

Friday, 11 September 2020

Law Council raises concerns about government's extension to temporary insolvency emergency measures

The Law Council of Australia has raised a number of concerns over the federal government's announcement this week that it intends to extend temporary insolvency emergency measures, introduced as a result of the COVID-19 crisis, into 2021.

The joint announcement, made by the Treasurer and the Attorney-General, proposed extending the temporary increase in the threshold at which creditors can issue a statutory demand, extending temporary bankruptcy protections, and extending the temporary relief for directors from any personal liability for trading while insolvent.

Law Council of Australia President, Pauline Wright, noted the commendable rationale for the proposed extension of these measures was to 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.

However, drawing on the recommendations of the Insolvency & Restructuring Committee (Committee) of the Business Law Section of the Law Council of Australia, Ms Wright urged the government to carefully review all temporary insolvency emergency measures before extending them beyond 31 December 2020 in order to avoid unintended consequences.

"Delaying steps that would otherwise lead to the liquidation of unviable businesses exposes more viable businesses to becoming substantial creditors of those unviable businesses. This has the potential to spread the contagion, making the eventual insolvency wave more widespread and difficult to resolve," Ms Wright said.

"The temporary emergency measures and all other relief being afforded distressed businesses during the current pandemic will eventually be removed. When that happens the insolvent entities that remain will likely be so bereft of assets or possible recoveries that external administrators – who themselves generally conduct small business enterprises – may be reluctant to take on the arduous tasks of liquidating insolvent entities.

"Furthermore, extending the inevitable commencement of liquidations and bankruptcies allows even more time to pass from the date of otherwise potentially voidable transactions, thus increasing the opportunities for pre-insolvency advisors to assist in structuring of an insolvent entity's affairs to defeat the claims of creditors. Such prolongation could give rise to illegal phoenix activity.

"As a result of these concerns, the Law Council considers that in order to avoid unintended negative consequences, any further extensions to the temporary insolvency emergency measures should be reviewed carefully and, if continued beyond 31 December 2020, any ongoing measures should only be formulated after extensive consultation.

"Striking an appropriate balance is not an easy task, and the Law Council is concerned that simply extending insolvency emergency measures into 2021 may inadvertently cause avoidable economic and social harm."

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The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.