

Senate Select Committee on COVID-19

ASIC response to Question on Notice

QoN: 001
Senator: Patrick
Topic: National COVID-19 Coordination Commission
Hansard Page: 31

Question:

CHAIR: Thank you very much, Senator Watt. I have one question for ASIC from Senator Patrick, who was questioning you, Mr Shipton, when you disappeared the first time through technology breakdown. His question is: has ASIC had any interaction with the National COVID-19 Coordination Commission since it was established?

Mr Shipton: I'm not aware of liaisons, but let me take that on notice because we have had significant liaisons with our brethren agencies in Canberra.

CHAIR: Thank you. If you could take that on notice that would be excellent.

Answer:

On 15 April 2020, ASIC's Financial Capability team participated in a meeting organised by the National COVID-19 Coordination Commission with representatives from Treasury, Industry, Infrastructure and the Australian Taxation Office. The purpose of this meeting was to share information and discuss relevant activity.

ASIC also provided input to a broader mapping exercise coordinated by Treasury as part of their report back to the Service Delivery and Coordination Committee on the communication going to businesses and individuals on the Coronavirus economic support measures.

Senate Select Committee on COVID-19

ASIC response to Question on Notice

QoN: 002
Senator: Watt
Topic: Phoenix activity
Hansard Page: 32 and 33

Question

Senator WATT: This is the last one from me. One other area where the government has made some regulatory changes concerns the temporary moratorium on the insolvent trading rule, which means that directors are now exempt from personal liability in certain circumstances. My question is to ASIC. Were you consulted on those changes? How would you assess the risk of phoenixing and other fraudulent activity as a result of those changes?

Mr Price: I'm not aware that we were consulted on those changes. I'd like to take that on notice to be absolutely sure. In terms of phoenix activity, that remains a high priority for us, regardless of the market environment. I think, with the extraordinary commercial circumstances that we've seen, it is possible that we will see an uptick in insolvencies and possibly an uptick in unscrupulous people attempting to phoenix their businesses. But we're very attuned to that and we've got a—

Senator WATT: But my question was whether the changes have increased that risk.

Mr Price: I'd be speculating if I tried to answer that question. As I said, I think, with the extraordinary economic circumstances, there may well be an increase in insolvencies. We just need to see how things play out. We're well placed to try to deal with illegal phoenix activity if that arises.

Answer

Safe harbour protection for directors from personal liability for insolvent trading was introduced in 2017. It applies to debts incurred in circumstances where the director, on starting to suspect that the company may be insolvent, or become insolvent at a future time, begins to develop one or more courses of action that are reasonably likely to lead to a better outcome for the company.

The government's COVID-19 related additional temporary safe harbour measure provides further temporary protection to directors for debts incurred in the ordinary course of business after 25 March 2020 (for six months until 25 September 2020). The Explanatory Memorandum states that a director is taken to incur a debt in the ordinary course of business if it is necessary to facilitate the continuation of the business during the six-month period. It appears to relate to debts incurred to keep the business operating through the pandemic, including trading debts.

After making relevant searches and enquiries ASIC is not aware that ASIC was consulted about these temporary measures.

ASIC continues to publicly encourage directors to obtain independent advice from a trusted appropriately qualified advisor when considering how the temporary safe harbour applies and to obtain objective advice about the financial viability and future prospects of their business.

The temporary safe harbour measure does not exempt directors from their duties under the *Corporations Act 2001* and at equity: which include discharging their duties with a degree of skill and diligence that a reasonable person would exercise if they were a director of a company in the company's circumstances with the same responsibilities, to act in good faith in the best interests of the company and not use their position (or information they obtain from that position) to gain an advantage for themselves or someone else or cause detriment to the company.

ASIC has no evidence to suggest that this particular measure would increase the risk of phoenixing and other fraudulent activity but acknowledges untrustworthy advisors may seek to take advantage of various financial and other measures introduced in response to the COVID-19 pandemic to promote illegal phoenix activity.