

Coronavirus Economic Response Legislation –

WHAT DOES IT MEAN FOR THE FUNDS MANAGEMENT INDUSTRY?

Directors of responsible entities and trustees of managed investment schemes need to understand the changes implemented by the new Coronavirus Economic Response Package Omnibus Legislation.



LANGTON CLARKE

Partner
Funds Management

61 7 3239 2926
langton.clarke@mcmahonclarke.com

The key messages for the funds management sector are about—

- temporarily lengthening the time and reducing the circumstances for which formal insolvency proceedings can begin
- providing relief to directors from insolvent trading under the safe harbour provisions in the Corporations Act
- extending the powers of the Treasurer.

The changes will be in place for a period of six months starting from 24 March 2020, unless this grace period is extended in the future. Partner Langton Clarke and law graduate Thomas Chow explain the impact.

THE STORY SO FAR

On 23 March 2020 the Government passed the Coronavirus Economic Response Package Omnibus Bill 2020 which aims to reduce the financial impact of the COVID-19

pandemic on Australian companies and individuals. The bill was fast-tracked through parliament and received royal assent on 24 March.

STATUTORY DEMANDS

The legislation extends the monetary threshold and the time limit for responses for statutory demands issued to a corporation. The monetary threshold was increased from \$2,000 to \$20,000 and the time allowed for a response has increased from 21 days to six months.

The changes made by the legislation are temporary, applying for the next six months, unless extended, and only apply to statutory demands issued after 23 March 2020.

For fund managers, particularly those holding and managing real property, the changes mean it may be more difficult to take action against defaulting counterparties such as tenants. That means any statutory demand issued would not require attention for a period of several months.

INSOLVENT TRADING

For the next six months, the statutory provisions relating to a director's personal liability for insolvent trading are relaxed. The legislation effectively prevents directors who engage in insolvent trading

from being held personally liable for their action (the safe harbour provisions under the Corporations Act).

The safe harbour provisions specifically target personal liability arising from an insolvent company incurring debt. Importantly, the debt must be incurred in the ordinary course of the company's business prior to the appointment of an administrator or liquidator. If a director intends to rely on this relief, they will bear the evidential burden of proof. Additionally, when incurring the debt, the directors must take reasonable steps to ensure the safe harbour provisions apply to their conduct.

The safe harbour provisions do not apply to debt incurred prior to 23 March 2020. Also, the amendments relating to insolvent trading may be extended beyond the six-month period.

The legislation, through the safe harbour provision, is intended to protect company directors that incur debt in order to keep their businesses operational in what is expected to be a turbulent period. The safe harbour provisions could apply to directors of responsible entities and trustees of managed investment schemes for debts they incur.

POWERS OF THE TREASURER

The Treasurer may, by legislative instrument, exempt a person from the provisions of the Corporations Act. To make an exemption the Treasurer must be satisfied—

- it would be unreasonable to expect a person to comply with the provision because of the COVID-19 pandemic, and
- the exemption is necessary to facilitate the continuation of a business or mitigate the economic impacts of the COVID-19 pandemic.

Any instrument made by the Treasurer as a result of the increased powers ceases to be in force at the end of the six-month period.

WE CAN HELP

Using our industry sector expertise and understanding we are actively monitoring the legal, regulatory and commercial implications of the COVID-19 pandemic for the funds management and real estate industries. **Click here** to visit our COVID-19 Hub which captures our latest thinking and other resources.

Our lawyers can explain how the new legislation impacts your business and what it means for your decision making.