

FRAUD AND INSOLVENCY | JULY 2021

AUSSIE RULES

When the measures in the UK designed to protect businesses from insolvency eventually draw to an end, what guidance can be taken from Australia where similar measures ended a few months ago?

We have entered time-on in the fourth quarter. Throughout 2020, both the UK and Australian governments responded promptly to the economic consequences created by the COVID-19 pandemic. This led to flexible and innovative measures being implemented in order to meet the economic needs of businesses. However, despite the temporary measures having been in place in the UK for over a year, some of those measures have been extended yet again and are now due to end on 30 September 2021 (for restrictions on winding-up petitions and statutory demands) and 25 March 2022 (for enforcement restrictions in relation to commercial leases in England). The suspension of wrongful trading liability ended on 30 June 2021.

With the end of the temporary measures approaching, what does the future hold for financially distressed businesses in the UK? In Australia, similar measures ended between December 2020 and March 2021 but, despite a predicted "tsunami" of insolvencies once those measures ended, Australian insolvencies are still approximately 40% down on pre-COVID levels.

In this article, we consider what guidance UK businesses can take from the Australian experience and what may happen once the final siren eventually sounds. Is the UK going to follow Australian rules, or are we are playing a different game entirely?

Commercial tenants / Landlord Moratoriums

The UK's *Coronavirus Act 2020*, which received Royal Assent on 25 March 2020, introduced a swathe of emergency measures in response to the pandemic. In particular, section 82 introduced a moratorium on a landlord's ability to forfeit a commercial lease on grounds of unpaid rent in England and Wales. This measure does not give tenants any entitlement to rent reduction (or prevent rent from accruing) but merely prevents landlords from repossessing commercial premises based on unpaid rent. The measure was initially due to expire on 30 June 2020 but, as COVID-19 continued to throw a number of "chaos balls" to businesses across most industries, extra time has now been given five times (with the latest extension due to end on 25 March 2022 in England and 30 September 2021 in Wales).

Regulations were also introduced in the UK to increase the amount of unpaid rent necessary for Commercial Rent Arrears Recovery (**CRAR**) to be used (a procedure that allows landlords to take control of and sell tenants' goods to recover outstanding rent arrears). The level of unpaid rent required to initiate CRAR has been increased several times throughout the pandemic. This measure has also recently been extended for a further nine months in England to 25 March 2022.

In Australia, the NSW Government enacted the *Retail and Other Commercial Leases (COVID-19) Regulation (Regulation)* on 24 April 2020 to implement the National Cabinet's Code of Conduct for commercial tenancies (**Code of Conduct**). This Regulation put in place temporary measures to share the economic impacts of the pandemic between commercial landlords and tenants. The Regulation initially applied for a period of six months but was extended until 28 March 2021 when it lapsed.

Despite this, recently passed amendments to the NSW *Retail Leases Act 1994 (the Act)* ensure that following the lapse, eligible tenants will remain protected in relation to circumstances arising throughout the April 2020 and March 2021 Regulation period. Under the Act a property owner cannot, for example, evict an eligible tenant because they were unable to pay their rent due to COVID-19 during the prescribed period unless they have first renegotiated

rent and attempted mediation. The amendments will not impact a property owners' rights in relation to circumstances arising after the prescribed period.

The UK government ran a consultation between 6 April 2021 and 4 May 2021 to help inform its approach to withdrawing the measures that are in place. At the end of April 2021, ministers received an open letter from hospitality leaders urging them to consider a similar rent relief scheme to that in Australia. On 16 June 2021, the government announced that legislation will be introduced to "ring-fence" unpaid rent that has built up for businesses that have had to remain closed during the pandemic. Landlords and tenants will be expected to share the financial impact of the periods of closure and will be encouraged to come to an agreement on how to handle the money owed (for example, waiving some of the total owed or agreeing a longer-term repayment plan). If agreement cannot be reached between the tenant and landlord, the new legislation will require the parties to use a binding arbitration process to resolve the dispute. The emphasis on the "sharing" of the financial impact of the pandemic and on the re-negotiation of outstanding rent arrears between the landlord and tenant seems to have taken at least some inspiration from the Australian model.

