



The Talking Law Podcast
Episode 102 – COVID Safe Harbour Rules (for directors) and Statutory Demand changes explained

Transcript

Joanna: Hi, it's Joanna Oakey here and welcome back to Talking Law, a podcast proudly brought to you by a commercial legal practice Aspect Legal. Now today we're talking about the very topical area of the COVID safe harbor provisions that have come into play in recent weeks in response to some of the real risks of insolvency that have read their head due to the COVID nightmare that we're currently working through. So in this episode, we're analyzing the Safe Harbor provisions, we're really getting into detail to discuss how the Safe Harbor provisions work and what they mean for directors what personal liability means for a director where that it can stem from in relation to directors duties and where this COVID safe harbor can step in to assist directors in making various decisions in relation to how to help guide that business through this crisis. And we are also talking about statutory demand. So we're talking about the changes that have come into play. In recent times. We're talking about what that means. We're talking about that what that means, from the perspective, both as a creditor and as an debtor because of course, the changes will have impacts for wherever you see it on both sides of the fence. Now in order to talk about this very fertile area at the moment we have on board a senior solicitor from aspects legal Jo Wright. So without further ado, let's speak to Jo.

Joanna: Jo, welcome on to Talking Law.

Jo Wright: Hi, Joanna, how are you?

Joanna: Great. I am fabulous. Thank you so much for joining us today. Okay, so today I want to talk about two areas. I want to talk about the COVID safe harbor as it being referred to at the moment and also the changes in relation to statutory demands because we have changes that are applicable in both of these areas at the moment. So I think it's important that we touch on both of them. So let's perhaps start with the COVID safe harbor changes and maybe if you can give us just a quick background to what the Safe Harbor provisions are in any event, because this isn't a completely new area of law, it's just, you know, a little bit of a change or an addition to what we had in the past. So maybe if we start with the 2017 provisions, and let's talk a bit about those first,

Jo Wright: Yeah, so the government introduced in 2017, some safe harbor provisions, and they were really designed to give some or to give directors protection from insolvent trading, and they were designed to give directors an ability to adopt an alternative strategy to appointing either administrator or liquidator. So as your listeners may be aware, that company can't trade while insolvent and a director has particular duty to prevent a business from either trading while insolvent or the risk of trading while or preventing the risk of trading while insolvent.

Joanna: And then I'm sorry, I just want to throw in there in the way of that You know, practically this impacts directors is because if they're found to be acting in breach of these duties that can trigger personal liability. And so that's where you know the real risk for directors come.

Jo Wright: Absolutely it can trigger both criminal and civil liability and it can also lead to a director potentially being made bankrupt because of the significance of the insolvency, the debt that's been incurred. So yeah, it's got quite significant ramifications for a director. So the Safe Harbor provisions that were put in place in 2017 were designed for companies to be a little bit more entrepreneurial in how they were addressing a potential insolvency issue. So it gave directors ability to adopt an alternative strategy to try and trade or manage their business out of the risk of insolvency. So it meant that a director was not liable for insolvent trading for any costs incurred, either directly or indirectly associated with adopting that alternative strategy so long as that strategy was being actioned and being put in place, then while that strategy was being put in place, then the Safe Harbor mechanisms would apply and would give some level of protection to a director. So they were in place, basically to ensure that the first point of call was an administrator or liquidator and to give businesses a chance at turning things around. So given the current circumstances, the government has introduced a new safe harbor mechanism and people are referring to it as the COVID safe harbor mechanism. That means that directors will be relieved from personal liability for debts incurred if the business was trading while insolvent during this COVID period, but there are conditions in place

Joanna: And talk us through those because, you know, the devil is often in the details, Jo. Isn't it?

Jo Wright: They are Yes. So there are three key limiting conditions. The first is that a debt must have been incurred after the 25th of March this year. And that's the date that these measures were put in place by the governments. They must be incurred in the ordinary course of business. And they must have been incurred before any administrator was appointed. So that gives the ability for companies while they're effectively in the hibernation phase at the moment during the weather in COVID, to basically potentially go into debt to safeguard their business and to protect their business in the long term. And the government has, you know, it comes down to what's in the ordinary course of business and the

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government has given some guidance to watch that means for businesses so they've said that it could be, some examples are taking out a loan to the business has enough money to pay staff over the next six months or to compliment, I guess the job keeper program. And it also could be used, for example, to borrow money to invest in technology so the business could move online or change part of their business to adapt to this new economy that we're all experiencing at the moment.

Joanna: And so I guess, you know, what are some tips that we could give our audience of, you know, business owners or managers in businesses, if they're grappling with solvency issues and solvency risk, and they are wanting to find, you know, ways out of the tough situation that they're in, but they're not sure whether they should be you know, whether they're too close to the line, whether they should be looking at insolvency right now, or they should be doing, the actions that they're taking might be protected under this COVID Safe Harbor. Let's maybe talk about some of the things other than obviously seeking advice. To make sure what you're doing is something that will be protected under the Safe Harbor, what are some of the other things that they should be, you know, thinking of?

Jo Wright: Well, obviously, getting advice is one of the key ones. But other than that, the main thing is to be operating in good faith. And these provisions that the government has put in place and not permission to go and to ignore all the director duties that are in place. So directors always have directors have duties under the corporations or they need to adhere to at all times and these measures are not in place for you to allow risky behavior or directed to breach their fiduciary duties. These measures are in place to try and safeguard and protect the business for the long term. So if they can see and measure, say, for example, paying for advice on how to transition their business, to be an online business, and to be able to provide their services online during the next six months, then that is a reasonable area that they could be putting their money or taking out a loan to do that investment. I guess the key is for them to be operating in good faith, the keys for them to be making sure that the measures that they're putting in place have the best chance or put their business in the best chance of survival. And they're the things that they need to keep in mind. But it does not alleviate them of any of their other directors duties. It is purely about trying to safeguard and preserve the future of their business. Yeah.

