

# IN FOCUS

April 2020

HALL CHADWICK 



The Coronavirus Economic Reform Package Omnibus Act 2020 (Cth) took effect on 25 March 2020.

It makes temporary amendments to Australian Insolvency and Corporations Law that are intended to provide a safety net to otherwise profitable and viable businesses which face financial distress as a result of the economic impact of coronavirus and health measures to prevent its spread.

### Corporations - Statutory Demands

ISSUE	CURRENT LAW	NEW LAW
The statutory minimum for a creditor to issue a statutory demand	\$2,000	Temporarily increased to \$20,000 (for a period of 6 months)
The period within which a debtor must respond to a statutory demand	21 days	Temporarily increased to 6 months

#### Points to note

- The legislation takes effect from 25 March 2020. For statutory demands issued 24 March 2020 and prior, the normal law applies- i.e \$2000 and 21 days.
- Accordingly as the law does not have retrospective effect, those companies subject to outstanding unsatisfied statutory demands which have been served are not provided with a six month period of grace, being demands already in the system.
- The temporary changes apply to winding up in insolvency grounded on an unsatisfied statutory demand.
- It does not apply to winding up on other grounds eg the just and equitable ground.
- Presumably, a winding up application grounded upon demonstrated evidence of insolvency is similarly not subject to the new restrictions.
- As the legislation is self repealing- it covers the period 25 March 2020 to 24 September 2020.
- Methods of enforcement through the Courts such as writs of possession, writs of execution and garnishee notices are unaffected by the legislation. The issue here is of course the respective courts, respective responses to the coronavirus crisis.

### Individuals - Bankruptcy

ISSUE	CURRENT LAW	NEW LAW
Minimum Debt	\$5,000	Temporarily increased to \$20,000
Timeframe in which a debtor must comply with a bankruptcy notice	21 days	Temporarily increased to 6 months
Timeframe where a debtor is protected from enforcement action following presentation of a declaration of intention to prevent a debtors intention	21 days	Temporarily increased to 6 months

#### Points to note

- Similar to Corporations, as the law does not have retrospective effect bankruptcy notices already in the system are subject to the normal rules.
- Therefore a subsisting bankruptcy notice needs to be complied within 21 days and failure to do so would ground an act of bankruptcy enabling the creditor to issue a sequestration order, i.e bankruptcy.
- Similarly the legislation covers a period of 6 months from 25 March to 24 September 2020.

## Relief from Insolvent Trading

- Directors will be temporarily released of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business. Accordingly, the potential of personal liability for insolvent trading is lifted for the 6 month duration of the legislation.
- To secure the relief, debts must be incurred in the ordinary course of the company's business i.e that is necessary to facilitate the continuation of the business.
- There is no relief from fraudulent or intentional insolvent trading.
- Debts incurred in this period are still due and payable by the company in accordance with the applicable payment terms.
- This amendment has been characterised as a "temporary second safe harbor" for directors
- However, directors should be conscious it is not a panacea to the potential for personal liability as a result of their company's activities
- Directors fiduciary duties at common law and under statute continue in place. In particular, as a company is approaching the threshold of insolvency its directors owe a fiduciary duty to consider the interests of creditors.
- The failure to pay employee entitlements remain a civil penalty for which directors can be personally liable.
- The lock down liability for failing to lodge returns with the ATO will continue to apply.
- It is understood however the ATO will act judiciously during this period including temporary reductions or deferrals of payment arrangements, withholding enforcement actions including director penalty notices and wind ups.
- The recently introduced anti-phoenix provisions in the Corporations Act will continue to apply.

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## General Comments

- There has been quite a lot of commentary lauding these measures as freeing up directors to provide them the flexibility to focus on the task of navigating the challenges brought by the corona virus;
- It is quite clear however that the measures are not a "get out of jail free card" and that directors will need to continue to be cognisant of the interests of creditors particularly if the threshold of insolvency approaches.
- There is an argument that temporary relief from insolvent trading is an unusual measure to be introduced at such a relatively early stage of the response to the economic impact of the corona virus.
- An insolvent trading claim is only available in liquidation. The new measures presuppose that any attempt to resurrect the company would have failed and has the effect of protecting a director's personal assets from the implications of the rescue attempt. In such circumstances, who bears the costs of the failed rescue attempt - it would be the company's creditors employees and counterparties.
- Given the unprecedented nature of the crisis it is unrealistic to expect the government to have done nothing in this area.
- However in the area of lifting of the threshold amount for statutory demands there seems to be a philosophical misunderstanding of the power relationship between debtor and creditor/supplier eg the supplier who is owed \$15,000 may well be a small business themselves who requires that money to be paid in accordance with terms to avoid financial distress;
- The likelihood is that the blanket approach of the measures will enable businesses that were already subject to financial distress, for reasons unconnected with the coronavirus to "hide in the long grass" as it were, with attendant negative implications for creditors and the economy as a whole.
- There has been some commentary that all these measures do is kick the can down the road and there will be a debt reckoning in 6 months time.
- There are industries that to a degree have remained unaffected by the implications of the corona virus and the attendant public health measures eg mining. Indeed there are industries that anecdotally would have experienced an upswing in turnover such as retail food and their primary producer suppliers. Such industry sectors represent the green shoots for economic growth and their success will to a large extent determine the length of the current downturn. They should be protected where possible from exposure to debt effected customers;
- It stands to reason that every dollar circulating in the economy now will assist with the speed of the recovery from this shock.
- Accordingly, the messaging should be that if you can pay now you should be paying and it is not entirely clear at this time whether this balance was achieved with these measures.

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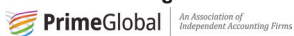
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