

Webinar: Coronavirus (COVID-19). Know your directors' duties and how to manage them

Gavin Robertson, Principal Lawyer - Commercial, Macpherson Kelley
John Keenan, Principal, BRI Ferrier

Sponsored by:

macpherson kelley.

BRI Ferrier

Monday, 6 April 2020

Disclaimer

Disclaimer

This webinar has been created with all reasonable care and attention paid to ensuring its accuracy during development.

Whilst all reasonable care has been taken in the development of course material, Governance Institute of Australia Ltd, the authors of any course material and presenters:

- do not purport to provide legal, accounting, financial or tax advice or express any opinion, on any specific matter or issue, and their contributions or statements should not be relied upon for this purpose, whether made known to them or not;
- do not warrant that the content of its course is fit for any individual purpose or expectation other than as a study in the stated field, whether made known to them or not;
- do not warrant or represent any benefit other than as expressly published on the Governance Institute of Australia Ltd's webpage (<http://www.governanceinstitute.com.au/education-training/short-coursescertificates/features-and-benefits-of-study/>)
- disclaim all responsibility and liability for any loss or injury arising from any decision or action taken based upon or prompted by the contents of course materials, howsoever caused; and
- reserve the right to correct any errors or omissions in their material, at any time and from time to time.

It is always important to seek independent legal or other professional advice in respect of one's own particular circumstances.

COVID-19 AND DIRECTORS DUTIES

- Measures to moderate the spread of the virus have had a severe impact on businesses.
- Government announced a “safety net” to allow businesses to resume normal operations.
- Safety net has limited affect and does not absolve directors from their general and statutory duties.

STATUTORY DEMANDS

macpherson kelley.

BRI Ferrier

- Threshold increased from \$2,000 to \$20,000.
- Period to satisfy demand increased from 21 days to 6 months.
- Likely affect is that companies will trade on a cash only basis.

INSOLVENT TRADING

- New temporary safe harbour.
- Debts must be incurred “in the ordinary course of business”.
- Non-exclusive test that incurring the debt be necessary to facilitate the continuation of the business during the 6 month period.
- Temporary safe harbour preferable to the old safe harbour.

DIRECTORS DUTIES

macpherson kelley.

BRI Ferrier

- Act in good faith in the best interests of the company.
- Act with the degree of care and diligence that a reasonable person might be expected to show.
- Business judgement rule defence.

PRACTICAL IMPLICATIONS

- Survive and recover.
- Debts will ultimately be repayable.
- Plan, implement, review, document.

SURVIVAL MODELS

macpherson kelley.

BRI Ferrier

- Commercial approach to restructure and trade on.
- Go into hibernation via a voluntary administration and “holding” Deed of Company Arrangement.
- Use voluntary administration to achieve a restructure under a Deed of Company Arrangement.

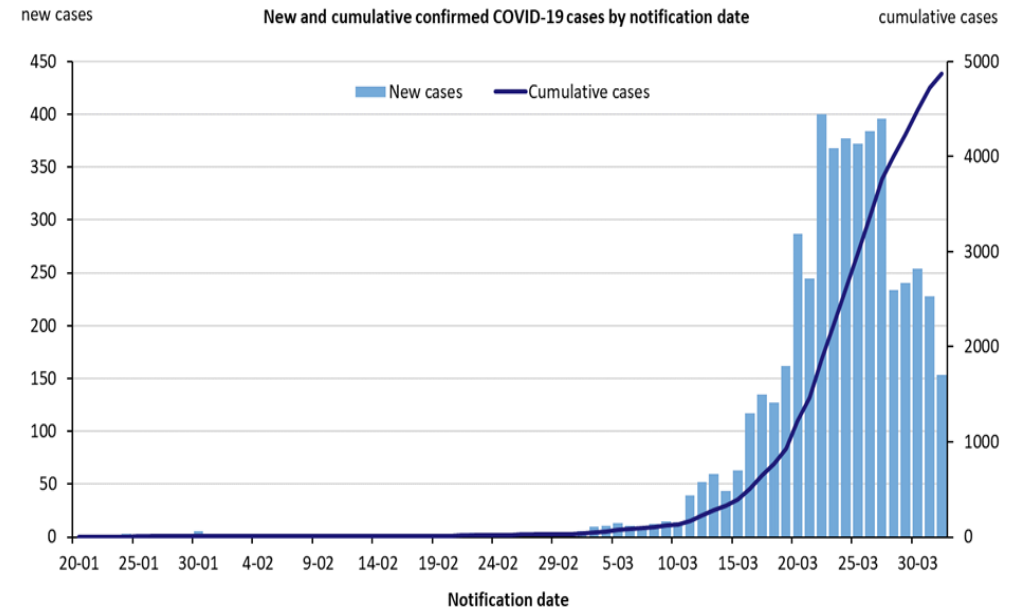
Insolvent Voluntary Administration may be the only option for some.

