

# Model Behaviour: the Australian version of America's Chapter 11 Bankruptcy Scheme - Trustees & Creditors

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*On 24 September 2020, the latest instalment in Australia's insolvency reforms was announced. These reforms have been branded "the most significant reforms to Australia's insolvency framework in 30 years".*

For information about the proposed insolvency regulations, read Part 1 of this blog [here](#).

*The proposed scheme has been developed to provide relief to small business in light of the economic impact of the coronavirus by way of the additional debt taken on to survive. However, the impact of the proposed mechanisms is wide reaching, and particularly in circumstances where no draft legislation has been released, no consultation has been undertaken, and the plan is to have these amendments in place by 1 January 2021, the reforms may be hazardous for creditors and insolvency practitioners. Read on to find how the insolvency reform will affect you.*

## **Ramifications for Creditors**

Aside from the implicit ramifications listed in [Part 1](#), for at least thirty-five business days, creditors can do nothing to recover their debt. During the thirty-five day period, creditors are restricted from:

- Enforcing a personal guarantee given by a director or relative of a director of the debtor company;
- Invoking an ipso facto clause arising from the agreement with the debtor company; and
- Taking action against the debtor company.

Additionally, as businesses can continue to trade in the thirty-five business day period, the potential for creditors and debt to increase during that time is significant. The only limitation

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appears to be that the company must trade in the ‘ordinary course of business’ – what this means in the middle of a semi-formal restructuring period remains to be seen.

### ***Ramifications for Insolvency Practitioners***

If adopted, the [proposed measures](#) will alter the nature of the debtor and insolvency practitioner relationship immeasurably.

The proposed reforms include the creation of a role of “small business restructuring practitioner”. Whilst registered liquidators will be able to undertake this role, the intention is that new entrants in the market may register solely as a small business restructuring practitioner – with qualifications or standards of training as yet unspecified.

Practitioners will not be personally liable for debts incurred during the restructuring period – which will be a relief, however the relationship (and personal exposure) of the practitioner to the company and creditors is unclear. Can a practitioner be sued for advice or decisions made during this period? To whom will the practitioner be accountable in the event there is a concern regarding implementation of the plan?

Given the flat fees and percentage returns the restructuring practitioner is to an extent at the whim of the debtor company and the amount of work involved for the practitioner will need to be controlled carefully. Unless the new breed of practitioner is regulated in the same way as liquidators, there will be an inequality of overheads which may make the role less attractive to registered liquidators.

The responsibilities of the practitioner in developing the restructuring plan are to assist the directors of the debtor company by:

- Helping to determine the eligibility of the company and its directors to participate in the simplified process;
- Supporting the development of the plan including the collation of supporting documents to be provided to creditors; and
- Certifying the plan to creditors.

If the plan is accepted, the practitioner becomes a “bookkeeper” of sorts and is responsible for monitoring the payments made pursuant to the plan. This work is conducted in exchange for an agreed percentage of the payments made to creditors. Practitioners will need to be careful (or protected) against becoming de facto directors depending upon the work involved in the restructuring plan.

### **The Current Status of the insolvency reforms**

The measures falling within the insolvency reforms were announced on 24 September 2020 under a [Media Release from the Treasurer](#). The legislation which would implement the insolvency reforms has yet to be made available to the public.



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Watch this space to find out how the insolvency reforms are implemented and how it will affect you.

Matthews Folbigg Lawyers has a specialist team dedicated to Insolvency, Restructuring and Debt Recovery. If you would like more information or advice in relation to Insolvency, Restructuring or Debt Recovery practice and procedure, please contact Stephen Mullette or Jeffrey Brown on (02) 9806 7459 or (02) 9806 7446, or email [stephenm@matthewsfolbigg.com.au](mailto:stephenm@matthewsfolbigg.com.au) or [jeffreyb@matthewsfolbigg.com.au](mailto:jeffreyb@matthewsfolbigg.com.au).