

	consideration is not a sum certain in money)	agreement is entered into
4	redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option
5	issuing redeemable preference shares that are redeemable otherwise than at its option	when the shares are issued
6	financially assisting a person to acquire shares (or units of shares) in itself or a holding company	when the agreement to provide the assistance is entered into or, if there is no agreement, when the assistance is provided
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into	when the transaction is entered into

588G(2). By failing to prevent the company from incurring the debt, the person contravenes this section if:

- (a) the person is aware at that time that there are such grounds for so suspecting; or
- (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

The elements of the duty

- **Who is liable?** [s 588G(1)(a) of the *Corporations Act 2001* (Cth)]
 - A person who is a **director at the time** when the company incurs the relevant debt.
 - Persons not formally appointed as directors but who act as **de-facto or shadow** directors are also subject to the duty.
- **Incurs a debt** [s 588G(1)(a) of the *Corporations Act 2001* (Cth)]. The obligation must be an **ascertainable debt** involving an obligation to pay a liquidated sum instead of an obligation to pay unliquidated damages or equitable compensation for breach of fiduciary duty by the director [*Hawkins v Bank of China* (1992) 26 NSWLR 562]:
 - "Debt" was held to include a contingent liability such as a guarantee.
 - "Incurs" was held to include the undertaking of an engagement to pay a sum of money at a future time, even if the engagement is conditional and the amount involved is uncertain.
- **When is debt incurred?** [table in s 588G(1A) of the *Corporations Act 2001* (Cth)]. This is important because s 588G(1)(b) of the *Corporations Act 2001* (Cth) requires proof that the company is insolvent at the time the transaction **took place**.
- **Insolvency.** The test for insolvency is outlined in s 95A of the *Corporations Act 2001* (Cth):
 - 95A(1).** A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
 - 95A(2).** A person who is not solvent is insolvent.
- Even if company owed substantial amounts of money it must be foreseeable that this money will be paid in sufficient time to pay current debts. Hence the relevant test is a 'cash flow' test not an 'assets over liabilities' test [*Metropolitan Fire Systems Pty Ltd v Miller* (1997) 23 ACSR 699].
- **Rebuttable presumption of insolvency** – s 588E of the *Corporations Act 2001* (Cth) operates to assist in proving that a company was insolvent at the relevant time:

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