CURRENT ENVIRONMENT

- Highly unpredictable and unprecedented
- Many businesses struggling
 - Revenues collapsed
 - Cashflow problems
 - Debtors not paying – preserving cash reserves – causing a “freeze”
 - Staff being “stood down” under Fair Work Act
 - Parties unable to complete on contracts – supply chain issues
 - Government bans on industries and activities
 - Airlines, Tourism, Restaurants, Pubs, Clubs, Retail, Parks, Recreation

macpherson kelley.

BRI Ferrier



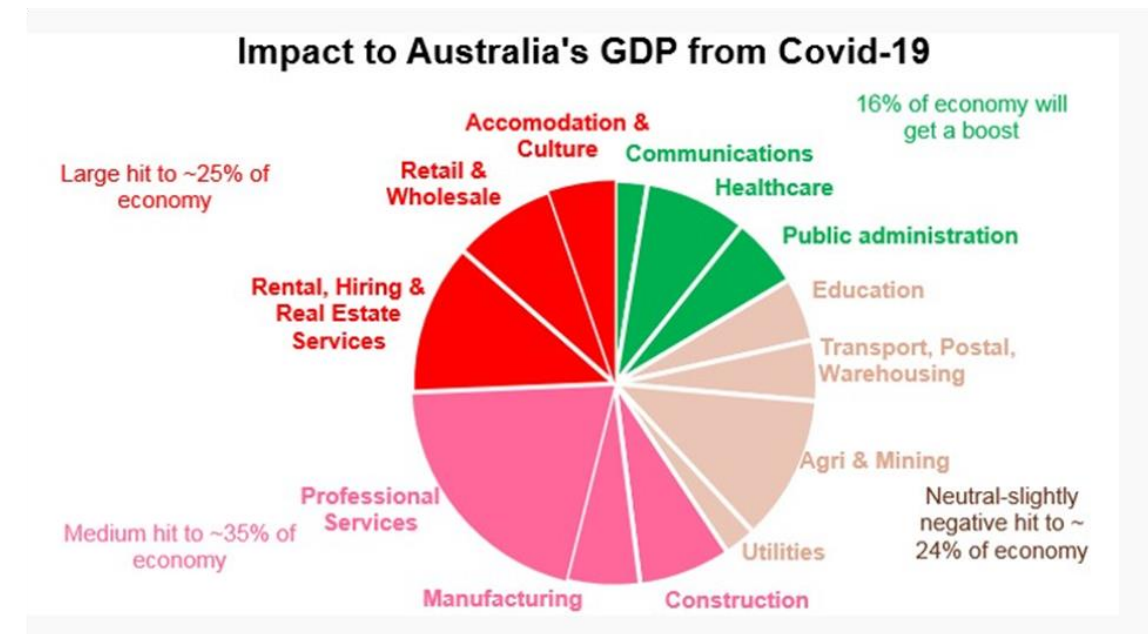
* Source – www.health.gov.au data at 1 April 2020

Way Forward

- Directors in tough position – need to take advice and act promptly
- Government Support - \$320 billion in forward spending
 - Business focus on survival by way of hibernation
- Options:
 1. Commercial negotiation to buy time
 2. Formal hibernation using Holding Deed of Company Arrangement
 3. Restructuring using Voluntary Administration and Deed of Company Arrangement

macpherson kelley.

BRI Ferrier



*Source – www.abc.net.au at 28th March 2020-AMP Data

Commercial Approach

macpherson kelley.

BRI Ferrier

- Focus is to negotiate with stakeholders to buy time to “ride out” the Covid-19 impact
 - hopefully 6 months or less, but this is becoming less likely
- Levers to pull:
 1. Labour – Stand Down and use Job Keeper
 2. Rent – seek relief and use non-eviction legislation
 3. Creditors – extended payment terms and 6 month statutory demand
 4. Debtors – negotiate payments as best possible – risk preferential payments
 5. Finance – defer bank debt and apply government backed small loans
 6. Other – government subsidies and relief – PAYG, Payroll tax, ATO deferral



* Source – adastraconsulting.ie

Formal Hibernation – Holding DOCA

macpherson kelley.

