

Australian Government economic response to the Coronavirus

Interim changes to the insolvency rules

23 March 2020

On 22 March 2020, the Australian Government announced urgent interim changes to the insolvency rules as set out in the *Corporations Act 2001 (Cth)*, the *Corporations Regulations 2011 (Cth)* and *Bankruptcy Act 1966 (Cth)* to assist with the financial impact of the Coronavirus on Australian businesses. While at present there is no guidance as to when these urgent measures will commence, they will no doubt come into effect imminently.

As these measures are to be taken urgently, changes to the legislation are yet to be published and so the specifics as to the changes are yet to be determined. However, key features of the changes are as follows:

Statutory demands

-) A temporary increase to the threshold debt to issue a statutory demand will increase from \$2,000 to \$20,000. The statutory timeframe for a company to respond to a statutory demand will be extended temporarily from 21 days to six months. This will apply for six months.
-) A temporary increase to the threshold debt to issue a bankruptcy notice will increase from \$5,000 to \$20,000. The statutory timeframe for an individual to respond to a bankruptcy notice will be extended temporarily from 21 days to six months. This will apply for six months.
-) It will be important to take account of and clearly state these time periods when issuing statutory demands and bankruptcy notices, and equally, when commencing winding up or bankruptcy proceedings. Errors in time periods in notices will likely render those notices void.
-) Equally, when issued with a statutory demand or bankruptcy notice, or an application flowing from same, it will be important to check the date on which the notice was issued when calculating relevant time periods.

-) Although not yet stated, we do not consider these changes will apply retrospectively. That is, statutory demands issued prior to the commencement of the changes will most likely be subject to the lower threshold and shorter timeframe.

Moratorium on insolvent trading

-) Directors will be temporarily relieved of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business. This will relieve the director of personal liability that would otherwise be associated with the insolvent trading. It will apply for six months.
-) Temporary relief from personal liability for insolvent trading will apply with respect to debts incurred in the ordinary course of the company's business. Cases of dishonesty and fraud will still be subject to criminal penalties.
-) Any debts incurred by the company will still be payable by the company. However, the changes will effectively mean that enforcement action with respect to those debts by way of issuing a statutory demand will be frozen for a period of six months.
-) It is too soon to say whether legislative changes will account for this moratorium in provisions dealing with the calculation of the "Relation Back Day" for the purpose of determining whether a transaction is void. However, it will certainly be arguable that a six month grace period should be taken into account by liquidators when bringing voidable transaction claims.

Other relief

-) The Australian Taxation Office (ATO) will also work together with owners or directors of businesses that are currently struggling due to the Coronavirus, including temporary reduction of payments or deferrals, or withholding enforcement actions, including Director Penalty Notices.
-) At the moment, this will be determined on a case by case basis, depending on how the business has been impacted.

In the coming days

We will continue to provide updates as and when specifics regarding these changes are published by the Government.

As these changes will come into effect imminently, we recommend that you give urgent thought to whether any statutory demands for debts of \$2,000 can be issued prior to the changes taking effect, so as to receive a return on that debt in a much shorter timeframe.

We note that these changes will not impact on the safe harbor provisions in the *Corporations Act*. To that end, it will still be worth companies facing insolvency to contact

us to discuss potential alternate courses of action which are 'reasonably likely' to lead to a 'better outcome' for the company than administration or liquidation.

Further, we recommend that any business facing difficulty in meeting taxation debts or other financial liabilities should contact the ATO, ourselves, or appropriate financial institution immediately. It will be important to keep an open line of communication with the relevant institution, and in most cases the institution will likely work with the business to assist with avoiding insolvency.

For more information on the changes, we refer you to the Australian Government information page at <https://treasury.gov.au/coronavirus/businesses>.

If you wish to discuss these matters further, please contact our office.