NEW SOUTH WALES
BAR ASSOCIATION

COMMERCIAL LAW SECTION

Covid-19 related developments in commercial law and practice

This document summarises recent legislative and judicial developments relevant to commercial practice in light of challenges posed by the COVID-19 pandemic. It does not constitute legal advice and readers should undertake their own research and seek up to date advice relevant to their particular circumstances.

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Insolvent trading, statutory demands and bankruptcy notices

As part of the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) which took effect on 25 March 2020, three important sets of changes were introduced into the Corporations and Bankruptcy legislation to assist in avoiding unnecessary insolvencies during the course of the pandemic.

First, there is now a "temporary safe harbour" defence to insolvent trading. The new s 588GAAA of the *Corporations Act* 2001 (Cth) provides that the insolvent trading provisions in s 588G(2) do not apply in relation to a debt incurred by a company if the debt is incurred:

(a) in the ordinary course of the company's business;

(b) during the six-month period starting on 25 March 2020 (or such longer period as is prescribed by the regulations); and
(c) before any appointment during this period of an administrator or liquidator.

There are also provisions with regard to the onus of proof of the temporary defence and its application to holding companies in relation to the debts of their subsidiaries. Although the defence provides relief to directors from the consequences insolvent trading, it is important to bear in mind that the company remains liable for debts incurred.

Secondly, and again only for the six months from 25 March 2020, two critical changes have been made to the statutory demand regime: (1) the threshold for issuing a statutory demand on a company is $20,000 (rather than $2,000) and (2) companies have six months (rather than 21 days) to respond to statutory demands served on them (Corporations Act s 9, definitions of "statutory minimum" and "statutory period"; Corporations Regulation 54.01AA). This will reduce the ability of creditors to resort to statutory demands to require outstanding debts to be paid.

Thirdly, corresponding changes have been made to the bankruptcy legislation. For bankruptcy notices issued, and petitions and declarations presented, in the six months from 25 March 2020: (1) the threshold for initiating bankruptcy proceedings is $20,000 (rather than $5,000); (2) debtors have 6 months (rather than 21 days) to respond to a bankruptcy notice; and (3) the period of protection a debtor obtains on presenting a declaration of intention to present a debtor's petition is 6 months (rather than 21 days) (*Bankruptcy Act* 1996, s 5, definitions of "stay period", "statutory minimum", "statutory period"; Bankruptcy Regulations 4.02AA, 4.10A).

Virtual meetings for companies

A series of decisions in the Federal Court have authorised "virtual" meetings to occur so as to avoid infringing legislative restrictions on gatherings or placing people's health at risk.

In *Eagle, in the matter of Techfront Australia Pty Ltd* [2020] FCA 542, Farrell J made orders permitting company administrators to hold meetings of creditors during the administration by telephone or audio-visual conference in place of a physical meeting. Her Honour also

authorised meetings of a committee of inspection of creditors to occur by the same means. The orders were made under s 447A of the Corporations Act and s 90-15 of the Insolvency Practice Schedule.

Similar orders were made by Middleton J in *Strawbridge, in the matter of Virgin Australia Holdings Ltd* [2020] FCA 571.

In *Avita Medical Ltd, in the matter of Avita Medical Ltd* [2020] FCA 592, Jagot J ordered a meeting of shareholders for the purposes of voting on a scheme of arrangement to occur by audio and audiovisual means. The orders prescribed a procedure for giving access to the meeting, asking questions and conducting votes. Her Honour required the company to maintain a help line to assist shareholders and proxyholders who experience technical difficulties with voting or participating in the meeting. The orders were made under ss 411 and 1319 of the Corporations Act.

The position has now been addressed by legislation, pursuant to an instrument made by the Treasurer under s 1362A of the *Corporations Act* 2001 (Cth). The *Corporations (Coronavirus Economic Response) Determination (No 1)* 2020, provides that for the six months from 5 May 2020, provisions of the Corporations Act and Regulations, the Insolvency Practice Rules and Passport Rules, are modified so as to enable virtual meetings. The Determination enables persons to participate in meetings without being physically present in the one place; and deals with the use of technology to enable the taking of votes, speaking at meetings, the appointment of proxies and the giving of notice of meetings.

Electronic signature

Both State and Commonwealth governments have enacted provisions to make it easier to sign and attest the signature of documents using remote access technology.

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation* 2020 (NSW), which took effect on 22 April 2020, provides that the witnessing of a signature required under an Act or another law to be witnessed may be witnessed by audiovisual link; and arrangements in relation to witnessing signatures and the attestation of documents may be performed by audiovisual link. Documents covered by the provision include wills, powers

of attorney, deeds or agreements, enduring guardianship appointments, affidavits and statutory declarations. There are provisions specifying measures that must be taken by a person witnessing the signing of a document by audiovisual link. The regulation is force for six months unless this is changed by further regulation.