Winding-up petitions and wrongful trading suspension

The UK's *Corporate Insolvency and Governance Act 2020 (CIGA)* came into force on 26 June 2020. Among other measures, Schedule 10 of CIGA implemented a prohibition on presenting winding-up petitions (including those based on statutory demands) from 27 April 2020 unless the petitioner can show that it has reasonable grounds for believing that coronavirus has not had a financial effect on the company. This has effectively led to a moratorium on winding-up petitions given the difficulty in showing that the pandemic has not had an effect on the company. The restriction on issuing winding-up petitions is now being extended to 30 September 2021, so it is still some months before creditors will have a restored ability to issue winding-up petitions against recalcitrant debtors.

Section 12 of CIGA introduced a temporary suspension of the wrongful trading liability for directors in the UK, requiring the court to assume that directors are not responsible for the worsening of a company's financial position occurring during the "relevant period". The initial relevant period was 1 March 2020 to 30 September 2020. A second suspension was introduced from 26 November 2020, which expired on 30 June 2021.

Similar measures were introduced by the Australian Federal Government on 24 March 2020 in the *Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (CERPO)*. Creditors were prohibited from issuing a statutory demand to a company in circumstances where the debt owed was less than A\$20,000 (as opposed to the usual statutory minimum of A\$2,000) and the time within which a company needed to respond to a statutory demand increased from 21 days to six months (with a view to allowing companies some breathing space to make payment of their debts). This was implemented for an initial period of six months from 25 March 2020, but was subsequently extended to 31 December 2020.

The CERPO also provided for a "special safe harbour" to relieve company directors of their duty to prevent insolvent trading for debts incurred after 25 March 2020 in the ordinary course of the company's business. These initial measures were due to end after six months, but were extended to 31 December 2020 (in line with the relief provided with respect to winding-up procedures).

Since the Australian temporary measures have been withdrawn, there has been a natural increase in statutory demands and subsequent winding-up applications being issued but, to date, there has been nothing like the "tsunami" that was expected. Notwithstanding this, the Australian government is considering increasing the statutory minimum for issuing a statutory demand to A\$4,000 on a more permanent basis in order to curb the still anticipated rush of winding-up applications.

Furlough / JobKeeper

In the UK, the Coronavirus Job Retention Scheme (**CJRS**) has been in place since 20 April 2020. This introduced the (now very familiar) concept of furlough to alleviate pressure on employers and mitigate unemployment levels. As things stand, the CJRS is due to end on 30 September 2021.

Similarly, from 30 March 2020 the Australian Government introduced a A\$90 billion wage subsidy program called "JobKeeper". This subsidy was developed to cover the costs of an employees' wages in businesses negatively affected by the pandemic. The subsidy was extended in July 2020 and continued through to 28 March 2021. The program was widely taken-up, reaching over 900,000 organisations and 3.5 million individuals in the first three months. In the original subsidy scheme running from 30 March 2020 to 27 September 2020, eligible employers were given A\$1,500 per fortnight to pass on to eligible employees. The amount of the subsidy was gradually reduced between 28 September 2020 and 28 March 2021 (when it ceased).

Whilst there are some suggestions that the withdrawal of JobKeeper in Australia severely affected parts of the workforce in circumstances where parts of the economy continue to be affected by the pandemic, the statistics suggest that Australia's labour market is steadily growing notwithstanding the end of the scheme.

It is undoubtedly the case that employment levels in the UK would have been much more significantly impacted by the pandemic in the absence of the furlough scheme. However, it remains to be seen whether or not the furlough scheme has simply kicked the ball further down the field.

The Highlights

Through a combination of amendments to legislation to compliment the withdrawal of temporary measures, economic decisions made to boost the Australian workforce and an increasingly flexible approach to the needs of the Australian business community, there has been a better economic recovery in Australia than anticipated.

The temporary measures introduced in the UK have meant that the number of formal insolvencies is considerably lower than pre-pandemic levels. However, many commentators predict a wave of new insolvencies as those measures eventually end. The Australian experience may provide a more positive outlook, but it is worth noting that the UK economy differs in a number of significant respects and has suffered well over four million more cases of COVID-19 than Australia. The UK therefore faces some very different challenges to Australia and, as can be seen from the recent extensions, seems to be playing a much longer game. What will happen next season?

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