

## Coronavirus Alert: Avoiding and managing insolvencies

26 March 2020

Coronavirus has been a significant issue causing emerging stress across business communities.

In our experience, clients who recognise early signs of financial trouble are most likely to avoid insolvency.

This can be achieved with our assistance through restructuring and turnaround solutions including forbearance arrangements with creditors, such as the Banks, like waiving interest payments or delay or suspension in payments. You might also qualify for new government assistance programs.

### Insolvency

At a high-level, insolvency is when a person or a company can no longer pay its debts when they fall due.

### Insolvent Trading

If you are a director of a company, it is most important you understand insolvent trading and its implications so you do not end up losing your personal assets.

## 新型冠状病毒预警： 避免破产及破产管理

2020年3月26日

新型冠状病毒是目前一个重要的问题，新型冠状病毒的爆发对商界造成的压力日趋严重。

根据我们的经验，越早意识到财务问题越可能避免破产。

我们可以协助您通过重组和周转的方式解决您面临的破产问题，包括和您的债权人如银行，达成延迟偿还债务的协议，该协议可能使您无需支付贷款利息、延迟或终止付款。您也有可能有资格申请政府新的援助项目。

### 破产

概括来说，破产是指个人或公司在债务到期时不能偿还其债务。

### 无清偿能力

如果您是公司的董事，了解无清偿能力和它的含义至关重要。这样才不会让您最终损失您的个人资产。

Section 588G of the *Corporations Act* creates a duty to avoid insolvent trading – you must ensure the company does not trade or incur further debts of any kind once the company reaches the point of insolvency or incur a debt that would lead the company into insolvency.

A company director that fails to prevent the company from trading while insolvent may become personally liable for debts incurred when there were reasonable grounds for suspecting the company was insolvent or would become insolvent. Liquidators and ASIC are usually very critical of directors they suspect traded while insolvent and penalties can be severe.

One of the measures announced by the Federal Government to enable businesses to trade through the impact of COVID-19 is a six month exemption from personal liability for trading while insolvent. This temporary relief applies to debts incurred in the ordinary course of the company's business and the debts will remain payable by the company.

Directors must still act in the best interests of the company and any engagement in fraud or dishonesty by directors during this period could result in criminal penalties.

Further information about the government's measures are available [here](#).

## Recognising when to get help

Are you unable to:

1. Pay your bills?
2. Keep your wages and superannuation payments up to date?
3. Make payments due to the ATO up to date?
4. Obtain access to affordable short-term finance?

If you answered "yes" to any of these questions, we recommend you talk to us about navigating your way through the coming months to understand what insolvency might mean for you and your options.

《公司法》第588G条规定了避免无清偿能力的责任：一旦公司达到破产的临界点或者产生了会导致公司破产的债务，您必须保证公司不产生交易或者不可以以任何其他形式让公司产生债务。

在有合理原因怀疑公司破产或将无力偿债时，如果公司董事不能阻止公司继续经营，那么公司董事可能会对债务承担个人责任。清算师和澳大利亚证券与投资委员会通常对他们怀疑在破产时却还继续经营的董事处以严厉的惩罚。

联邦政府最近宣布了一系列措施以帮助企业度过冠状病毒所带来的影响，其中一项即允许企业在破产后六个月继续经营，无须承担个人责任。这是一个临时救济措施，使公司可以继续支付在正常业务过程中产生的债务。

董事必须为公司的最大利益行事，如果在此期间，董事从事任何欺诈或不诚实的行为都有可能导致刑事处罚。

有关政府措施的更多信息，请点击[此处](#)。

## 您应了解何时需要我们的帮助

您是否不能：

1. 支付您的账单？
2. 继续支付员工工资和养老金？
3. 支付澳大利亚税务局的相关费用？
4. 获得可以负担的短期融资的途径？

如果以上任何一个问题的回答为“是”，我们建议您和我们讨论，了解破产对您意味着什么以及您可以做的选择，规划您接下来几个月的方向。

## Consequences of Insolvency

### Individuals

**Bankruptcy** applies to individuals and occurs when you are declared to be unable to pay your debts under the *Bankruptcy Act 1966*. The standard period for bankruptcy is 3 years, but you can be discharged early in some circumstances. Once bankrupt, and then after you are discharged, you do not have to pay most of the debts you owe but it can affect your future ability to borrow money. There are other significant implications of bankruptcy which should all be seriously considered and understood, including your ability to travel overseas, to work in certain trades or professions and the impact on your credit report. An alternative to bankruptcy is entering into a debt agreement or 'personal insolvency agreement' that can also discharge you from most debts without going bankrupt.

### Companies

**Voluntary Administration** is used to quickly resolve a company's future by appointing a qualified independent person to take control of a company to determine if it can be saved. In some circumstances, a company can be saved by a 'trade-on', a sale of business by the administrator or by restructuring using a 'DOCA' (deed of company arrangement). If the company can't be saved, the administrator will prioritise increasing the return to creditors. An administrator can be appointed by the directors, a liquidator, creditors of the company or the Court. During the administration, landlords can be prevented from re-taking possession of business premises, and creditors can be prevented from enforcing personal guarantees given by directors.

**Liquidation** occurs when a qualified independent person takes control of an insolvent company to wind up its affairs in an orderly and fair way for the benefit of creditors. Shareholders, creditors or the Court can place a company into liquidation after which unsecured creditors cannot pursue or continue legal action against the company without Court approval.

