the transactions and financial position and performance of the company or would not enable the preparation of financial statements that could be audited.</p> <p>Where appropriate, a statement concerning non-compliance with appropriate accounting standards.</p>
<p>An assessment of whether the director's failure to secure compliance with s286 was dishonest: s344(2)</p>	<p>Was the director dishonest?</p> <p>Material showing that the failure by the director to secure compliance of the company with s286 was dishonest, such as evidence of destruction of records or evidence of a deliberate decision not to keep records so as to avoid detection of an offence. See also Table 5 as regards proof of dishonesty.</p>

Table 8: Possible contravention of s198G—Unauthorised exercise of powers while company under external administration

Section 198G: Elements of the offence	Suggested information/sources of evidence
While a company is under external administration...	<p>Period when power must not be exercised</p> <p>Information demonstrating that the company is under administration, a liquidator or a provisional liquidator has been appointed in relation to the company, including the relevant court order or deed of appointment.</p>
an officer must not purport to perform or exercise a function or power of that office.	<p>An officer</p> <p>Confirm that the person is an officer of the company: see Table 1.</p> <p>Confirm that the officer's actions are not subject to an exception under s198G(3) or (4), for example if the company has executed a deed of company arrangement which has not terminated, or the officer is acting:</p> <ul style="list-style-type: none"> • as the external administrator of the company; • with the written approval of the external administrator or the court; or • in circumstances which, despite the fact the company is under external administration, the officer is permitted by the Corporations Act to act. <p>Details of the unauthorised exercise of the power</p> <p>Details of the circumstances surrounding the exercise of the power, including:</p> <ul style="list-style-type: none"> • the date(s) and nature of the exercise of the power; • the parties involved in the exercise of the power; • all relevant documentation relating to the exercise of the power (e.g. signed letters, agreements or bank withdrawal slips); and • statements from creditors and other third parties either involved in the transactions or having knowledge of the person's exercise of the power of an officer.

Table 9: Possible contravention of s588G—Trading while insolvent

Section 588G: Elements of the offence	Suggested information/sources of evidence
The relevant person is a director.	<p>The person is a director</p> <p>See Table 1.</p>
The date the company became insolvent	<p>Date of insolvency</p> <p>Analysis of the balance sheet including:</p> <ul style="list-style-type: none"> • analysis of net asset position and changes over time; • analysis of working capital and deterioration over time; • analysis of current ratio/quick ratio and changes over time; • analysis of ageing of debtors and creditors and changes over time; • assessment of collectability of debts; • deterioration of cash over time; • analysis of when debts become due and payable and the existence of repayment arrangements or deferred terms arising from a course of dealings; and • material showing payments to creditors of rounded sums not reconcilable to specific invoices. <p>Analysis of trading history including:</p> <ul style="list-style-type: none"> • material showing a history of trading losses; and • material showing deteriorating gross margins or increasing expenses as a percentage of sales. <p>Analysis of other indicators of insolvency including:</p> <ul style="list-style-type: none"> • information or material that may show an inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts; • information or material that may show an inability to raise debt or equity finance, including a poor relationship with the current banker, and inability to borrow further funds; • increasing level of loans from third parties to support working capital; • information or material that may demonstrate non-payment of statutory liabilities (e.g. superannuation, GST, other taxes); • details of unexplained resignation of directors or high turnover of key personnel; • information or material that may demonstrate non-payment of insurance premiums; • poor/inadequate books and records; • details of dishonoured cheques; • details of proceedings commenced to recover debts owed by the company; • details of any admissions of financial difficulties or inability to pay; • information or material that may show a change in trading terms to COD; • information or material that may indicate special arrangements

