Law Council
OF AUSTRALIA

Business Law Section

31 March 2020

Ms Jodi Keall
Manager
Corporations and Managed Schemes Unit
The Treasury
Level 29, 201 Kent Street
SYDNEY NSW 2000

By email: Jodi.Keall@treasury.gov.au

Dear Ms Keall,

Consequential corporate insolvency emergency measures

1. I refer to our ongoing communications in relation to law reform issues, particularly in relation to measures that will assist in the conduct of business dealing with the current situation regarding COVID-19.

2. Following the passing of the *Coronavirus Economic Response Package Omnibus Act 2020* and the temporary measures enacted by instrument, a number of consequential issues can be identified which need addressing.

3. Hence, this further submission is made by the Insolvency and Restructuring Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia.

4. The details of the various changes are set out in the *attached* Schedule.

5. The areas of concern can be summarised as follows:

    a. Changes required to assist the convening of meetings of creditors for voluntary administrations;

    b. Changes to meeting procedures and voluntary administration procedures so that they may be more easily accommodated during the Covid-19 crisis period;

    c. Changes to voluntary administrator's personal liability so that they are extended the same protection as company directors;

    d. Consequential changes to other provisions of director's duties during the insolvent trading moratorium so that the purpose of the temporary instrument is not defeated;

    e. Changes required to 'safe harbour' provisions so that they may more easily be implemented to meet the needs of companies and directors during the period of the crisis;

    f. Changes required as a result of changing the periods relating to statutory demands;

g. Changes to preserve the integrity of voidable transaction provisions with respect to relation-back and recovery periods.

6. For completeness, the Committees also address two further matters:

   a. Consequential changes that should be made in relation to the Fair Entitlements Guarantee Act, which may not fall within the power currently granted to the Treasurer, but which, it is submitted, should be considered for reform as soon as practicable;

   b. Other timing provisions in the Corporations Act which, for the reasons outlined in that part of the Schedule, should not be changed.

7. The BLS would be pleased to assist in developing the appropriate measures to address the concerns raised in this submission.

8. If you would like to discuss this issue or would like further information, please contact Mr Scott Butler, chair of the Insolvency & Restructuring Committee at sbutler@mccullough.com.au or on (07) 3233 8653.

Yours faithfully,

Greg Rodgers
Chair, Business Law Section

Schedule - Consequential corporate insolvency emergency measures

Section or Rule	Context	Proposed change
Convening of Meetings		
Corporations Act		
Section 436E Corporations Act: Purpose and timing of first meeting of creditors	The administrator must hold a meeting of the company's creditors to determine whether to appoint a committee of inspection **within 8 days** after the administration begins. The administrator that convenes the meeting must give written notice to as many of the company's creditors as reasonably practicable at **least 5 business** days before the meeting.	**Issue** Compliance with working from home recommendations and travel restrictions may make it more difficult for administrators to gather the information about who creditors are and to issue the notice within the required time frames. **Recommendation** The time for holding the first meeting be extended to 20 days after the administration begins. Although notice of the meeting can be provided electronically to creditors if they have an electronic address (section 600G), it must still be posted if they have not nominated one. Again, compliance with working from home recommendations and travel restrictions may make it more difficult for administrators to print and post notices of meeting, but the extension of time above should be sufficient to deal with that.
Section 439A(5) Corporations Act	The administrator of a company must convene a meeting of the company's creditors within the convening period, which must be held within 5 business days before, or within 5 business days after, the end of the convening period. The convening period is: (a) if the day after the administration begins is in December, or is less than 25 business days before	**Issue** Compliance with working from home recommendations and travel restrictions will make it more difficult for administrators to gather the information necessary to properly prepare the report and issue it within the required time frames. In addition, given the current uncertainty about the length of the restrictions imposed on Australian business because of COVID19, it is likely that:

