

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020

Section 454N of the *Corporations Act 2001* (the Corporations Act) provides that the Minister may, by legislative instrument, declare kinds of rights to which the stay on enforcing rights merely because a company is under restructuring does not apply or does not apply in specified circumstances. The Minister may also declare kinds of contracts, agreements or arrangements referred to in a specified law of the Commonwealth in relation which the stay on enforcing rights merely because a company is under restructuring does not apply.

The *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* (the Declaration) makes amendments to the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (the Stay on Enforcing Certain Rights Declaration) to declare kinds of rights of contracts that do not attract the stay on enforcing rights merely because the company has entered restructuring under the new debt restructuring process under section 454(1) of the Corporations Act.

The economic consequences of the Coronavirus known as COVID-19 highlight the need for a system of external administration that can accommodate the needs of small businesses. In these situations, complex, lengthy and rigid procedures can be unsuitable.

In response to these challenges, the Australian Government announced a package of reforms to the corporate insolvency framework, including major changes to accommodate eligible small businesses. The reforms are designed to meet the needs of small businesses by reducing the complexity and costs in insolvency processes. The reforms are implemented through the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*, the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* and the *Corporations Amendment (Corporate Insolvency Reforms) Rules 2020*.

The Declaration is consequential to these reforms to Australia's corporate insolvency framework. In particular, the Declaration makes consequential amendments to the Stay on Enforcing Certain Rights Declaration to apply the exemptions to the operation of the stay on enforcing rights merely because the company has entered restructuring under the new debt restructuring process under new Part 5.3B of the Corporations Act.

The operation of the stay on enforcing a right (often known as an ipso facto clause) has the potential to reduce the scope for a successful restructure, decrease the enterprise value of a business entering formal administration, or prevent the sale of the business as a going concern. These outcomes can reduce or eliminate returns in a

subsequent liquidation by disrupting the businesses' contractual arrangements and destroying goodwill, potentially prejudicing other creditors and defeating the purpose of an external administration process.

Public consultation did not occur specifically in relation to the Declaration. However, the Regulations make only consequential amendments to the Stay on Enforcing Certain Rights Declaration to give further effect to the new debt restructuring process. Extensive public consultation was conducted in relation to the new formal debt restructuring process. The Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 was publicly released in exposure draft form between 7 and 12 October 2020. Similarly, the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* were publicly released in exposure draft form between 17 and 24 November 2020. As part of these consultation processes, submissions were received from various industry participants and industry bodies.

The Declaration forms part of the reforms to the corporate insolvency framework. These reforms will deliver significant regulatory savings for impacted businesses and individuals. A Regulatory Impact Statement for the corporate insolvency reforms is included in the explanatory statement to the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* (OBPR Ref: 25694).

Details of the Declaration are set out in [Attachment A](#)

A Statement of Compatibility with Human Rights has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and is at [Attachment B](#).

The Declaration is a legislative instrument for the purposes of the *Legislation Act 2003*.

Schedule 1 to the Declaration commences on the day after this instrument is registered or the day on which Schedule 1 to the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* commences, whichever occurs later.

ATTACHMENT A

Details of the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020*

Section 1 – Name of the Declaration

This section provides that the name of the Declaration is the *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* (the Declaration).

Section 2 – Commencement

Section 2 provides that sections 1 to 4 of the Declaration commence on the day after the Declaration is registered. Schedule 1 to the Declaration commences on the day after Declaration is registered or the day on which Schedule 1 to the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* commences, whichever occurs later.

Section 3 – Authority

The Declaration is made under the *Corporations Act 2001* (the Corporations Act).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments to the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018*

Exemptions to the operation of the stay on enforcing certain rights

Section 454N(1) of the Corporations Act (as inserted by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*) provides, generally, that a right cannot be enforced against a company for the reason that the company has come or is under restructuring if the right arises for that reason by express provision of a contract, agreement or arrangement. Restructuring for this purposes means the formal debt restructuring process in Part 5.3B of the Corporations Act.

Declaration of kinds of rights

Under section 454N(6) of the Corporations Act, for the purposes of section 454N(5), the Declaration declares kinds of contracts and rights in relation to which the stay does not apply.

