Holding back the tide – preventing a wave of insolvencies

Yesterday the Treasurer announced a new restructuring process to assist small business recovery.

The new process will replace the temporary insolvency relief and protections that were quickly introduced in response to the COVID-19 downturn. Those temporary protections expire on 31 December 2020.

The current temporary protections have resulted in a 46% decrease in external administrations during the March to July 2020 period as compared with the same period in 2019.

It is likely that the current protections are allowing a considerable number of small businesses to continue to trade that would otherwise have failed even if the COVID-19 pandemic never occurred. It can be expected that upon the removal of the temporary insolvency relief on 1 January 2021 there will be a wave of small business insolvencies.

New restructuring process for small businesses

To limit this wave of insolvencies, from 1 January 2021 companies with liabilities of less than $1 million will be able to access a new debt restructuring process. This will involve:

- a 'small business restructuring practitioner' (over a 20 business day period) determining whether the company is eligible for the process, reviewing the financial affairs of the company, and developing a debt restructuring plan with the business owner;
- the business continuing to trade under the control of its owners while a debt restructuring plan is developed;
- the 'small business restructuring practitioner' presenting the plan to creditors;
- creditors voting on the plan (secured creditors will not be bound by the plan); and
- (subject to more than 50% of creditors by value voting in favour of the plan) ongoing payments to creditors overseen by the 'small business restructuring practitioner'.

On the current proposal, companies and directors will only be able to use the restructuring process once every seven year period. This suggests that the reforms may not be 'temporary' and that the restructuring process is set to become a permanent addition to existing insolvency regimes.

The new restructuring process provides a moratorium, like the existing voluntary administration regime. However, the new restructuring process requires insolvency practitioners to be 'hands off', with business owners continuing to run day-to-day operations of the business. In some circumstances, this will reduce costs, encourage earlier adoption of the process, and increase the prospects of business recovery. But the ability of the practitioner to help businesses recover may be more limited than under the current regime.

There is only very limited information about the new proposal at this time. It is not yet clear who will be able to qualify as a 'small business restructuring practitioner'. The announcement also foreshadows changes to the law relating to unfair preference claims but provides no specifics.

Doubtless, further information will become available in the short term. We will publish further updates as more information is released.

CCK Lawyers has the experience, capacity, know-how and depth to assist businesses in good times and in bad.

We Go the Extra Mile

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