	Good Friday--the period of 25 business days beginning on: (i) that day; or (ii) if that day is not a business day--the next business day; or (b) otherwise--the period of 20 business days beginning on: (i) the day after the administration begins; or (ii) if that day is not a business day--the next business day. The notice convening the report must attach a report by the external administrator about the company's business, property, affairs and financial circumstances, which sets out: (a) whether, in the administrator's opinion, it would be in the creditors' interests for the company to execute a deed of company arrangement; (b) whether, in the administrator's opinion, it would be in the creditors' interests for the administration to end; (c) whether, in the administrator's opinion, it would be in the creditors' interests for the company to be wound up; (d) the reasons for the opinions referred to above; (e) such other information known to the administrator as will enable the creditors to make an informed decision about each matter covered above; (f) whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the Act; and	(a) proposals for a deed of company arrangement will be few and far between, meaning more companies will have to go into liquidation; and (b) the administrators will not be able to form informed recommendations as to what is in the best interests of creditors. **Recommendations** Section 439A(5) Corporations Act should be amended so: (a) the convening period is six months; (b) the meeting can be held at any time within the convening period, or within 5 business days after, the end of the convening period. An alternative manner of proceeding would be as follows: An amendment could be made: • At the conclusion of subsection 439A(5), a post-amble should be added containing the words "unless another period is prescribed". • At the conclusion of subsection 439A(2), "unless the Regulations provide otherwise" should be added. • A new regulation in the Corporations Regulations 2001: (1) Subject to sub-regulation (2), for the purposes of section 439A(5) of the Act, the period prescribed is the period beginning on the day after the administration begins and ending on the latest of: (a) 26 October 2020;

	(g) if a deed of company arrangement is proposed—details of the proposed deed.	(b) a day set by a Court in an order under subsection 439A(6) of the Act; and (c) the day that would be applicable under subsection 439A(5) of the Act if this regulation were not in force. (2) Without limiting subsection 439A(6) of the Act, the Court may make an order that the convening period determined under be shorter or longer than the period specified in regulation (1). (3) An order under sub-regulation (2) may be made on the application of: (a) the administrator of the company; (b) a creditor of the company; or (c) the company; or (d) ASIC; or (e) any other interested person. (4) For the purposes of subsection 439A(2) of the Act, the prescribed period for holding a meeting is any day in the period commencing the day after the meeting of creditors under section 436E of the Act and concluding 5 business days after the end of the convening period. (5) This regulation applies to any administration which commences or is ongoing after this regulation comes into force. The Committee proposes a further legislative amendment rather than an instrument under section 1362A. That is because any instrument made under section 1362A ceases to have effect 6

		months after it is made. Given the proposed change extends administrations to a period which is 20 business days after the end of the 6 month period in which the instrument-making power is in force, we cannot see how an instrument could be made effecting the proposed change properly unless it were to be followed by a later, further instrument or variation of the instrument under section 1362A(5).
Insolvency Practice Rules		
IPRC 75-5(1): When meetings must be held	A meeting directed to be convened under IPS 75-15 (above) must be held as soon as reasonably practicable (unless it is not reasonable for the external administrator to comply with the direction to convene meeting).	No change required, as flexibility exists in what is 'reasonably practicable' in the circumstances.
IPRC 75-30: Time and place of meetings	The convenor of meetings must convene the meeting at the time and place that the convenor thinks are **most convenient for the majority of persons entitled to receive notice of the meeting**. This does not prevent a meeting from taking place **at separate venues provided that technology is available at the venues to give all persons attending the meeting a reasonable opportunity to participate**.	**Issue** Meetings should be able to be conducted entirely online. It is not possible to comply with this rule for such virtual meetings. **Recommendation** There should be an amendment so that meetings can be convened and held entirely online via video conference or audio conference without there needing to be any actual 'place' that the meeting is held.
Procedures at meetings		
Insolvency Practice Rules		
IPRC 75-75: Participating in meetings by electronic means	If facilities for participating in a meeting of creditors by electronic means will be available for the meeting, and a person has been given a statement in accordance with IPRC75-35(2)(b): (a) the convenor must take all reasonable steps to ensure that the facilities are available and operating during the meeting; and	**Issue** IPRC 75-75 appears to be intended to cover all meetings that IPRC 75-35(2)(b) applies to, but the wording of IPRC 75-75 refers only to 'a meeting of creditors'. It is unclear, therefore, whether it applies to a meeting of a committee of inspection, which it should. **Recommendation**

