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EXTENSION OF DIRECTORS DUTY TO PREVENT INSOLVENT TRADING

On Monday 7 September 2020, a joint announcement by the Australian Treasury and Federal Attorney Generals Department confirmed that:

"The Morrison Government will continue to provide regulatory relief for businesses that have been impacted by the Coronavirus crisis by extending temporary insolvency and bankruptcy protections until 31 December 2020.
The changes will also extend the temporary relief for directors from any personal liability for trading while insolvent.
The extension of these measures will 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.
As the economy starts to recover, it will be critical that distressed businesses have the necessary flexibility to restructure or to wind down their operations in an orderly manner."

Reasoning for the Government Approach

From the announcement the reasoning for the Government Approach includes:

- There are obvious concerns that as JobKeeper 1 ends in September 2020 (last payment in October 2020) there are some businesses under distress that may not be sustainable in the future;
- Distress drives directors/owners/management to consider alternatives and potential exposure to personal liability from insolvent trading. This can be a major issue in Director/s decision making in distressed situations – the family home can become exposed;
- If distressed businesses began aggressive restructuring and formal insolvency processes in October 2020 then considerable job losses are likely from SME's to larger businesses;
- At present, the majority of the economy is still transitioning through the impact of the pandemic, with limited new jobs available until the economy begins to stabilise and improve;
- From the announcement, it appears the extension aims to attempt to avoid a large unemployment event that may not be rectified until well into 2021 by reducing pressure on Directors from insolvent trading concerns.

The extension has also created other implications on the business trading landscape and obviously will not resolve the issues with a strong portion of distressed businesses; however, it may allow time for some businesses to survive.

It would not be a surprise for the extension to be further extended to 31 March 2021 to avoid major issues in January 2021 and provide holiday investment into the economy.

Although the extension covers insolvent trading, all other directors duties remain in force including obligations on directors to conduct themselves honestly, to not mislead and in the best interest of the company.

Comments from Industry, Directors and Banks around the Extension

Australian Institute of Company Directors
"With this measure extended, many businesses will now be able to weather the immediate storm, which in the long-run will be a better outcome for the Australian economy. It's important for directors to remember that their duties remain intact and that this is in no way a 'free pass'. Directors must continue to assess the ongoing financial liability of their organisation, and, critically, the impact of incurring further debts." (Source: aicd.companydirectors.com.au 7 September 2020)

Australian Restructuring Insolvency & Turnaround Association
"The overwhelming response of the restructuring and insolvency profession has been that this is just kicking the tin down the road or, more likely, creating a real snowball effect- ARITA CEO John Winter - The fundamental problem is that what this is doing is transferring the harm from bad businesses to perfectly good businesses. Those good businesses, ones that we desperately need to help drive any economic recovery out of COVID, are rightly still expecting to be paid as creditors. Insolvency acts like a quarantine that stops sick companies from spreading the virus of bad debts to other companies. The extension of this moratorium just allows the contagion to keep spreading." (Source: accountantsdaily.com.au 8 September 2020)

ANZ Bank
While there were currently low numbers of companies being wound up, or individuals facing financial strife, this was because government support and banks' temporary loan deferrals had bought time. ANZ group executive for Australian retail and commercial banking Mark Hand said the bank was planning on the assumption that more businesses would need to assess their viability after the Christmas trading period. "We expect our small business [clients] to come in a second wave, effectively, where we need to have those in-depth conversations next year," Mr Hand said." (Source: smh.com.au 8 September 2020)

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