Section 588G: Elements of the offence	Suggested information/sources of evidence
	<p>with selected creditors;</p> <ul style="list-style-type: none"> • information or material that may show that the overdraft facility was regularly at its limit or that the limit was exceeded; • information or material that may show cheques being drawn but not mailed to creditors in payment of outstanding debts; and • information or material that may show post-dated cheques being issued.
<p>The director had reasonable grounds to suspect the company was insolvent or would become insolvent by incurring the debt, or a reasonable person in a like position would have had reason to suspect.</p>	<p>Reasonable grounds to suspect insolvency</p> <p>Details of the basis on which the director had reasonable grounds to suspect the company was insolvent, including:</p> <ul style="list-style-type: none"> • financial statements that disclose a history of serious shortage of working capital, unprofitable trading and increasing accumulated losses; • poor or deteriorating cash flow; • difficulties paying creditors, including the existence of recovery proceedings (letters from solicitors, court proceedings and statutory demands from creditors), as well as increasing ageing of accounts payable; • non-payment of statutory debts (e.g. superannuation, GST); • poor or deteriorating working capital; • increasing difficulties collecting debts; • overdraft facilities at the limit; and • file notes of discussions with creditors in which they detail their discussions with the director attempting to obtain payment of outstanding debts.
<p>The extent of debts incurred after the company became insolvent</p>	<p>Details of debts incurred while insolvent</p> <p>An analysis of debts incurred while the company was insolvent, including an analysis of:</p> <ul style="list-style-type: none"> • when debts were incurred, by reference to contracts, trading terms and history, together with an assessment of repayment terms agreed with particular creditors (refer to correspondence files); • the creditors' ageing ledger and any trend in changes to ageing; • superannuation and taxation records, to ascertain the ageing and extent of outstanding amounts; and • details of the involvement of the director in the incurring of any of those debts.
<p>Analysis of whether 'safe harbour' protection is available</p>	<p>Analysis of 'safe harbour' protection (s588GA)</p> <p>Evidence that the director has started developing one or more courses of action that are reasonably likely to lead to a better outcome for the company, and a debt is incurred directly or indirectly in connection with any such course of action within the period specified in 588GA(1)(b), for example:</p> <ul style="list-style-type: none"> • an assessment of the steps taken by the director to inform themselves of the financial position of the company, including an analysis of any legal or accounting advice received, adequacy and

Section 588G: Elements of the offence	Suggested information/sources of evidence
	<p>timeliness of management accounts, existence of cash flow or trading budgets, together with diary notes of discussions with directors, employees and third parties relating to the director's understanding of the financial position;</p> <ul style="list-style-type: none"> • an assessment of the steps taken by the director, if relevant, to prevent misconduct by officers or employees that could adversely affect the company's ability to pay all its debts; • the steps taken to ensure the company is maintaining adequate financial records; • evidence that the director has engaged an appropriately qualified entity and provided them with sufficient information to give appropriate advice about whether the course of action is reasonably likely to lead to a better outcome for the company; • evidence that a plan is being developed and implemented to restructure the company's affairs to improve its financial position; and • evidence that the appropriately qualified advisor is of the opinion that the course of action is reasonably likely to lead to a better outcome for the company. <p>Analysis of whether the director is excluded from relying on the 'safe harbour' protection on the basis that:</p> <ul style="list-style-type: none"> • there is evidence that the company has failed to pay employee entitlements by the time they fall due; or • there is evidence that the company has failed to give returns, notices, statements, applications or other documents as required by the taxation laws; and • the failures above meet the criteria in 588GA(4)(b); or • if relevant, there is evidence that, after the relevant debt has been incurred, the director has failed to comply with paragraph 429(2)(b), or subsections 475(1), 497(4) or 530A(1) of the Corporations Act; and • the failures above amount to less than substantial compliance with the relevant provision of the Corporations Act; and • there is no court order in force in relation to the failures mentioned above.
Analysis of any defence available to the director	<p>Analysis of available defences (s588H)</p> <p>Reasonable grounds to expect solvency:</p> <ul style="list-style-type: none"> • an assessment of the steps taken by the director to inform themselves as to the financial position of the company, including an analysis of any legal or accounting advice received, adequacy and timeliness of management accounts, existence of cash flow or trading budgets, etc, together with diary notes of discussions with directors, employees and third parties relating to the director's understanding of the financial position. <p>Reliance on third-party information concerning solvency:</p> <ul style="list-style-type: none"> • an assessment of the adequacy of the advice provided by the third party, together with an assessment of whether the person was sufficiently expert to provide such solvency advice; and