**Receivership** is the appointment of a qualified and independent person by a secured creditor or, in certain circumstances, the court, to control some or all of the company's assets. A company in receivership can also be in provisional liquidation, liquidation, voluntary administration or subject to a 'DOCA'.

## 破产的后果

### 个人

**破产**适用于个人，根据1996年《破产法》，如果您宣布无力偿还债务时即破产。破产的期限一般为3年，但是在某些情况下可以提前解除。一旦宣布破产或在破产解除后，您都不需要偿还绝大部分的欠款，但是这会影响到您日后贷款的能力。破产还有其他严重的影响，您需要认真考虑，包括您出国旅游的能力，在日后从事某些行业或专业的能力，以及对您信用记录的影响。破产的另一种选择是订立一项《债务协议》或《个人破产协议》，可以使您在不破产的情况下结清大部分欠款。

### 公司

**自愿管理程序**：即指派一位有资格的独立个人接管公司，决定是否可以挽救公司并快速的解决公司的问题。在一些情况下，可以通过交换、出售业务或通过“DOCA”（公司债务协议）的方式挽救公司。如果不能挽救接管人将优先考虑债权人的权益。接管人可以由董事，清算人、债权人或法院任命。在自愿管理程序下，可以防止房东收回公司营业处所，也可以防止债权人强制执行董事提供的个人担保。

**清算**：即当有资格的独立接管人接管了无力偿还其债务的公司，为债权人的利益以公正有序的方式结束公司事务。股东，债权人或法院都可以进行公司清算。此后无担保债权人未经法院批准不得对公司提起诉讼或继续对公司提起法律诉讼。

**接管**：即由担保债权人或在某种情况下法院任命的有资格的独立个人控制公司部分或全部资产。即便公司进入接管状态也可以进行临时清算、清算、自愿管理程序或取决于DOCA协议。

**Restructuring** is an option to prepare a company for an economic downturn. It enables directors and executives to downsize and simplify a business to meet changing demand and market conditions. To do this, a director might be entitled to take advantage of statutory 'stand down' provisions (to put employees on leave without pay), or plan for termination or redundancy payouts.

Companies that pre-empt changes and restructure early are often those that survive market downturns and we are already seeing airlines, hotels and other businesses in the tourism and hospitality industries restructure and adapt to changes in economic conditions. Restructuring can take many forms and may also be a way to handle disruption to supply chains.

**Scheme of Arrangement** is a formal debt restructuring mechanism that varies the debt terms between a company and its creditors. This is more often useful for a company with a relatively small number of creditors.

**Safe Harbour Provisions** are designed to protect directors from insolvent trading by enabling a company to continue trading where the company would likely be viable if it were able to restructure or trade out of financial difficulties.

To qualify for protection, the director must show a number of things, including that the company is up to date with its ATO lodgements and payments to employees, that the director has one or more clear plans for the company's future and that the director took expert advice about Safe Harbour as soon as he or she suspected the company was or may be insolvent. This is a technical area which requires the director to meet a number of thresholds. The current conditions could see a number of companies rely on the Safe Harbour Provisions if there is a belief that the global pandemic can be managed or a vaccination is a realistic outcome.

**公司重组**也是使公司为经济衰退做好准备的一种选择。这可以使董事和高管缩小公司规模并简化业务，以满足不断变化的市场需要和条件。董事有可能可以利用“stand-down”（雇员无薪休假）的规定 或计划解雇或裁员。

那些可以提前变革进行重组的公司通常能够在市场低迷时期生存下来。而且目前我们已经看到航空、酒店、旅游以及餐饮业开始重组的现象以适应经济变化。重组可以采取多种形式并也是解决供应链中断的一种方式。

**债务整理方案**是一种正式的债务重组机制，以改变公司和债权人之间的债务条款。这种方式通常对债权人较少的公司更为有用。

**避风港条款**旨在通过公司重组摆脱财务困境继续经营以避免公司破产。

一旦董事认为公司破产或有可能破产，公司董事必须满足一定条件才可以适用避风港条款。这包括公司能及时支付澳大利亚税务局的费用和员工工资、公司董事对公司未来有一个或多个详细的规划，并在怀疑公司已经或将要破产时，董事就避风港条款咨询了专家建议。这是一个非常专业的领域。在当前情形下，如果全球疫情可控或研发出可治愈的疫苗，许多公司可能会依靠避风港条款避免破产。



There are a number of practical steps that all businesses should be considering as they plan for the next few months and an eventual easing of the difficult current financial headwinds.

企业在未来几个月的规划中需要考虑各种具体措施以缓解所面临的财务困境。

Thynne + Macartney's team will be producing further updates for our clients as the situation evolves.

随着形势的发展，Thynne + Macartney 团队会为我们的客户提供更多的信息。

To receive copies of our further updates, sign up [here](#) or visit our [website](#).

如果您需要更多信息，请您在[此处](#)注册或访问我们的[网站](#)。

**Thynne + Macartney**

**We're with you.**

我们与您同行。

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## About Thynne + Macartney

For 127 years Thynne + Macartney has been helping people and businesses in Queensland to build and grow, as well as navigate the challenges and issues that sometimes come up.

We are a proud Queensland focused law firm with offices in Brisbane and Cairns.

Our commitment to regional Queensland is a substantial contribution to our firm's success.

Thynne + Macartney has survived World Wars, Great Depressions, Spanish and other flus, recessions and financial crises.

This too will pass and we will thrive as we always have – by prioritising our clients, offering support through the challenges ahead and working together to find the best possible outcomes and solutions.

**Proud of our past, excited by our future,**

**Thynne + Macartney – we're with you.**