



## ASIC guidance on director's duties to prevent insolvent trading

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Section 588G of the *Corporations Act 2001* (Cth) imposes a positive duty on directors of a company to prevent insolvent trading. Due to the economic downturn, the Australian Securities and Investments Commission (ASIC) believed the market, which includes directors and professional advisors, would benefit from clarification as to what factors ASIC considers prior to commencing an investigation into insolvent trading.

On 29 July 2010, following intensive consultation and input from a variety of stakeholders, ASIC released regulatory guide 217 *Duty to Prevent Insolvent Trading: Guide for Directors*. The guide sets out the relevant law in relation to insolvent trading, including available defences. Importantly, Part B sets out four key principles as to what directors should do in order to meet their obligations to prevent insolvent trading. The principles are that directors should:

1. Ensure proper financial records are kept by the company and keep themselves informed about the company's financial position and affairs at all times so that they can reasonably form a view about:
  - (a) the company's present financial viability, and
  - (b) the impact of incurring any further debt".
2. Regularly assess a company's solvency and immediately take positive steps in investigating financial difficulties.
3. Where there are reasonable grounds to suspect that the company is in financial difficulty, obtain appropriate advice from a "suitably qualified, competent and reliable person" about the financial position of the company and how any difficulties may be overcome.
4. Consider advice received and "act appropriately" in a "timely manner".

The regulatory guide expands on the above points, and then outlines factors which ASIC will look at in order to assess whether a director has breached their duty to prevent insolvent trading. These factors are annexed as a table to the regulatory guide, and directors should review them to help determine whether they are taking sufficient steps to assess the solvency of the company. A copy of regulatory guide 217 is available from the ASIC website at [www.asic.gov.au/rg](http://www.asic.gov.au/rg).

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