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# COVID-19 Insolvency Reform

## Debt hibernation or

## Zombie creation?

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# Introduction

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**Australia**

**New Zealand**

# COVID-19 Law Reform in Australia

## Insolvency specific reforms

### *Coronavirus Economic Response Package Omnibus Act*

- Temporary changes made to Australian insolvency laws for six months
- Two major changes:
  - **Statutory demands** – increases from 21 days to **6 months** and \$2,000 to **\$20,000**
  - **Safe harbour** – directors granted relief from personal liability for insolvent trading
- Does not extend to relief from statutory or common law directors' duties

# COVID-19 Law Reform in New Zealand

## Insolvency specific reforms

### **COVID-19 Response (Further Management Measures) Legislation Act:**

- Temporary “safe harbour” for directors
- Temporary new Business Debt Hibernation procedure
- Fast tracked voidable transactions changes

# COVID-19 Law Reform in New Zealand

## Insolvency specific reform: Business Debt Hibernation

- Provides "breathing space" for entities affected by COVID-19 in the form of a moratorium against enforcement action (with some significant exceptions for GSA holders and employees).
- Moratorium initially only lasts one month unless the company's proposed "arrangement" supported by a majority of creditors, in value and number.
- The arrangement is temporary only and not a full restructuring of debt.
- If passed, the arrangement, and moratorium, lasts a further 6 months.
- Company remains under control of directors.

# COVID-19 Law Reform in Australia

## Commercial leasing

**Rent relief** – National Cabinet Mandatory Code of Conduct (7 April 2020)

- Mandatory for retail landlords and SME tenants who:
  - Have an annual turnover of less than \$50m;
  - Have suffered a 30% fall in turnover; and
  - Are participants in JobKeeper program.
- Measures include:
  - Moratorium on evictions for non-payment of rent
  - Mandatory reductions in rent on a case-by-case basis
  - Rent deferrals must be amortised over the balance of the lease



# COVID-19 Law Reform in New Zealand

## Commercial leasing

- Rent relief: limited legislative intervention
- So-called “Christchurch clause” that is a feature in many leases
- Extensions to Property Law Act 2017 notice periods

# COVID-19 Law Reform in Australia

## Other reforms

**JobKeeper** – \$1500 fortnightly subsidy per employee paid to entities with:

- Less than \$1b turnover and 30% fall in turnover;
- More than \$1b turnover and 50% fall in turnover;
- Currently worth \$70 billion and will end on 27 September 2020

## Tax deferrals

- Businesses can defer tax payments including tax assessments, FBT assessments and excise
- Tourism, agriculture and education sectors
- In addition, airline industry has been relieved from government taxes and charges worth \$715 million



# COVID-19 Law Reform in Australia

## Other reforms

### Bank loan guarantee for SMEs

- Government guarantee of 50% of new loans to SMEs (up to \$40 billion new lending)
- Up to \$250K for up to 3 years
- Unsecured and no payments in first 6 months
- Turnover less than \$50M



# COVID-19 Law Reform in Australia

## Other reforms

### Relief and Recovery Fund

- \$1 billion support fund for sectors disproportionately impacted by COVID-19
- Tourism, agriculture and education sectors
- In addition, airline industry has been relieved from government taxes and charges worth \$715 million



# COVID-19 Law Reform in New Zealand

## Other reforms

### Wage Subsidy Scheme

- Subsidy rate of:
  - \$585.80 (gross) per week for full-time employees
  - \$350.00 (gross) per week for part-time employees
- Initially available for businesses experiencing a minimum in 30% decline in actual or predicted revenue over the period of 30 day (as compared to the previous year).
- **Extension now available from 10 June 2020** for businesses experiencing a revenue loss of at least 40%). for a 30-day period in the 40 days before they apply

### Tax Measures

- Flexibility in statutory deadlines
- Changes to tax loss continuity rules
- Tax Loss Carry Back scheme

# COVID-19 Law Reform in New Zealand

## Other reforms

- Business Finance Guarantee Scheme for SMEs
  - \$6.25 billion in loans available
  - Eligible businesses can apply for loans up to \$500,000 with Government guaranteeing 80% of risk
- Small Business Cashflow Loan Scheme
  - One-off loans up to \$10,000 plus \$1,800 per full-time employee, up to \$100.000

# COVID-19 Law Reform in New Zealand

## Other reforms

### **Economic Response Packages**

- Initial \$12.1 billion dollar package – now expanded.
- Primary focus on wages subsidy scheme with a targeted extension for hardest hit sectors.
- \$600 million aviation sector relief as part of the wider Economic Response Package.
- \$100 million redeployment of workers package.