The Declaration declares that the kind of rights referred to in section 5(4) of the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (the Stay on Enforcing Rights Declaration) are declared under section 454N(6)(b) of the Corporations Act to be kinds of rights to which section 454N(1) of the Corporations Act does not apply. *[Schedule 1, items 3, 6 and 7, sections 5(3), (4) and (6) of the Corporations (Stay on Enforcing Certain Rights) Declaration 2018]*

This has the effect that the stay on proceedings in section 454N(1) of the Corporations Act does not apply to each of the following kinds of rights:

- a right to change the basis, including by the application of a different rate, on which an amount in respect of or under any of the following is calculated:
 - a financing arrangement; or
 - a guarantee, indemnity or security related to a financing arrangement (whether or not the guarantee, indemnity or security is limited in any way);
- a right to payment by way of indemnity (whether or not the indemnity is limited in any way) in respect of:
 - any liability or loss arising as a result of a person preserving or enforcing rights; or
 - any charges and expenses incurred by a person in preserving or enforcing rights;
- a termination right under a standstill or forbearance arrangement, whether or not the standstill or forbearance arrangement suspends, preserves or modifies the right under the other contract, agreement or arrangement to which it applies;

- a right to change the priority, or order, in which amounts are to be paid, distributed or received under a contract, agreement or arrangement;
- a right of set-off or a right of combination of accounts;
- a right to net balances or other amounts;
- a right to take action to enforce:
 - a right referred to in paragraph 5(4)(e) or (f) of the Stay on Enforcing Rights Declaration (relating to the a right to set-off or a right of a combination of accounts, and a right to net balances or other amounts); or
 - a right referred to in subsection 6(1), (2) or (3) of the Stay on Enforcing Rights Declaration (relating to a right to appoint a controller of property) if, on the enforcement of that right to take action, the circumstances referred to in subsection 6(4) or (5) of the Stay on Enforcing Rights Declaration (as applicable) would be satisfied;

for the purposes of enforcing a right referred to in paragraph (e) or (f), or in subsection 6(1), (2) or (3) (as applicable), whether or not an amount is due for payment, will or may become due for payment, or is unpaid;

- a right to:
 - assign or otherwise transfer rights or obligations; or
 - novate rights or obligations;
- a right:
 - for property that is subject to a circulating security interest to become subject to a non-circulating security interest; or
 - for a floating charge over property to operate as a fixed charge; or
 - for property consisting of accounts or chattel paper to be transferred to a secured party by way of security; or
 - that restricts the grantor of a security interest in property from dealing with the property;
- a right:
 - to perform obligations; or
 - to engaged another person to perform obligations; or
 - to enforce rights; or

- to engage another person to enforce rights;

of the specified person under a contract, agreement or arrangement;

- a right to enforce a possessory security interest in circumstances where paragraphs 440JA(b), (c) and (d) of the Corporations Act (relating to property subject to banker's lien) are satisfied;
- a right to enforce a possessory security interest in circumstances where paragraphs 453X(b), (c) and (d) of the Corporations Act (relating to property subject to banker's lien) are satisfied.

Declaration of kinds of rights in specified circumstances—a right to appoint a controller

Further, the Declaration declares that a right to appoint a controller of property of a specified person is declared under paragraph 454N(6)(c) of the Corporations Act to be a kind of right to which subsection 454N(1) of the Corporations Act does not apply in the circumstances specified in sections 6(4) and (5) of the Stay on Enforcing Rights Declaration. *[Schedule 1, item 8, section 6(3A) of the Corporations (Stay on Enforcing Certain Rights) Declaration 2018]*

This has the effect that the stay on proceedings in section 454N(1) of the Corporations Act does not apply to a right to appoint a controller of property of a specified person in the following circumstances:

- the right is to be enforced by a person who has a security interest in, or over, property of the specified person; and
- in relation to property of the specified person:
 - a controller has been appointed; or
 - a right to appoint a controller has been enforced.

The amendments made by the Declaration mirror the kinds of rights that are declared in relation to other forms of external administration: arrangements and reconstructions (see section 415D of Part 5.1 of the Corporations Act), receivers, and other controllers, of property of corporations (see section 434J of Part 5.2), and administration of a company's affairs with a view to executing a deed of company arrangement (see section 451E of Part 5.3A).

Minor and consequential amendments

The Declaration makes a number of amendments to cross-references in the Stay on Enforcing Rights Declaration to reflect the kinds of rights declared for the purposes of the debt restructuring process in Part 5.3B of the Corporations Act, including in the definition of 'specified person' in section 4. *[Schedule 1, items 1, 2, 4, and 5, sections 3, 4, and 5 of the Corporations (Stay on Enforcing Certain Rights) Declaration 2018]*

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Corporations (Stay on Enforcing Certain Rights) Amendment (Corporate Insolvency Reforms) Declaration 2020* (the Declaration) makes amendments to the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (the Stay on Enforcing Certain Rights Declaration) to declare kinds of rights of contracts that do not attract the stay on enforcing rights merely because the company has entered restructuring under the new debt restructuring process under section 454(1) of the Corporations Act. The Declaration also declares kinds of contracts, agreements or arrangements referred to in a specified law of the Commonwealth in relation which the stay on enforcing rights merely because a company is under restructuring does not apply.

Human rights implications

The Declaration does not engage any of the applicable rights or freedoms.

Conclusion

The Declaration is compatible with human rights as it does not raise any human rights issues.