

# TEMPORARY CHANGES TO ASSIST BUSINESSES DURING THE COVID-19 PANDEMIC

Temporary measures have been introduced by the Australian government to assist businesses impacted by the COVID-19 pandemic

This article provides a general overview of the Australian government's *temporary* changes to statutory demands, bankruptcy and directors liability for trading while insolvent to address the COVID-19 pandemic and is not intended to be comprehensive. If you have any concerns, or if circumstances relating to the issues set out below arise, please contact Industry Legal Group.

These changes commenced on 25 March 2020 and at the time of writing this article are to remain in place for six months. Creditors may still take action to recover debt through the courts.

## STATUTORY DEMANDS

**What is a statutory demand?**

A statutory demand is a document served on a debtor that is a company by a creditor requiring payment of a debt. If the debtor does not pay the outstanding amount or make a Court application to set aside the statutory demand within the required time, then an application can be made to the Court to have the debtor wound-up in insolvency.

**What are the changes?**

At the time of writing this article the changes are:

1. the period within which a debtor must pay the debt or make an application to the Court to have the statutory demand set aside is increased from 21 days to six months; and
2. the minimum debt amount to issue a statutory demand has increased to \$20,000.

## BANKRUPTCY

**What is Bankruptcy?**

A person who is unable to pay their debts may be declared, through a legal process, to be bankrupt. A creditor may apply for a bankruptcy notice if an individual, the debtor, has a final judgement against them by a Court to pay a specified amount. If the debtor does not comply with the bankruptcy notice within the required time (or take other steps), the creditor can file a creditor's petition with the Court, following which a Court may make a sequestration order making the debtor bankrupt.

**What are the changes?**

At the time of writing this article the changes are:

1. the period within which a debtor must pay the debt identified in the bankruptcy notice, or otherwise avoid an act of bankruptcy is increased from 21 days to six months; and

2. the minimum debt amount required to apply for a bankruptcy notice has increased to \$20,000.

## TEMPORARY RELIEF FOR DIRECTORS FROM THE DUTY TO PREVENT INSOLVENT TRADING

If a company trades while insolvent the directors of the company are personally liable and under normal circumstances the directors would be required to enter into an insolvency procedure, for example voluntary administration.

The government has made temporary changes to this obligation during the COVID-19 pandemic by giving directors temporary relief from personal liability if (1) the company incurred the debt in the ordinary course of the company's business (2) during the six month period commencing 25 March 2020 (or longer period if so prescribed for this purpose) and (3) before an administrator or liquidator is appointed. Note that if a director is seeking to rely on this temporary measure, the director must be able to prove each of the foregoing points exist, including producing books and records.

If seeking to rely on this temporary measure **it is very important for directors** to consider, and satisfy themselves, whether or not the temporary measure will provide them with adequate protection; if the business is and will remain viable and be in a position to engage in solvent trading once the COVID-19 pandemic and the temporary measure lifts; and what realistic steps the business should take to assist it engage in solvent trading and remain viable (these should be written).

Directors also need to continue to comply with their director's duties (as no relief is granted in respect of director's duties) and to always act honestly. If the director/s do not think the business can return to solvent trading, other options can be considered, for example external administration. Relevantly:

- the relief is only granted in respect of debts incurred in the *ordinary course of the company's business* (according to the government's explanatory memorandum, this could, for example, include debts incurred to facilitate the continuation of business during the six month period, such as a director taking out a loan to move some operations online or to continue paying employees during the COVID-19 pandemic);
- the company will still be required to repay any debts the company incurs;



- the measure is only temporary;
- the Australian government fact sheet named 'Temporary relief for financially distressed businesses' notes that these measures do not apply to 'egregious cases of dishonesty or fraud' (for which criminal penalties apply);
- the director's duties, such as the duty to act with care and diligence continue to apply and no relief has been granted in this respect;
- it is important for directors to act honestly, consider and satisfy themselves if the business is and will remain viable, consider what realistic steps can be taken to achieve this and return the business to solvent trading (in writing) and take steps that continue to comply with the director's duties.

## TAKEAWAYS

The key takeaways are:

- temporary changes to time frames and minimum debt amounts are in place for statutory demands and bankruptcy notices;
- temporary relief is in place for director's personal liability while trading insolvent; and
- the temporary measures commenced on 25 March 2020 and, at the time of writing this article, continue for a period of six months.

If you have any concerns, or if circumstances relating to the issues set out in this article arise, please contact Industry Legal Group.

*This article is intended for information purposes only and should not be regarded as legal advice. Please contact Industry Legal Group for specific advice.*

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