# Hibernation or zombification?





# Impact of COVID-19 reforms

## What is happening?

### COVID-19 Insolvency Events

Date	Company	Sector
21 April 2020	Virgin Australia Holdings Ltd	Aviation
23 March 2020	Freedom Oil and Gas Ltd	Energy
06 April 2020	Sky and Space Global Ltd	Energy
30 April 2020	Liquefied Natural Gas Ltd	Energy
10 June 2020	Moreton Resources Ltd	Energy
18 May 2020	Silver Heritage Group Ltd	Entertainment
29 May 2020	The PAS Group Ltd	Retail

# Impact of COVID-19 reforms

## New Zealand experience

Notable Insolvency/Receivership Appointments			
Date	Company	Insolvency event	Sector
2 April 2020	Kikki.K (NZ) Pty Limited	In liquidation	Retail
3 April 2020	FE Investments Limited	In receivership	Finance
15 April 2020	Tango Finance Limited, Tango New Zealand Limited, Antares New Zealand Holdings Limited [ <i>parent shareholding companies of Burger King</i> ]	All in receivership	Hospitality
15 May 2020	EncoreFX (NZ) Limited	In liquidation	Finance
27 May 2020	Smiths City Group Limited and Smiths City (Southern) Limited	Both in receivership	Retail
28 May 2020	Green Cabs Limited	In interim liquidation	Transport



# Courts and COVID-19 insolvencies

## Court attitudes to COVID-19 insolvencies

Date	Company	Orders granted	Reasons
1 April 2020	Colette Group	<ul style="list-style-type: none"> <li>Administrators excused from personal liability for rent for two weeks (subsequently extended by a further 3 weeks)</li> </ul>	<ul style="list-style-type: none"> <li>Administrators allowed ‘<i>further time to assess what is best for creditors as a whole given the ever-changing physical, legal and economic impacts of the COVID-19 pandemic</i>’</li> <li><b>“Those circumstances could not be described as “usual”. They are in fact extraordinary. The Administrators find themselves operating the Colette Group in an ever-changing environment brought about entirely by external factors”</b></li> </ul>
20 May 2020	Virgin Australia Holdings Ltd (Virgin Group)	<ul style="list-style-type: none"> <li>Administrators’ personal liability limited for future Virgin Group contracts and JobKeeper payments for entire administration period</li> </ul>	<ul style="list-style-type: none"> <li><b>“... the orders sought are of an extraordinary nature. They are sought and will be made in response to the particular circumstances confronting the Administrators. In addition, there are national interests at stake having regard to the fact that that Virgin is one of two national airlines, and... the fact that Virgin employs thousands of people”</b></li> </ul>

# Impact of COVID-19 reforms

## New Zealand experience

Company	Orders sought	Comments
Encore FX	Modify the default statutory requirement relating to the creditor's meeting.	<ul style="list-style-type: none"> <li>• Documents permitted to be sent and tabled by email and posting on website</li> <li>• Meeting by video or teleconference</li> <li>• Creditors could vote by electronic means</li> </ul>
CBCH Group Pty Ltd (Colette Group)	Second extension of convening period	<ul style="list-style-type: none"> <li>• Court has general power to allow an application for a further extension of convening period under Companies Act</li> <li>• Noted power to extend or shorten time re Covid 19</li> <li>• <i>“requiring the administrators to convene a watershed meeting by 9 June 2020 would hardly be in the general interests of the creditors, given the current general uncertainty in the commercial community as New Zealand comes out of the COVID-19 lockdown. This is a clear case for extending time to see if a better outcome can be obtained for creditors.”</i></li> </ul>
“Shake Shed”	Excusing receivers from personal liability for rent (successive orders covering period March to end June 2020 for certain stores)	<ul style="list-style-type: none"> <li>• <i>“It is noted that various property managers and agents appear to be swamped with post-lockdown issues and rent abatement requests, and it has been too difficult for them to reach a satisfactory position in relation to all 22 premises in the time available. “</i></li> <li>• Court considered majority of landlords unlikely to be materially affected: franchisees not companies in receivership that have been making rental payments</li> </ul>