Section 588G: Elements of the offence	Suggested information/sources of evidence
	<ul style="list-style-type: none"> • diary notes of the steps taken by the director to question the third party in order to gain understanding of the advice provided. <p>Not involved in management at the time the debt was incurred:</p> <ul style="list-style-type: none"> • details of why the director was not involved in management at the time, by analysis of medical records (to the extent they are available), travel records (to the extent they are available), and records of discussions with the director and third parties concerning the reasons that prevented the director from being involved in the management of the company at the time each debt was incurred. <p>Reasonable steps taken to prevent the company incurring the debt:</p> <ul style="list-style-type: none"> • an assessment of actions taken to prevent the company incurring the debt (including any action taken to appoint an administrator), from an analysis of correspondence, minutes of meetings, and diary notes of discussions with the director, staff and third parties.
<p>An assessment of whether the director's failure to prevent the incurring of the post-insolvency debt was dishonest</p>	<p>Was the director dishonest in failing to prevent the company incurring the debt?</p> <p>Material that may show that the person had an opportunity to prevent the company from incurring the debt and did not, including:</p> <ul style="list-style-type: none"> • file notes of discussions with the directors, employees and creditors concerning the circumstances surrounding the incurring of particular debts; and • review of correspondence or other documents relating to the circumstances surrounding the incurring of the debt. <p>Material that may show that the failure was dishonest (i.e. the debt was incurred with the knowledge that it would produce adverse consequences, the failure was intentional, wilful or deliberate, and it included an element of deceit or fraud), including:</p> <ul style="list-style-type: none"> • file notes of discussions with the directors, employees and creditors concerning the circumstances surrounding the incurring of particular debts; and • review of correspondence or other documents relating to the circumstances surrounding the incurring of the debt. <p>As regards proof of dishonesty, see also Table 5.</p>

Table 10: Possible contravention of s590—Offences by officers or employees of certain companies

Section 590: Elements of the offence	Suggested information/sources of evidence
<p>The relevant person is a past or present officer or employee.</p>	<p>The relevant person is a director or officer</p> <p>See Table 1.</p> <p>The relevant person is an employee</p> <p>See Table 3.</p>
<p>The relevant person, when capable of doing so, has failed to disclose all property (including books) of the company.</p>	<p>Failure to disclose property</p> <p>Books (including financial statements), documents, diary notes of discussions with employees and other third parties that may show:</p> <ul style="list-style-type: none"> • the company’s alleged ownership of the relevant asset at the relevant date; and • the existence of undisclosed books relating to the affairs of the company. <p>Material showing attempts to locate or recover those assets, including discussions with the relevant person or persons.</p>
<p>The relevant person, when capable of doing so, has failed to disclose details of property disposed of within 10 years of the relevant date, outside the ordinary course of business.</p>	<p>Failure to account for property disposed of outside the ordinary course of business</p> <p>Books (including financial statements), documents, diary notes of discussions with employees and other third parties that may show:</p> <ul style="list-style-type: none"> • the company’s reported ownership of the asset at a moment in time; • the date and nature of the transaction; • the parties to the transaction; and • that the disposal of the property was not in the ordinary course of business (e.g. it was to a related party, it was an unusual ‘one-off’ transaction).
<p>The relevant person has, within 10 years of the relevant date or after that time, made false entries into the books of the company.</p> <p>The relevant officer within 10 years of the relevant date fraudulently concealed or removed property (including debts) of the company, fraudulently obtained credit on behalf of the company or property the company has not paid for, or participated in the fraudulent alteration of, or omission from, the books relating to the company.</p>	<p>Falsification of books</p> <p>Material that may demonstrate the false nature of the books, such as documents held by a third party (e.g. bank statements, receipts and other records from independent third parties) that are inconsistent with or contradict the records maintained by the relevant person.</p> <p>Information or material from employees regarding the preparation or creation of the relevant books that goes to show the falsity of those books.</p>
<p>The relevant person engaged in conduct that prevented the production of books relating to the company’s affairs.</p>	<p>Conduct preventing delivery of records</p> <p>The material that may demonstrate such conduct will depend upon the circumstances of each matter.</p>

Section 590: Elements of the offence	Suggested information/sources of evidence
<p>The relevant person has, within 10 years of the relevant date or after that time, made false representations to creditors in order to obtain their consent to an agreement relating to the affairs of the company or the winding up.</p>	<p>Misrepresentations to creditors</p> <p>Information or material relating to the making of the alleged misrepresentation (e.g. file notes of conversations, letters or other written communications to creditor(s) and statements from creditor(s) that the representation was made).</p> <p>Material that may disprove the substance of the alleged misrepresentation (i.e. documents or other records that contradict the substance of the statement). Any material that may show that the relevant person had no reasonable grounds to believe that the statement was correct at the time the alleged misrepresentation was made.</p>
<p>The relevant person has failed to advise the liquidator of the fact that they believe or know that a false debt has been proved by a person.</p>	<p>Failure to advise of proof of false debt</p> <p>Material or information that may show that the relevant person knew or believed (or had sufficient information that they should have known) that a creditor had proved a false debt.</p> <p>Material or information that may show that the relevant person failed to inform an appropriate officer of their knowledge/belief. (This material or information will usually be negative, e.g. 'No one was informed'.)</p>