BRI Ferrier

- Commercial option may not work,
 - doesn't relieve Directors duties
 - Hold out creditors or contracting counter-parties
- Must be, or may become, insolvent to enter Voluntary Administration
- Objective is to use the Voluntary Administration and Deed of Company Arrangement process to put in place a formal moratorium with creditors and obligations for this Covid-19 period
- Further deal put to creditors to consider when environment returns to rational market
 - Access to capital markets return
 - Deferred Property sale
 - Business unit sale

Restructure to Thrive

macpherson kelley.

BRI Ferrier

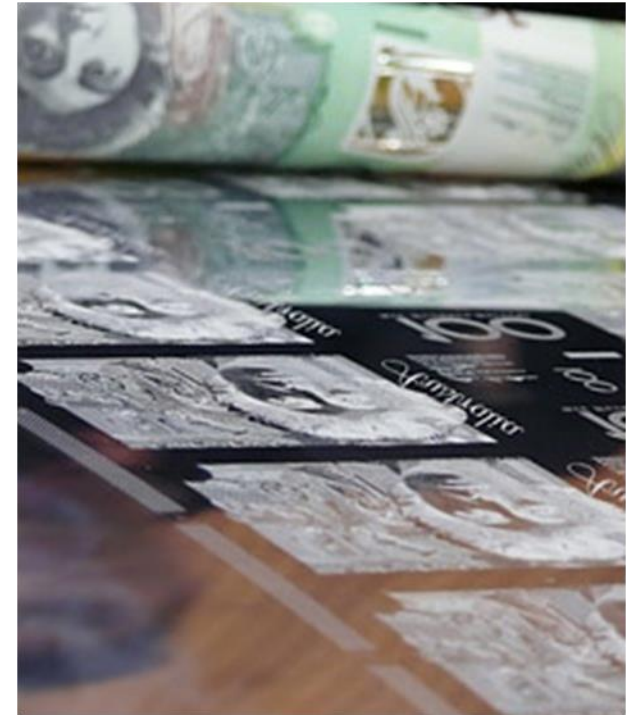
- Use this turbulent period and “down time” to restructure affairs
- Objective is to use the Voluntary Administration and Deed of Company Arrangement process to restructure the trading and contractual obligations in the business
- VA can be used to “excise” underperforming aspects to get back to core viable business:
 - unprofitable leases, contracts, excess labour, other onerous elements.
- DOCA proposed for creditors to consider - ultimately return the company to solvency, continue to trade. Very flexible:
 - recapitalise over time, and in a more stable trading environment;
 - compromise creditor claims over time;
 - new management if necessary;
 - sell assets or facilitate a merger;
 - restructure the shareholdings;

Recap Government Support

- Job Seeker - \$1,500 per fortnight for staff
- Eviction ban on landlords
- Bank debt deferral <\$10M
- Government backed loans to \$250K
- Small/Medium Business employers assistance \$20K to \$100K through PAYG;
- Waiver of Payroll tax – unique to each state
- Asset Write-off limits increased to \$150K and accelerated depreciation
- ATO deferral on payments & remitting interest – upon application
- Trainee wage subsidies including apprentices
- Various industry specific support – including airlines, child care

macpherson kelley.

BRI Ferrier



* Source – rba.gov.au

Key Takeaways

macpherson kelley.

BRI Ferrier

- Each business is unique
- Government is offering support – use it
- Directors need to act quickly, but with caution
- Be flexible – may use a combination of options
- Seek advice from professionals



* Source –google.com

macpherson kelley.

BRI Ferrier

Questions

Thank you

macpherson kelley.

BRI Ferrier



Gavin Robertson

Principal Lawyer - Commercial

Macpherson Kelley

Sydney, NSW

+61 2 8298 9544

gavin.robertson@mk.com.au



John Keenan

Principal

BRI Ferrier

Sydney, NSW

+61 2 8263 2300

+61 407 422 082

jkeenan@brifnsw.com.au

Thank you



Thank you for choosing Governance Institute of Australia's professional development.

Please contact us for further course inquiries:

Toll free: 1800 251 849

National Office: (02) 9223 5744

Course details available at:

governanceinstitute.com.au/coursesevents/calendar-of-events/

A close-up photograph of a person's hands typing on a laptop. The person is wearing a mustard-colored, textured knit sweater. On their left wrist, they are wearing a black watch and several gold-toned bangles. The laptop is open on a wooden desk. The background is softly blurred, showing what appears to be a window or a wall with some text.

Virtual Governance and Risk Forum 2020

Monday 11 and Tuesday 12 May 2020

View the line-up at
governanceinstitute.com.au/GRMF