

COVID-19: (AUSTRALIA) TEMPORARY CHANGES TO INSOLVENCY LAWS TO SUPPORT BUSINESSES DURING CORONAVIRUS CRISIS

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**This information is accurate as of 9.00 am Monday 23 March 2020 (local AEDT time) and is subject to change as this situation evolves.*

In an unprecedented move the Federal Government has announced temporary changes to some aspects of existing insolvency laws as part of the plan to try and keep businesses operating during this unique health crisis time.

INSOLVENT TRADING

With one of the most stringent insolvent trading regimes in the world, it is not surprising that one of the announcements that the government has made is a "softening" of these laws for six months. During this time, directors will be relieved from their duty to prevent a company from trading whilst insolvent with respect to debts incurred in the ordinary course of carrying on its business. It flows that directors will not become personally liable for such debts as would normally be the case under the normal insolvent trading regime. It is hoped that this will give directors confidence to continue to trade, to the extent practically possible, during this extraordinary time we find ourselves in. The government has made it clear that this relief only relates to debts incurred in the ordinary course of business and not where dishonesty and fraud are involved.

TEMPORARY INCREASE IN THRESHOLDS AND TIME TO COMPLY

For both personal and corporate insolvency matters, the government is providing a temporary increase to the amount required to issue a Statutory Demand against a company and a Bankruptcy Notice against an individual. The government is also increasing the time within which a company and an individual has to comply with a Statutory Demand and a Bankruptcy Notice respectively. Set out below are the new temporary changes:

1. Statutory Demand

The threshold is increasing from \$2,000 to \$20,000. The time period within which to comply is going from 21 days to six months.

2. Bankruptcy Notice

Similarly, the threshold amount for a Bankruptcy Notice to be issued is also increasing, this time from the current amount of \$5,000 to \$20,000. The government is also increasing the time within which to comply with a Bankruptcy Notice from the existing 21 days to six months.

In addition to the above matters, there is also change to the time period so far as it relates to where a debtor declares an intention to present a debtors petition. Currently, there is a period of protection for the debtor of 21 days before an unsecured creditor can take action to recover debts. In line with the other extension of time periods, this protection is increasing to six months. This, the government hopes, will allow a debtor more time to consider the options that are best for them.

The government has said that all of the changes set out above will apply for six months.

ATO ENFORCEMENT MAY BE SUSPENDED

Businesses may also seek tailored reductions in, or deferrals of, payments owing to the ATO. Consistent with the temporary relief on time to comply with Statutory Demands and Bankruptcy Notices, the ATO may also defer enforcement action including Director Penalty Notices and winding up action.

POWER TO THE TREASURER UNDER THE CORPORATIONS ACT

As the impact of COVID-19 is moving so rapidly on every front, the issues confronting businesses will also continue to move at a pace which the legislature and regulators may struggle to keep up with. Whilst there is power within Australian Securities and Investment Commission (ASIC) to provide relief to companies from statutory compliance obligations contained within the *Corporations Act 2001* (Act), the exercise of this power requires companies to apply to ASIC for such relief. With the pace of change before us, companies may not have the time to make an application and ASIC may not have the capacity to determine such applications. In addition there may be disruptions to the Federal Parliament sitting that might be required to pass necessary legislation.

With all of this in mind, the Treasurer is being given temporary instrument power in the Act to amend provisions of it to provide relief or modify obligations to enable a company to comply with requirements during this time. This power will apply for 6 months and any instrument made by the Treasurer will apply for 6 months from the date it is made.

WHAT ELSE MIGHT ASSIST?

At this stage, we foresee that in circumstances in which the broadest ranging temporary moratorium against creditor action (including the commencement of court action) remains the appointment of administrators, that step may still be the only viable option for some companies. The appointment of administrators also gives a company the ability to potentially avoid having critical supply contracts terminated for reason only of the company's insolvency, thanks to the 2018 ipso facto legal reforms.

BENEFITS OF EXTENDING THE CONVENING PERIOD IN ADMINISTRATIONS

One complementary measure (which might be something the Treasurer could utilise the instrument power under the Act referred to above) would be the temporary extension of the convening period applying to Voluntary Administrations. Extending the convening period to, say, 6 months (for consistency with the other temporary measures) would potentially enable companies to avoid entering a liquidation scenario prematurely without having the opportunity for their business to be given the best chance to survive the extraordinary and unforeseeable economic impacts of the Coronavirus.

An extension of the period is likely to assist in circumstances where it will be exceptionally difficult for administrators to make recommendations about the company's future while social and economic turmoil continues unabated and where the ability to restructure a company or sell assets in order to ensure a company's solvency may be impossible in the short term.

HOLDING DEED OF COMPANY ARRANGEMENT (HOLDING DOCA)

An alternative to an extension of the convening period would be for a company which is seeking a general extension of the administration moratorium to propose a Holding DOCA after entering voluntary administration. Any Holding DOCA proposed for creditor approval would need to specify the assets which will be committed to the deed fund for distribution to creditors, provide for the duration of the holding moratorium period and include a regime for interim reporting to creditors during that period under the supervision of the deed administrator. Sufficient information would need to be available to the administrators for them to be able to recommend to creditors that the Holding DOCA may offer a better outcome than an immediate winding up of the company.

CONCLUSION

Small and medium businesses, which are the "life blood" of the economy, need every type of support possible to give them any chance that they will be able to survive the catastrophic economic impact of the Coronavirus. The speed at which the Federal Government is giving the temporary legal relief, in conjunction with the economic stimulus package, is to be commended. It is positive that there may also be scope for further complementary relief to be given, as the unprecedented social and economic situation continues to develop at breakneck speed.

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