INSOL Europe/LexisNexis coronavirus (COVID-19) Tracker of insolvency reforms—New Zealand (update)

26/05/2020

Restructuring & Insolvency analysis: We look at the reforms to the insolvency law of New Zealand prompted by the coronavirus (COVID-19) pandemic. Written by James McMillan, David Shillson ,Mark Broad and Patrick Glennie of Dentons Kensington Swan.

We have previously written about the proposed introduction of 'safe harbour' and business debt hibernation schemes in response to the coronavirus pandemic (see News Analysis: Coronavirus (COVID-19) New Zealand—'Safe harbour' for company directors and business debt hibernation—what do these proposed changes mean for you and your business?). The Bill containing these changes has now been passed by Parliament and received royal assent (having first been split so that measures dealing with compliance matters are included in a separate Act). However, the Bill's passage through Parliament was not without drama (comparatively speaking!) and the COVID-19 Response (Further Management Measures) Legislation Act 2020 contains a number of changes from the proposal that we previously commented on. We have outlined the schemes and the key changes below.

The 'safe harbour' scheme

Compared to the business debt hibernation scheme, only minor changes were introduced to the 'safe harbour' scheme as it went through the parliamentary process. The Select Committee's main concern was to make clear that the scheme should not be used to delay, to the detriment of creditors, a necessary decision to appoint liquidators to a company. This concern, however, did not lead to any substantive changes. The scheme now applies to all companies set up, and to all decisions made, before 3 April 2020, rather than before 25 March 2020 as previously proposed. This change was made so that the Act ties in with when the scheme was first announced by the government. The Act as passed also puts more limits on the government's ability to extend the 'safe harbour' periods.

So, following those changes, the scheme as enacted is in line with what was set out in our previous articles. In short, the 'safe harbour' scheme provides directors with limited shelter from their duties:

- not to trade recklessly (section 135 of the Companies Act 1993), and
- not to enter into an obligation on behalf of a company unless they reasonably believe the company will be able to fulfil that obligation (Companies Act 1993, s 136) until 30 September 2021

However, while the provisions provide directors with shelter from these duties under certain circumstances, directors will only be protected if:

- in the directors' opinion (which must be held in good faith), the company is facing or is likely to face significant liquidity problems in the next six months due to the coronavirus pandemic
- the company could pay its debts as they fell due on 31 December 2019, and
- the directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due within the next 18 months (for example, by utilising the business debt hibernation scheme to get the business back on track)

It is important that directors keep the company's performance under constant review if they are relying on the 'safe harbour' scheme as it does not provide them with a free pass.

The business debt hibernation scheme (BDH)

Compared to the 'safe harbour' scheme, many more changes were made to the business debt hibernation scheme (BDH) scheme as it went through Parliament. On the whole, we consider that these changes have

improved the scheme, both by making it more useful and by reducing the compliance burden. An example of a change that will increase the impact of BDH is that debts incurred after BDH is entered into will now be included as long as they relate to obligations signed up to before entering into the scheme. This change will mean that ongoing rent obligations will be covered and mean that the scheme will have a much greater positive financial impact for businesses. From the compliance side, one example is that before entering into BDH, directors now only need to sign a certificate confirming their belief in certain statements, rather than provide a formal statutory declaration as was formerly proposed. There is now also a clear process by which a business can choose to exit BDH.

A further change is that creditors holding a security over all, or substantially all, of the debtor business' assets (eg a GSA holder) will now be excluded from the scheme for the whole protected period. Under the original Bill, these creditors would have been prevented from taking enforcement action in the initial one month protected period. This part of the scheme has now been simplified and these creditors can take enforcement action at any time.

Overall, though, the scheme as enacted retains the fundamental elements that we have written about before. If it meets certain conditions, a business can deliver a notice to the Registrar stating that its board has agreed to enter into BDH. The business will then enter into a protected period during which creditors (with some exceptions) will not be able to take any enforcement action. In that month, the business will have the opportunity to put forward a proposal which, if approved by a majority of creditors (in number and value), will extend the protected period for a further six months. The proposal can postpone debts or reduce payment of debts during the six month period, but it cannot cancel debts or limit the rights of creditors after the end of the period. During the protected periods, guarantors will also largely be protected, and creditors entering into arms-length transactions with the debtor business will also be protected from voidable transaction clawbacks.

Comment

It is not surprising that no major changes were made to the 'safe harbour' scheme as it passed through Parliament. While many will share the concern expressed by the Select Committee that the scheme could encourage some directors to continue trading when there is little hope for recovery, on balance, the scheme is a helpful move to give some protection to directors trying to deal with difficult circumstances. Several responses to the Select Committee suggested a wider ranging review of the reckless and insolvent trading provisions of the Companies Act 1993 would be welcome and we will continue to monitor this space.

The changes to the business debt hibernation scheme are more wide ranging but practical. There are still a number of hoops for businesses to jump through to enter into BDH so we would expect most businesses considering it to seek professional advice, but it is now less complicated than initially proposed. It is also more useful as it covers a wider category of debts.

Any business owners or directors thinking about making use of these schemes should be carefully considering their options. These schemes will help in some situations where the underlying business is sound but should not be seen as a complete substitute for existing, more permanent restructuring options.

If you are worried as to how these schemes will apply to you or your business, or wish to discuss your options more generally, please get in touch with the authors of this article.

INSOL Europe/LexisNexis COVID-19 Tracker of Insolvency Reforms

A tracker of insolvency reforms globally produced by LexisNexis in partnership with INSOL Europe is now available: Coronavirus (COVID-19) Tracker of insolvency reforms globally.

We look at various countries worldwide which are expediting reforms to their restructuring and insolvency laws, temporarily suspending onerous insolvency law provisions, increasing limits for statutory demands, suspending enforcement powers and introducing other measures to deal with the coronavirus crisis. As the situation is rapidly evolving with more countries adding new measures daily, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.