	(b) the person is responsible for accessing the facilities during the meeting. A person (or person's proxy or attorney) who participates in the meeting using facilities is **taken to be present in person at the meeting**.	Amend IPRC 75-75 to also apply to meetings of a committee of inspection. This could be effected by deleting the words 'of creditors'.
IPRC 75-110: Voting on resolutions	**75-110(1)**: A resolution put to the vote at a meeting is to be decided: (a) if a poll is requested by the person presiding at the meeting, or by a person participating and entitled to vote – by a poll; or (b) otherwise – on the voices. **75-110(2)**: Unless a poll is requested, the person presiding at the meeting must declare that a resolution has been passed (etc.) on the voices. **75-110(4):** A declaration is conclusive evidence of the result to which it refers, without proof of the number or proportion of the votes recorded in favour of or against the resolution, unless a poll is requested. **75-110(5)**: If a poll is requested: (a) the poll must be taken immediately; and (b) the person presiding may determine the manner in which the poll is to be taken.	No change required, but it would be incumbent on the chair of the meeting to ask for a poll if it is not possible to determine if a resolution is passed on the voices.
Insolvency Practice Rules		
IPRC 75-140: Adjournment of meetings of creditors	A meeting may be adjourned from time to time and from place to place by: (a) resolution; or (b) the person presiding at the meeting.	**Issue** Whilst the amendments proposed to sections 439A(3) and 439A(5) will deal with meetings which have yet to be convened, amendments are also necessary to deal with meetings which have been convened. **Recommendations**

	IPRC 75-140(2): the meeting must not be adjourned to a day that is more than 15 business days after the day on which the original meeting was held. **IPRC 75-140(3):** Despite IPRC 75-140(2), a meeting convened under section 439A (second creditors' meeting) must not be adjourned to a day that is more than 45 business days after the day on which the original meeting was held. **IPRC 75-140(4):** Unless otherwise provided by the resolution by which it is adjourned, the adjourned meeting must be held at the same place as the original meeting. **IPRC 75-140 (5):** The convenor of the meeting or a person nominated by the convenor must, **by the end of the next business day**, give notice of the adjournment to the persons to whom notice of the meeting must be given under section 75-10. **IPRC 75-140 (6):** If a meeting is adjourned to a day more than 6 business days after the passing of the resolution by which it is adjourned, the company must cause notice of the day, time and place of the resumption of the meeting to be electronically lodged with ASIC in accordance with sub-regulation 5.6.75(4) of the regulations at least 5 business days before that day. **IPRC 75-140 (7):** A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.	The maximum period for the adjournment of a second meeting of creditors in IPRC 75-140(3) should be extended to six months after the day on which the original meeting was held. IPRC 75-140(4) – This should be amended to align with any amendments to IPRC 75-30. IPRC 75-140(5) - The notice period should be extended to be within 5 business days, again to account for delay which will be caused by remote working arrangements.
Additional rules for particular kinds of administration		

Insolvency Practice Rules		
IPRC 75-225: Companies under administration – how certain things are convened	**IPR 75-225(1)**: The administrator of a company under administration must convene a meeting under: (a) section 439A of the Act (to decide future of company under admin); or (b) subsection 449C(4) of the Act (vacancy in office of administrator), by written notice given to as many of the company's creditors as reasonably practicable.	No change required if the proposed amendments to section 439A(5) are made.
Committee of Inspection		
Insolvency Practice Rules		
IPRC 80-5: Eligibility and procedures	Under IPRC 80-5(3), a committee of inspection must meet at such times and places as its members from time to time appoint.	**Issue** Meetings of a committee of inspection should be able to be conducted entirely online. It is not possible to comply with this rule for entirely virtual meetings. **Recommendation** There should be an amendment so that meetings can be convened and held entirely online via video conference or audio conference without there needing to be any actual 'place' that the meeting is held.
IPRC 80-20: Time to reply with reasonable requests	Under IPS 80-40, a committee of inspection may request the external administrator to give information, provide a report or produce a document to the committee. The external administrator must comply with the request unless: …. (c) it is otherwise not reasonable for the external administrator to comply with the request.	No change required. Compliance with working from home recommendations may make it difficult for administrators to gather the information requested within the 5 business day period, but they can request an extension under the current rule.

