

TEMPORARY CHANGES TO INSOLVENCY LAWS – STATUTORY DEMANDS AND INSOLVENT TRADING IN THE CONTEXT OF COVID-19

FELICITY DALLE NOGARE AND MELANIE DAVEY

16 JULY 2020

Disclaimer: The information contained in these slides is general in nature and should not be relied on as legal advice. It is recommended that you obtain legal advice that is specific to your circumstances.



INTELLECTUAL PROPERTY
TECHNOLOGY AND
COMMERCIAL LAW

dcc.com

OVERVIEW OF LEGISLATION

- *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) (Schedule 12).
- Provisions effective from the day after Royal Assent was granted - **25 March 2020**.
- Provides temporary changes to provisions of the *Corporations Act 2001* (Cth) relating to:
 - Insolvent trading.
 - Statutory demands.
- Temporary changes to provisions of the *Bankruptcy Act 1966* (Cth).
- Temporary relief operates for **six months** from **25 March 2020**.
- Operates alongside existing safe harbour provisions.

INSOLVENT TRADING – WHAT IS THE RELIEF?

- Supplement to existing safe harbour provisions.
- Provides temporary relief from director's personal liability for debts incurred:
 - In the "ordinary course of business".
 - During the 6 month period.
 - Before the appointment of an administrator or liquidator.
- A holding company may also be able to rely on the relief (subject to restrictions) in relation to debts incurred at the subsidiary level.

INSOLVENT TRADING – WHAT REMAINS APPLICABLE?

- A company continues to remain liable for debts incurred.
- The temporary relief does not extinguish criminal penalties associated with dishonest insolvent trading.
- The temporary relief does not relieve a director from any other duty (either legislative or fiduciary).

STATUTORY DEMANDS

- Statutory minimum (threshold) has been temporarily increased to \$20,000.
- Response time before the presumption of insolvency arises has been temporarily increased to 6 months from the date of service.

| | Prior to 25 March 2020 | Period of 6 months commencing on 25 March 2020 |
|---|----------------------------------|--|
| Statutory minimum (threshold) | \$2,000 | \$20,000 |
| Response time before the presumption of insolvency arises | 21 days from the date of service | 6 months from the date of service |

- The temporary changes do not affect:
 - Other methods of winding up (e.g. where sought by ASIC).
 - The ability of a creditor to sue a company to recover a debt, and then to rely on other enforcement regimes once a judgment is obtained.

POTENTIAL ISSUES AND UNCERTAINTIES

1. What are debts incurred in the “ordinary course of business”?
2. Will temporary relief be enough?
3. Inexpensive and efficient debt enforcement.
4. Regulations.
5. What if my business is a creditor? How do I seek payment efficiently?
6. Interaction of the PPSR.

OTHER RELIEF

- Treasurer's power to provide relief in specific circumstances.
- ATO support measures.