Table 11: Possible contravention of s596AB—Entering into agreements or transactions to avoid employee entitlements

Section 596AB: Elements of the offence	Suggested information/sources of evidence
<p>Relevant agreements or transactions were entered into that affect the recovery of employee entitlements.</p>	<p>Relevant agreements include agreements, arrangements or understandings, whether formal or informal, or partly formal and partly informal, whether written or oral, or partly written and partly oral, and whether or not having legal or equitable force, and whether or not based on legal or equitable rights.</p> <p>A transaction may include:</p> <ul style="list-style-type: none"> • a conveyance, transfer or other disposition of property of the entity; • a security interest created by the entity over property of the entity; • a guarantee given by the entity; • a payment made by the entity; • an obligation incurred by the entity; • a release or waiver by the entity; or • a loan to the entity, <p>and includes completed transactions, ones given effect to, or terminated transactions.</p> <p>A reference to a <i>relevant agreement or transaction</i> includes:</p> <ul style="list-style-type: none"> • a relevant agreement and a transaction; • a series or combination of relevant agreements or transactions; • a series of relevant agreements; or • a series of transactions. <p>The company does not have to be a party to the agreement or transaction, and approval by a court of the agreement or transaction does not avoid liability under this section.</p> <p>Note: Section 596AB does not apply to agreements or transactions entered into:</p> <ul style="list-style-type: none"> - under a compromise or agreement approved by the court under s411 of the Corporations Act; - under a deed of company arrangement; or - by a liquidator or provisional liquidator during the course of winding up the company. <p>Details of the relevant agreement or transaction</p> <p>Details of the relevant agreement or transaction entered into with an intention of, or with intentions that include the intention of, avoiding or preventing the recovery of employee entitlements or significantly reducing the amount of employee entitlements that can be recovered, including:</p> <ul style="list-style-type: none"> • the date(s) and nature of the transaction (e.g. the restructuring of a company's affairs to put employees in a separate entity that does not own any assets); • the parties involved in the transaction; and • all relevant documents relating to the transaction.

Section 596AB: Elements of the offence	Suggested information/sources of evidence
<p>An intention of the relevant agreement or transaction was to avoid, prevent recovery or significantly reduce the amount of employee entitlements that can be recovered.</p>	<p>Intention to avoid or prevent or reduce the recovery of employee entitlements</p> <p>Material or information that may indicate the intent of the transaction, including:</p> <ul style="list-style-type: none"> • any advice obtained by the company concerning the transaction; • any correspondence concerning the transaction; • minutes of meetings or other documents in which the transaction is considered; • records of discussions with directors and other parties concerning the purpose of entering into the transaction; and • an assessment of the reasonableness of any commercial rationale given by directors for entering into the transaction.
<p>Recklessness as to whether the relevant agreement or transaction will avoid or prevent recovery of, or significantly reduce the amount of, employee entitlements that can be recovered</p>	<p>Evidence of recklessness</p> <p>Material or information that may indicate that:</p> <ul style="list-style-type: none"> • the person was aware of the substantial risk that the relevant agreement or transaction would avoid, prevent or significantly reduce the recovery of employee entitlements; and • having regard to all the circumstances known to the person at the time, it was unjustifiable to enter into the relevant agreement or transaction. <p>This material or information could include:</p> <ul style="list-style-type: none"> • any advice obtained by the company concerning the transaction; • any correspondence concerning the transaction; • minutes of meetings or other documents in which the transaction is considered; • records of discussions with directors and other parties concerning the purpose of entering into the transaction and its effect; and • an assessment of the reasonableness of any commercial rationale given by directors for entering into the transaction.
<p>The effect of the transaction was to prevent or reduce the recoverability of employee entitlements.</p>	<p>Impact on recovery of employee entitlements</p> <p>Material and information showing the impact on the recovery of entitlements, including:</p> <ul style="list-style-type: none"> • details of outstanding employee entitlements from an analysis of wage records, the report on company activities and property (ROCAP) and proofs of debt; and • details of how the transaction has had the effect, and the quantum of the effect, on the recovery by employees of outstanding entitlements.