	IPRC 80-20(2): a request must be complied with within 5 business dates after receiving the request, or such later period as agreed with the committee of inspection. **IPRC 80-20(3):** if the external administrator is reasonably satisfied that, due to the nature of the request, an extension of time is required to comply with it, the external administrator must extend the period for compliance by written notice.	
Service of notices		
Corporations Act		
Section 600G: Electronic methods of giving or sending certain notices.	Under s600G, certain notices may be given by a 'notifier' to a 'recipient' by electronic means nominated by the recipient.	**Issue** The ability to give notices electronically under this section is dependent on recipients having already nominated a fax number or electronic address for receiving such notices. In the current environment where issuing notices may require urgency and where there may be a risk of service of notices may not be guaranteed (for example, if there is any disruption to postal delivery services), it would be a significant improvement to the orderly management of external administrations if external administrators can take advantage of a more flexible method of giving notices. **Recommendation** Two amendments are proposed: There should be an amendment to subsection 600G(2) as follows: (2) If the recipient nominates a fax number, or electronic address, by which the recipient may be notified of such notices or documents, *or otherwise has a publicly available fax number or email address*, the notifier may give or send the notice or document to

		the recipient by sending it to that fax number or electronic address. There should also be added a new subsection 600G(3A): *(3A) A notifier may give notice to a recipient by any other means not specifically referred to in this section provided the notifier is able to prove that the notice of document came to the attention of the recipient*.
Administrator's personal liability		
Corporations Act		
Section 443A: Administrator's personal liability Section 443B(a) and (2):	Administrators are personally liable for debts they incur in the performance or exercise of their functions and powers for: (a) services rendered; (b) goods bought; (c) property hired, leased, used or occupied; or (d) the repayment of money borrowed; or (e) interest in respect of money borrowed; (f) borrowing costs. Administrators are personally liable for so much of rent or other amounts payable by the company under the agreement where the company continues to use or occupy or is in possession of property of which someone else is the owner or lessor.	**Issue** If the convening period is extended, and hence the duration of an administration is extended, in order to allow the company's business to continue and a viable rescue and restructuring proposals to be obtained and put to a resolution of creditors, then consequential relief may need to be granted to the administrator in respect of their personal liability associated with trading on the company's business. This may be implemented by an instrument under section 1362A of the Act in the following terms: (1) Subsection 443A(1) does not apply to debts incurred by an administrator during the operation of this instrument, however, sections 443D and 556 of the Act shall apply as if an administrator were so liable under subsection 443A(1). (2) Subsection 443B does not apply to debts incurred by an administrator during the operation of this instrument, however, sections 443D and

		556 of the Act shall apply as if an administrator were so liable under subsection 443A(1). The cost or risk associated with the proposal is that administrators may unnecessarily continue to trade the business of a company, and continue to incur trading debts, in circumstances where it may not be reasonable. This may be to the detriment of those creditors, and may lead to those creditors being unwilling to continue to trade with the company in administration. This cost or risk is mitigated in the following ways. First, an administrator has a discretion to convene the meeting earlier. Second, the proposal as to the variation of the convening period provides that interested parties (which would include creditors) have liberty to apply to a Court to reduce the convening period. Third, if the debts are not reasonably incurred an administrator may be personally liable in any event because they are not incurred in the performance or exercise of the administrator's functions and powers. Given that under s588GAAA, directors have relief from personal liability for debts incurred in the ordinary course of the company's business during this period, it is appropriate that administrators have access to similar relief.
Directors duties to creditors during insolvent trading moratorium		
Corporations Act		
Section 180 & 181 Corporations Act: Liability of directors	A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence of a reasonable person in the circumstances. A director or other officer of a corporation must exercise their powers and discharge their duties in	**Issue** The Minister should issue a legislative instrument pursuant to s1362A of the Corporations Act confirming that sections 180 and 181 of the Corporations Act do not apply in respect of debts incurred by a company that fall within s588GAAA of the Corporations Act.