# Impact of COVID-19 reforms

## What isn't happening?

June Quarter 2019	June Quarter 2020
1920 insolvency events	1106 insolvency events
296 external administrations	189 external administrations
533 court windings-up	213 court windings-up
933 creditor windings-up	564 creditor windings-up

- The 80+ temporary regulatory processes instigated by the Federal Government appear to be preventing or slowing insolvency events

### June Quarter 2019 vs. 2020

- **45% decrease** in insolvencies
- **33.5% decrease** in external administrations
- **60% decrease** in court windings-up
- **40% decrease** in creditors windings-up

# Impact of COVID-19 reforms

## New Zealand experience

Company insolvencies – liquidations, receiverships and voluntary administrations:

- There were 104 company insolvency appointments in May 2020, which is roughly **50% lower than the appointments** in May 2019 (193) and May 2018 (204).
- In April 2020, there were 54 appointments, which was **less than a third of the number of appointments** in April 2019 (160) and April 2018 (150).
- Between 1 January 2020 and 31 March **appointments were down over this period** 2020, there were 269 formal insolvency appointments. when compared to the same periods in 2019 (454 appointments) and 2018 (559 appointments).

# Impact of COVID-19 reforms

## What's next?

As of 20 May 2020, **910,055 businesses** and **2.9 million employees** are enrolled with JobKeeper

Most popular industries:

- Construction (80% of businesses JobKeeper registered)
- Hospitality (76% of businesses JobKeeper registered)
- Retail (65% of businesses JobKeeper registered)
- Manufacturing (65% of businesses JobKeeper registered)



JobKeeper expires on 27 September 2020

# Impact of COVID-19 reforms

## The New Zealand perspective: What's next?

Wage subsidy as at 19 June 2020:

- **\$11.9 billion** paid out to approved Wage Subsidy and Leave Scheme applications
- **1,695,175 jobs** associated with a paid application, **202,243** of which are covered under the Wage Subsidy extension.
- Most popular industries:
  - Construction
  - Accommodation / Hospitality
  - Retail
  - Professional, scientific and technical services
- Has been extended once; businesses rolling out June onwards



# The effects of COVID-19 & use of the Wage Subsidy Scheme

90%

State that a loss of domestic customers / revenue has had an impact on their business's financial performance

66%

Of respondents report a turnover reduction of more than 50%

96%

Of subsidy-receiving businesses are subsidising the pay of 1–19 staff members

## The effect of the Wage Subsidy Scheme (top-4)

(% small positive + major positive impact)



Cashflow



Being able to keep operating for the foreseeable future



Being able to keep operating over the last 2–3 months



Staff retention

**Qb2.** Thinking about the last 1-2 months as COVID-19 has spread, how much has each of the following factors affected your business's financial performance? **Qb3.** Although Wage Subsidy applicants anticipated a turnover loss of at least 30%, how much do you think your turnover has actually fallen since COVID-19 started to spread? **Qc1.** How many of your staff have had their pay subsidised by the Wage Subsidy scheme? **Qc4.** Thinking about the effects of the Wage Subsidy scheme on your business, to what extent has it helped with each of the following factors up to now?

**Base:** Those who received the Wage Subsidy (n=90,134)

**13** – Ipsos | Understanding Employers' Views of the NZ Wage Subsidy Scheme

Source: MSD Wage Subsidy survey



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# Impact of COVID-19 reforms

## What's next?

Measure	End date
JobKeeper	27 September 2020
National Cabinet Mandatory Code of Conduct	27 September 2020
Insolvency reforms – statutory demands and safe harbour	25 September 2020
Deferral of tax amounts to be paid	12 September 2020





# Impact of COVID-19 reforms

## The New Zealand perspective: What's next?

Measure	(Current) end date
Wage Subsidy (extended)	Extensions will start expiring in August 2020
Safe harbour	30 September 2020
Business Debt Hibernation	24 December 2020
Property Law Act notice period extension	24 December 2020

# What's next

- Restructuring and insolvency techniques for larger businesses
- Impact on small businesses with mixed personal and business lending

*“As the number of registered liquidators has declined over the last few years, **the sector may lack the capacity to respond to a significant increase in insolvencies, should it occur.** This may be particularly evident with large and complex appointments.”*

**James Shipton (ASIC Chair)**

# Questions?



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