

Temporary relief for financially distressed businesses

The economic impacts of the Coronavirus and health measures to prevent its spread could see many otherwise profitable and viable businesses temporarily face financial distress. It is important that these businesses have a safety net to make sure that when the crisis has passed they can resume normal business operations. One element of that safety net is to lessen the threat of actions that could unnecessarily push them into insolvency and force the winding up of the business.

SUMMARY

The elements of the package are:

- A temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive;
- A temporary increase in the threshold for a creditor to initiate bankruptcy proceedings, an increase in the time period for debtors to respond to a bankruptcy notice, and extending the period of protection a debtor receives after making a declaration of intention to present a debtor's petition;
- Temporary relief for directors from any personal liability for trading while insolvent; and
- Providing temporary flexibility in the *Corporations Act 2001* to provide targeted relief for companies from provisions of the Act to deal with unforeseen events that arise as a result of the Coronavirus health crisis.

For owners or directors of a business that are currently struggling due to the Coronavirus, the ATO will tailor solutions for their circumstances, including temporary reduction of payments or deferrals, or withholding enforcement actions including Director Penalty Notices and wind-ups.

TEMPORARY HIGHER THRESHOLDS AND MORE TIME TO RESPOND TO DEMANDS FROM CREDITORS

A creditor issuing a statutory demand on a company is a common way for a company to enter liquidation. The Government is temporarily increasing the current minimum threshold for creditors issuing a statutory demand on a company under the *Corporations Act 2001* from \$2,000 to \$20,000. This will apply for six months.

Not responding to a demand within the specified time creates a presumption that the company is insolvent. 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.

To assist individuals, the Government will make a number of changes to the personal insolvency system regulated by the *Bankruptcy Act 1966*. The threshold for the minimum amount of debt required for a creditor to initiate bankruptcy proceedings against a debtor will temporarily increase from its current level of \$5,000 to \$20,000. This will apply for six months.

Failure to respond to a bankruptcy notice is the most common act of bankruptcy. The time a debtor has to respond to a bankruptcy notice will be temporarily increased from 21 days to six months. The extension will give a debtor more time to consider repayment arrangements before they could be forced into bankruptcy. This will apply for six months.

When a debtor declares an intention to enter voluntary bankruptcy by making a declaration of intention to present a debtor's petition there is a period of protection when unsecured creditors cannot take further

action to recover debts. This period will be temporarily extended from 21 days to six months. This will give debtors more time to consider the options that are best for them. This will apply for six months.

Creditors, many of whom are themselves small businesses, will still have the right to enforce debt against companies or individuals through the courts.

TEMPORARY RELIEF FROM DIRECTORS' PERSONAL LIABILITY FOR TRADING WHILE INSOLVENT

Directors are personally liable if a company trades while insolvent. This can lead to boards of directors feeling under pressure to make quick decisions to enter into an insolvency process if there is any risk that the company will experience periods where it will be trading while insolvent.

To make sure that companies have confidence to continue to trade through the Coronavirus health crisis with the aim of returning to viability when the crisis has passed, 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. Egregious 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.

Example

Steph, Mon and David own a small company that operates a chain of yoga studios in Sydney. Social distancing measures require the participants in the yoga class to be significantly reduced. As a result, their company incurs more debt, to the point where it cannot meet its debts as and when they become due and payable.

Under the provisions of the Corporations Act, the three owners would be personally liable if the business took on further debt without entering an insolvency procedure like voluntary administration or liquidation.

However, during the six month period in which the temporary relief is offered, their business can continue to open their yoga studios so that they can maintain their customers and quickly resume normal operations when the crisis has passed, and continue to incur debt. When economic conditions improve, the company can pay back the debt incurred.

PROVIDING THE TREASURER AN INSTRUMENT-MAKING POWER UNDER THE CORPORATIONS ACT

The impact of the Coronavirus and the health measures in place to limit its spread, in particular social distancing, is giving rise to unprecedented issues for businesses' ability to comply with the provisions of the Corporations Act.

The Australian Securities and Investment Commission (ASIC) has the power to offer relief from some provisions or to take no action for not complying with some provisions. But this can require companies to make individual requests to ASIC, which takes time. Importantly, it can still leave companies open to legal action from others, such as shareholders or creditors.

Companies are needing to make very quick decisions in the context of very uncertain trading conditions. To encourage business to make the hard decisions, it is important that the Government can provide regulatory certainty and provide it as quickly as possible. And the unprecedented nature of the Coronavirus health crisis makes it difficult to predict what regulatory issues will arise.

To deliver regulatory certainty at a time when Parliamentary sittings will also be disrupted, the Treasurer will be given a temporary instrument-making power in the *Corporations Act 2001* to temporarily amend

provisions of the Act to provide relief from specific obligations or to modify obligations to enable compliance with legal requirements during the crisis. The instrument-making power will apply for six months. Any instrument made under this power will apply for up to six months from the date it is made.

FOR MORE INFORMATION

For more information on the Australian Government's Economic Response to the Coronavirus visit treasury.gov.au/coronavirus.