	good faith in the best interests of the corporation and for proper purposes.	**Argument for:** The 6 month insolvent trading moratorium only removes the liability of directors for insolvent trading (except in the case of "dishonest" trading covered by s588G(3)). Directors have other areas of personal exposure apart from s588G(2), Corporations Act where they allow a company to trade whilst insolvent (*Kinsela* (1986) 4 NSWLR 722) or nearing insolvency (*Bell Group (No 9)* (2008) 39 WAR 1 at [20.3.3]). Therefore, notwithstanding the insolvent trading moratorium, directors may still be liable for breach of duty under ss. 180 and 181 of the Corporations Act where they permit their company to continue incurring debts whilst the company is insolvent, or which may make the company insolvent. This area of exposure for directors undermines the effectiveness of the new moratorium on insolvent trading claims in s588GAAA, Corporations Act which came into force on 25 March 2020. The reasoning above therefore satisfies the criteria (in s1362A(2), Corporations Act) for the issue of a legislative instrument, as it is necessary to facilitate continuation of business in circumstances relating to the coronavirus known as COVID-19, and in order to mitigate the economic impact of COVID-19. **Argument against:** The proposal aims to reduce director liability for breach of ss.180 - 181 where s588GAAA applies. However, ss. 180 – 181 apply in addition to (and not in derogation from) the common law. At common law (as reflected in *Kinsela*, *Bell Group* etc) directors may also be held liable for permitting their companies to incur debts whilst insolvent and that prejudice the position of the company's creditors. That is, this proposal does not fix all areas of potential liability for directors and is therefore a further "piecemeal" fix regarding the liability of directors who permit their companies to continue to trade whilst insolvent. However, the Committees consider that as Parliament considered it fit to enact s588GAAA then this proposed change should also be

		made to improve the effectiveness of s588GAAA (even if not a perfect solution).
Safe harbour provisions		
Corporations Act		
Section 588GA(4): Conditions for entering safe harbour	The defence of 'safe harbour' can only apply if certain conditions are met, namely that substantially all employee entitlements are paid when due, and all tax returns, notices and other requirements for tax are substantially up to date.	**Issue** The restrictions imposed by these conditions limit the number of companies that may benefit from the safe harbour protection in s588GA. It is recommended that the requirement in s588GA(4)(a) that companies be up to date with payment of employee entitlements (including super) and tax reporting in order to come within the safe harbour be removed. **Argument for:** First, the 6 month insolvent trading moratorium is, at best, likely to defer voluntary administrations and liquidations of companies operating SMEs until the moratorium ends. This is because: - Companies whose revenue has collapsed due to the closure of markets will have to continue to incur new debts in order to continue operating. - These debts won't be able to be repaid in full until after trading conditions have returned to normal - possibly well after the 6 month insolvent trading moratorium has ended. - The debts incurred in reliance on the insolvent trading moratorium may need to be paid in priority to other unsecured debts, including employee entitlements, in order to avoid the companies being wound up.