Joanna: And so I think the point here is Be really careful if you might be on the edge as you're making some of these decisions, make sure you're taking the right advice to make sure that you're that you're considering the right things, and that, you know, you're documenting things in the right way. Because at the end of the day, you know, it might be important for you to have a bit of a record behind you in relation to the reasoning for various decisions that you're making for the business.

Jo Wright: Absolutely. And it's also about realizing that these measures are new, and that if you've entered into a debt, and these measures will protect the company for six months, but we don't know what's going to happen at the end of six months and how this situation is going to be treated at the end of that six months. So documenting having a strategy in place to realize, well, once the six months is over, then will we be in a position that we can go back to trading and being solvent, and that's something to keep in mind. We don't know how they're going to be, I guess tested.

Joanna: Absolutely. Okay. And let's briefly just touch on the other area that we're going to cover today, which is the changes and once again, they're temporary. So the temporary changes in relation to statutory demand. So what's changed here Jo?

Jo Wright: So two things have changed here. And that is one that the minimum threshold for creditors has to issue statutory demand has increased from 2000 to 20,000. And the other



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critical changes that If a company does receive a statutory demand, they now have six months to respond to that, as opposed to the usual 21 days. So it just gives a little bit of breathing room for companies in terms of receiving the statutory demand and the ability to take some time in response.

Joanna: But one of the things perhaps we didn't do at the beginning is explain what a statutory demand is. And, you know, if an organization has counterparty that owes it money, there's two ways that it can seek enforcement of that debt. You can either file a statement of claim in court or you can send them a statutory demand and statutory demand requires that they respond within a certain period of time. It used to be 21 days, but now it's six months. And if you don't respond in that time, there is a presumption of insolvency and so that just allows you as a creditor to take proactive steps then to seek to have the business wound up but I think where these will be particularly interesting will be for organizations who are chasing debt now. So step demands used to be well, you know, perhaps can be a strategy in showing that you're serious in the pursuit of chasing money that's owed to an organization. But now, I guess the problem is, you know, serving a stat demand on your debtors will have less teeth less force than it once had, because you know, there isn't a short 21 day timeframe anymore, we've now got six months. So, you know, I think it really will bring into question the strategy of how you ensure you are getting paid and obviously that that is one of the issues right at the moment, but sometimes organizations are in situations where they're not getting paid, not because of a failure of the other party to have the money but because it's, you know, something else on on foot and in that sense stat demands can be a really useful part of its strategy.

Jo Wright: Absolutely. Creditors will be looking at other avenues to retrieve their money and not using this stat demands. So they might be looking at going through taking action to the courts to line up the company, but also when you're dealing with companies and supplies to keep in mind fully in terms of the transactions that companies are entering into that for them to recover money that the substrating then process will have less teeth over the coming months, and to be mindful of who they enter into contracts with given that there might be a higher risk of recovering money.

Joanna: Yeah, absolutely. You know what, that is such a good point, Jo. Okay. Well, look, Joe, thank you so much for being on the show today, I guess. Do you have any parting words for our audience for you today?

Jo Wright: I guess two words of advice. One is to be mindful of these new provisions and to really use them as a strategy to try and safeguard the business while we're going through COVID and to to get advice because there are new provisions where there are uncharted territory in terms of how they're going to play out, and it's good to get advice before taking steps that might have greater consequences.

Joanna: Yep, absolutely. Okay, Jo, I just want to say a massive thank you for coming on to Talking Law today. It's been an absolute pleasure having you on the show.

Jo Wright: Thanks very much, Joanna. It's been great.

Joanna: Well, that's it for this episode discussing all about the COVID Safe Harbor, and the changes to the statutory demand, timing and process. If you'd like more information about this topic, then just head over to our website at talkinglaw.com.au. Through that website, you'll be able to download a transcript of this podcast episode, if you'd love to read it in more detail. We also link through to an article there that we have on the very same topic. If you



prefer to read an article instead of a transcript or indeed if you want to read both the article and the transcript and of course at our website, you will also be able to find details of how to contact the fabulous Jo Wright or any of our other legal eagles at Aspect Legal if you'd like assistance with any of the items we covered today. So whether or not you'd like assistance with asset protection as a director or as a director, understanding how to apply these safe harbor provisions properly, to protect yourself, your own assets and the business as a whole, or whether indeed, you are a creditor that has money outstanding that you would like to chase from your debtors through a statutory demand process, or an alternative process given some of the issues we highlighted today with the previous timings and strategy of using statutory demands. So if you'd like any assistance with any of these areas, then just head over to a website either at talkinglaw.com.au or our website at Aspect Legal, that is aspectlegal.com.au and we have a button on our website that allows you to book in a time to have an initial free chat with one of our lawyers which I highly recommend if you have any concerns about your business in any of these areas. So that's it. I really hope you enjoyed what you heard today and if you did then don't forget to pop to your favorite podcast player and hit subscribe. Well, that's it and thanks again for listening in to Talking Law you've been listening to Joanna Oakey and Jo Wright from Aspect Legal who is our proud sponsor of Talking Law. Thanks a lot. We'll see you next time.