The *Corporations (Coronavirus Economic Response) Determination (No 1)* 2020 modifies provisions of the *Corporations Act* 2001 (Cth) regarding the execution of documents by a company. Section 127(1), which enables a company to execute a document without using a common seal by having it signed by certain company officers, is modified so as to permit those officers to sign a copy or counterpart of the document in physical form or to sign the document electronically. Additionally, the assumptions which s 129(5) of the Act permits outsiders to make in respect of documents executed without a seal under s 127(1) are extended to documents executed in accordance with the modified version of s 127(1). These provisions have effect for six months from 5 May 2020.

Payment of rent under commercial leases

A vexed issue is the management of rental obligations under commercial leases where tenants are no longer trading (or trading to the same extent) and landlords have no realistic possibility of obtaining an alternative tenant.

The issue arose in the context of the obligations of administrators of a corporate tenant in *Strawbridge, in the matter of CBCH Group Pty Ltd* [2020] FCA 555. The administrators of the Colette Group had closed some 93 retail stores while COVID-19 restrictions were in place, as the products sold by the Group would not be regarded as essential goods or services. Markovic J gave directions to the administrators, under s 90-15 of the Insolvency Practice Schedule, that for a specified period they would be justified in causing the companies not to pay rent pursuant to leases to which the stores were subject. Her Honour also made orders absolving the administrators from personal liability for the payment of rent over the same period, under s 447A of the Corporations Act. Markovic J accepted the administrators' submission that the orders would not prejudice the landlords because, among other reasons, the economic environment was such that no landlord would likely be able to find a replacement tenant in the near future; and there remained at least the potential for the

landlords' position to be ultimately improved if a post COVID-19 recapitalisation or sale occurred.

The issue has now been addressed by legislation. On 7 April 2020, the National Cabinet released a Mandatory Code of Conduct for commercial tenancies. The Code of Conduct contains a number of "good faith leasing principles" to be applied in negotiating temporary arrangements between certain landlords and tenants during the COVID-19 period.

The Code of Conduct is given force under NSW law through the *Retail and Other Commercial Leases (COVID-19) Regulation* 2020 (NSW), which commenced on 24 April 2020. It applies, broadly speaking, to lessees who qualify for the JobKeeper scheme and had a turnover of less than $50m in the 2018-2019 financial year. It provides, among other things, that for a six month period ending on 24 October 2020, lessors may not take various prescribed actions against lessees on the grounds of a failure to pay rent; rent may not be increased; and parties to a commercial lease may require a good faith renegotiation of the rent having regard to the economic impacts of the COVID-19 pandemic and the leasing principles set out in the National Cabinet Mandatory Code of Conduct.

Adjournment of court proceedings

A number of court decisions address adjournment applications made in consequence of difficulties caused by COVID-19.

In *ASIC v GetSwift Ltd* [2020] FCA 504, Lee J refused to adjourn a 10 week hearing due to commence on 9 June 2020. The proceedings, in which an ASIC regulatory action against a company and its officers was to be heard sequentially with a class action against some of the same defendants, involved a large number of witnesses (41 in the ASIC proceeding) and was to be conducted using Microsoft Teams. Lee J canvassed a number of considerations which were likely to make the conduct of a trial in these circumstances difficult and undesirable, but ultimately concluded that the trial could proceed without any real risk of practical injustice. His Honour had regard to arrangements that were to be made to mitigate some of the difficulties involved in conducting a trial, and also to the difficulties which would entail for the Court and other litigants if a trial of this magnitude had to be adjourned.

Similarly, in *Capic v Ford Motor Company* [2020] FCA 486, Perram J refused an application to adjourn a six week trial due to commence on 15 June 2020. That trial too would be conducted using virtual platforms. His Honour addressed a number of difficulties which would be encountered if the trial proceeded but considered that solutions (not all of them entirely satisfactory) could be found to many of these. He ultimately concluded to adjourn the trial at this stage because of the pandemic may be to adjourn it for an indeterminate period, and that the Court should attempt to make the trial work and only adjourn it later if this proved to be unworkable.

Conversely, in *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] FCA 539, Perram J acceded to an application to adjourn a hearing due to commence on 4 May 2020 in circumstances where seven witnesses were located in the People's Republic of China and travel restrictions meant that they would be unable to attend the hearing to be cross-examined on the affidavits and the taking of evidence by video link to China would arguably not be permissible under Chinese law.

In *Quince v Quince* [2020] NSWSC 326, Sackar J acceded to an application to adjourn a hearing in circumstances where the hearing would have to be conducted by video link. The plaintiff had alleged that certain transfers of shares purportedly executed by him were forged by the defendant. The trial would involve cross examination of the defendant on matters of credit in circumstances where there was little documentary or other circumstantial evidence. Sackar J accepted that in a case of that kind the atmosphere of the trial, and the judge's ability to assess the defendant's demeanour in answering the allegations, would be crucial to assessing the defendant's credit and that the plaintiff should be given the opportunity to ventilate that issue in the conventional way.