		- In order to continue to trade on when the insolvent trading laws return to normal, these companies will need to come within the original safe harbour (s588GA). If they cannot do so, they will need to enter voluntary administration or liquidation. - Many SME's will not be able to come within the s588GA safe harbour as they won't be able to pay their increased amount of debts incurred during the 6 month insolvent trading moratorium as well as pay all employee entitlements. They will therefore need to enter voluntary administration or liquidation. Secondly, many directors will need to rely on the original safe harbour (in s588GA, Corporations Act) instead of the new temporary moratorium on insolvent trading claims (in s588GAAA, Corporations Act). This is because: - Neither safe harbour provision (s588GA or s588GAAA) protects directors from "dishonest" insolvent trading (s588G(3). Whilst that is understandable, it is not clear what conduct amounts to "dishonesty" in the context of insolvent trading. There are very few cases on s588G(3). - In particular, it is not clear whether a director who permits the company to incur a debt whilst the director **knows** the company cannot repay the debt when due commits a breach of s588G(3) (as opposed to merely **suspecting** that the debt cannot be paid when due). If such conduct does amount to "dishonesty" then the director will get no protection from the temporary moratorium on insolvent trading in s588GAAA. - However, directors will be more likely to get the protection of the original safe harbour (s588GA) where the director can show that s/he is working to a plan that

		is likely to result in a better outcome than an immediate voluntary administration or liquidation. Therefore as many directors as possible should be able to get the protection of the s588GA safe harbour. **Argument against:** 1. Could be seen as encouraging non-payment of employees. (However, that is better than the alternative of employees losing their jobs if their employer has to go into external administration). 2. There is already some "leeway" in the original safe harbour provision, as companies only have to be in "substantial compliance" with its obligations to pay employee entitlements (see s588GA(4)(b)). However, it is not clear what "substantial" compliance amounts to.
Statutory periods for statutory demands		
Corporations Act		
Regulation 5.4.01AA: Extension of period of statutory demand	The period for compliance with statutory demand is extended to six months.	**Issue** The drafting of Regulation 5.4.01AA of the *Corporations Regulations* has the effect that, absent further amendment, there will be an undesirable disconnect between demands issued during the six month operation of the regulation and demands issued shortly thereafter. As it stands, demands issued during the six month period following commencement will need to be satisfied or dealt with within six months of service, whereas demands issued immediately after that period (at this stage, from 26 September 2020) will need to be satisfied or dealt with within 21 days. The effect is that any demand issued between 16 April 2020 and 25 September

		2020 will have an expiry which is after a demand issued on 26 September 2020. There should be some form of tail operation to the temporary measure. Given that a demand issued on 25 September will need to be satisfied or dealt with by 25 March 2021, it might be appropriate for any demand issued between 26 September 2020 and 4 March 2021 also to have an expiry on 25 March 2021. Absent any change, creditors properly advised would not issue a demand after 16 April 2020 and would instead wait until 26 September 2020. Any change should be implemented shortly, so that there is certainty for creditors now. Such a change could be effected by way of a new regulation to complement Regulation 5.4.01AA, or alternatively a new instrument under section 1362A of the Act (the provision enacted under Schedule 8 of the *Coronavirus Economic Response Package Omnibus Act 2020* which provides for certain Ministerial Instruments). However, an instrument under that provision can only have effect for 6 months (under subsection 1362A(4)), and would need to be supplemented by a new instrument or variation (under subsection 1362A(5)) shortly before section 1362A ceases to have effect.
Relation-back periods		
Corporations Act		
Section 588FE: Voidable transactions.	Various voidable transaction provisions having effect depending on the relation-back period**.**	**Issue** The relation-back periods for voidable transactions set out in s588FE of the *Corporations Act 2001* (Cth) are likely to require amendments to take into account not only the economic

		impacts of COVID-19, but also the legislative responses to those impacts. The introduction of s588GAAA and amendments to the statutory demand procedure will almost certainly have the effect that companies that are currently insolvent (whether due to COVID-19 or otherwise) are less likely to enter a formal insolvency process while those changes are in effect. In practice, for the purposes of s588FE, the relation-back day for those companies will occur probably up to six months later than it otherwise would have. In the absence of these laws, a company that is currently insolvent would be likely to enter administration, voluntary liquidation, or have winding up proceedings commenced against it. With the introduction of personal liability protection and the substantial lengthening of a process by which creditors may force an external administration of an insolvent company, such appointments are likely to be delayed whether or not an eventual trigger for appointment is not a statutory demand (because the absence of the availability of a winding up petition may be enough to allow directors to continue to trade). Ordinarily, any impugnable transactions that occurred during the relevant relation-back periods in s588FE would be voidable. However, if the commencement of a formal insolvency process is delayed by six months, impugnable transactions which occurred long before the COVID-19 crisis will be protected from will be protected from liquidator review. This could be addressed by including a temporary amendment to section 91 of the *Corporations Act 2001* (Cth), applicable to companies with a relation-back day during a specific period. However, that would not only extend the relation-back periods in s588FE in respect of voidable transactions. It would

