

The Australian federal government has announced that the temporary changes it enacted in March to the Corporations Act (Cth) (Act) concerning insolvent trading laws and the creditor's statutory demand regime (Insolvency laws) have been extended to 31 December 2020. The changes were due to expire on 25 September.

Economic Fallout Continues

Even before the magnitude of the June quarter results were known and Victoria's roadmap out of the current (prolonged) lockdown was announced, there was significant pressure on the federal government to extend the operation of the Insolvency laws. That pressure only intensified as a result of the sharpest single quarter decline in the national economy on record and amid general financial, commercial and social upheaval caused by Victoria's lockdown, its roadmap out and the associated closure of borders in other jurisdictions. As a result, it was always a question of the extent to which the Insolvency laws would be extended and not if.

It is likely that the federal government will reassess the case for a further continuation of the laws once the September quarter figures are known and subject to the outcome of the ongoing discussions between Canberra and the states on a full-scale reopening of the national economy in time for Christmas.

Substantial Further Reforms on the Agenda

Although no formal announcements have been made yet, the federal government appears to be actively considering substantial reform proposals to the overall insolvency and restructuring regimes under the Act. Unfortunately, given timing constraints, the ongoing economic impact of the virus and the federal government's current propensity to greenlight major changes under significant lobbying pressures, it is unlikely that any mid-term to long-term insolvency reform proposals will receive the scrutiny and objective assessment that they deserve. Among the proposals being canvassed are more debtor-friendly reorganisation options, which could potentially sideline the insolvency practitioners who have traditionally led (with significant success) our regime under Part 5.3A of the Act.

Directors at the Helm

The extended Insolvency laws provides directors with additional time to properly evaluate the financial, commercial and legal health of their businesses and their own personal circumstances. To the extent necessary, they will be able to engage appropriate advisers, and develop and implement safe harbour plans with a view to achieving better outcomes for their companies and safeguarding against personal risks.

Being at the Helm Comes With Risk

In announcing the extension, the federal government noted that "the measures were [intended to] lessen the threat of actions that could unnecessarily push businesses into insolvency and external administration at a time when they continue to be impacted by health restrictions." Directors should be concerned to ensure that while the extension provides them with (temporary) cover against "the threat of (some) actions," it does not extinguish their legal and professional duties and liabilities generally. If, for example, a future liquidator determines that debts were not incurred in the ordinary course of a company's business (as the Insolvency laws require), or that other antecedent transactions or wrongful conduct took place, those actions may still be pursued.

The tapering and ultimate withdrawal of other economic and legal relief measures should also cause directors to reassess the commercial viability of their businesses going forward. Some major domestic and international financial institutions are already gearing up for a significant wave of future insolvencies, including by ensuring that they are properly resourced to manage external administrations. As part of that process, it would not be unreasonable to assume that major creditors in general will, where possible and appropriate, look to take recovery or enforcement steps against third parties, including directors or related entities. As such, it is imperative that directors plan and prepare for the short to mid-term and undertake risk assessments well beyond the current expiry of the Insolvency laws.

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