		also have the effect of broadening the scope of s588FJ, which makes certain circulating security interests voidable if they are created within the six months before the relation-back day. The Committee is concerned that by impugning the enforceability of new circulating security interests, it may be more difficult for companies to effectively restructure their debt and negotiate a waiver or forbearance from their lenders. The continuing supply of credit, and indulgences by creditors, will be crucial to the economy's resilience during this crisis. On that basis we do not consider the relation-back period for the purposes of s588FJ should be altered. **The Committee proposes inserting a new provision 588FE(6C) under the emergency instrument power to the following effect**: (6) The transaction is voidable if: (a) the transaction is not otherwise voidable; (b) the relation-back day is between 26 March 2020 and 25 March 2021; and (c) if the relation-back day had been 25 March 2020, the transaction would otherwise have been voidable under this section. The end-date for the period specified in the proposed new section would depend on estimates of how long the economic effects of COVID-19 are likely to be felt, and how long it is likely to take for companies to enter formal insolvency processes after the end of the s588GAAA period. Given that, under the amended statutory demand process, demands issued up to six months from the commencement of the *Coronavirus Economic Response Package Omnibus Act 2020* will have a 6 month expiry, the drafting above assumes that

		most of those formal insolvency processes will commence within six months after the end of the period. The drafting may specify a simple 6 month extension to the relation-back periods, in order to take account of the increased time period for statutory demand processes, or alternatively a firm look-back to 25 March 2020 given insolvent companies are, unusually, going to be able to continue to trade for some time in any event. Sections 588FG(7), (8) and (9), 588FGAA(1)(b), 588FGB(4A), 588FH(1)(b) may also require minor amendments to refer to the relevant voidable transaction provisions in section 588FE as affected by the new subsection.
Section 588FF(3): Limitation period for pursuing voidable transactions	Liquidator is required to commence any action for recovery of voidable transactions under s588FE within 3 years of relation-back day.	In relation to the limitation period imposed in s588FF(3), with the moratorium currently in place, and proposed, and with the current trading difficulties facing liquidators investigating voidable transactions, creditors will be disadvantaged if liquidators have less effective time to investigate then commence proceedings for recovery of voidable transactions. It is therefore recommended that the Minister by instrument extend the time period specified in s588FF(3) from 3 years to 3 years 6 months.
Eligibility for advances under the Fair Entitlements Guarantee		
Fair Entitlements Guarantee Act		
Section 10(1)(c): Workers' entitlements to claims.	One of the conditions for eligibility for the FEG scheme is (under s10(1)(c) of the FEG Act) that the end of the worker's employment:	**Issue** While the following issue may not fall with the current emergency instrument power, the Committee points out that certain consequential reform will be required. For similar

	(i) was due to the employer's insolvency; or (ii) occurred less than 6 months before the appointment of an insolvency practitioner for the employer; or (iii) occurred on or after the appointment of an insolvency practitioner for the employer.	reasons to above, the Committee suggests that the *Fair Entitlements Guarantee Act 2012* (Cth) (**FEG Act**) be amended so that workers who lose their jobs during the period affected by COVID-19 are not prejudiced by the delays in formal insolvency appointments. In practice, it is impracticable for most employees to prove that their loss of employment was due to the employer's insolvency. As a result, most employees whose employment ends before an insolvency practitioner is appointed will rely on section 10(1)(c)(ii) of the FEG Act when applying for an advance. If an employer becomes insolvent during the period of operation of s588GAAA, there is a higher than normal likelihood that an insolvency practitioner will not be appointed to the employer. It is now widely-reported that thousands of workers have had their employment come to an end due to COVID-19, in circumstances where the employer is unable to continue to pay staff and is likely (at least temporarily) insolvent, and it is very likely that further jobs will be lost over the coming months. If: • an employee of a currently insolvent employer ceases employment now (or has recently done so); but • the appointment of an insolvency practitioner is delayed by six months (or more) in light of s588GAAA and the temporary changes to the statutory demand regime, the employee will not be eligible to participate in the FEG scheme. This would appear to be an unintended

		consequence of s588GAAA and the changes to the statutory demand regime. This will affect employees whose employment has already ended in the six months before the commencement of the *Coronavirus Economic Response Package Omnibus Act 2020*, but whose former employer is not yet the subject of a formal insolvency process. The Committee suggests that this can be addressed by inserting a new paragraph (iia) after s10(1)(c)(ii) of the FEG Act, that reads: *(iia) if an insolvency practitioner for the employer is appointed during the nine months commencing on 25 March 2020, occurred during the period commencing on 25 September 2019 and ending on 25 December 2020; or* This amendment would preserve the rights of any employee who would have been eligible for FEG if their employer had an insolvency event on 25 March 2020 or afterwards, where the insolvency event is delayed because of the introduction of s588GAAA and the changes to the statutory demand regime. The time periods suggested above assume that: • the six month periods in section 588GAAA and the amended statutory demand regime will not be amended; and • any employing entity that cannot recover after the six month s588GAAA period is likely to have a formal insolvency appointment within three months afterwards.

		It may be that economic modelling will suggest that a shorter or longer time period than the nine months contemplated above is appropriate. Any further amendments to the statutory demand period and the period in s588GAAA would need to be mirrored by further amendments to the FEG Act. The Committee acknowledges that the Commonwealth's liability to pay employment entitlements in insolvency is not the only issue in play in government policy considerations in respect of the COVID-19 response. If there is to be a broader regime for subsidising employee entitlements of insolvent and non-insolvent employers over this period, that will need to be taken into account in any amendments to the FEG Act.
Other pre-appointment periods		
Corporations Act		
Sections 459R, 588FL and 588GAC: Limitation periods for taking certain action.	• The six month period in which a winding up application must be dealt with under s459R; • s588FL, under which security interests will vest in the company in certain circumstances if they are not the subject of a registration on the Personal Property Securities Register (**PPSR**) more than six months before the relation-back day; • s588GAC, which grants powers to ASIC to make orders in relation to certain dispositions of property during the 12 months before the start of an external administration.	**Issue** The Committee does not advocate for changes to these provisions, and points out the arguments below in justification on that view, in case other parties seek to advocate for changes. Under s459R of the Corporations Act, an application to wind up a company must be determined within six months after the commencement of the application. That time period may only be extended by a Court order: s459R(2). Our view is that the changes introduced in the *Coronavirus Economic Response Package Omnibus Act 2020* do not justify an extension of that time. In particular, the significant disruptions that are

		expected to occur in the economy in coming months make it even more important that courts do not wind companies up based on 'stale' information. In cases where it is appropriate to extend the period, the Court has the power to do so. Under section 588FL, secured parties whose security interests are perfected solely by registration must ensure they register a financing statement on the PPSR within 20 business days after the creation of the security interest. If the registration is late, and the grantor of the security interest is wound up within six months after the registration, the security interest will vest in the company and effectively be void. The prospect of insolvency appointments being delayed because of the *Coronavirus Economic Response Package Omnibus Act 2020* does not require an extension of this six month period. The Committee would not recommend extending the 12 month relation-back period for transactions that ASIC can reverse. The procedure under s588GAC is a novel one, and provides a low-cost and quick alternative to making an application to the Court to address pre-appointment dispositions of property to defeat creditors. Due to the extraordinary nature of the power (the constitutional validity of which has not yet been tested), we would caution against expanding its scope even in response to the COVID-19 crisis.