Things to consider…

Class Actions

What is a class action?

A class action is a legal action taken on behalf of multiple parties, usually a group of individuals. The action seeks compensation for damages relating to the conduct of someone else, usually a company (called the "defendant").

Often the specific circumstances of just one, or a small number, of the people affected is used in the action to demonstrate the alleged conduct. This person is the "representative" of the class.

Class actions can be instigated in the Federal Court, or the Supreme Courts of NSW, Qld, Vic, Tas and WA.

Some examples of past class actions relevant to financial counselling include those taken against Cash Converters for breaches of State interest rate caps[1], Radio Rentals for breaches of consumer credit disclosure laws and the collection of debts for Robodebt where the Federal Government accepted that the scheme was illegal. All of these class actions settled successfully and many people received sums of money as a result.

Who runs a class action?

Class actions are usually run by lawyers on behalf of the members of the class. Some legal firms specialise in this work.

Who bears the cost of running a class action?

Costs incurred in conducting a class action can be borne by the law firm taking the action or can be funded by a third-party litigation funder.

If the action is successful, the law firm and any third-party litigation funder will seek to recover their costs from any damages awarded as part of the settlement (see next).

Members of the class will usually not be liable for any costs related to the action (unless the members in signing up, have agreed to contribute to the costs, but this is unusual).

What happens if the class action is successful?

If the class action results in damages being awarded by a court, the proceeds are distributed to the members of the class, the lawyers and, if there is one, a litigation funder. This only happens however after the court approves a settlement as being in the best interests of all the class members.

1 These related to breaches of the law prior to the National Consumer Credit Protection Act.

Published 09/02/2023

Class Actions

In approving amounts for distribution, the court considers three things:

- Whether the proposed settlement will result in a fair return to class members;
- What an independent cost expert report says about the reasonableness of the costs and disbursements claimed by the lawyers;
- If a third-party funder has funded the proceedings, what percentage of the pool of funds is a reasonable commission to be paid to it in the circumstances of the case.

The amount the court approves for the lawyers and the litigation funder will not be known until the end of the class action, that is when the court is being asked to approve the terms of settlement.

What happens if the class action fails?

If the class action fails, it is possible that the defendant (the other party) will seek to recover their legal costs.

If the class action was funded by a third-party funder, it will be required to pay those costs. Sometimes, the law firm may be required to pay and in some circumstances, some of the costs may fall on the representative applicant/s (but this risk should have been made clear at the outset). Importantly, the other members of the class will not be liable.

How do individuals find out about class actions?

Litigation funders and legal firms proposing to take class actions, or if they think a settlement is likely, may advertise through multiple channels for potential members to come forward. They may also be seeking representative applicants or plaintiffs.

In some cases, lists of potential members may have been obtained from the defendant entity – for example by court order, or by agreement.

Are all class actions the same?

No. Two common differentiating features are:

Closed or open

A class action can be commenced as a closed class or an open class.

A closed class is when the membership of the class is defined by some limiting definition. For example, to be a “group member” or “class member” a person must be signed up with the law firm and/or the funder.

Published 09/02/2023

Class Actions

An open class means that membership is open to all those who suffered the loss arising from the alleged conduct of the defendant. In an open class action, class members do not need to do anything until the time comes to register to participate in a settlement. If a person does not register by the specified date, then they will miss out on any distribution from the settlement.

Opt-in or opt-out

Signing up to a closed action means that a person has made a decision to opt-in.

In each of closed and open class actions, class members are given the opportunity to opt-out at some stage. If there is no cost to participating, the only reason to opt-out is if a person wants to sue the defendant personally instead.

Do members of a class action have to be witnesses in court?

No. Members who are not representative applicants are not required to be witnesses or participate in court proceedings. Sometimes, but very rarely, some class members are asked if they are willing to help give evidence but if that happens they will be given the choice whether to help or not.

Can anyone join a class action?

Class actions are defined by the alleged misconduct of the defendant entity resulting in loss to multiple people. There may be other defining characteristics of the action e.g. location. If it is a closed class, a person must agree to a law firm's or funder's terms to join the class. This is not common in consumer class actions. Most consumer class actions are open class actions. That is, they are open to all those who have suffered the alleged misconduct. A person still needs to satisfy the relevant criteria to be a class member, but in an open class action, as noted, they do not need to do anything unless to join the class until a settlement is proposed.

What is the impact of class actions on systemic issues?

Class actions can also play a broader role in addressing systemic issues. They can do this by drawing attention to the systemic failings that led to the misconduct. For some clients, this is also another reason they may wish to be involved. The Robodebt class action is a case in point, because as noted above, this led to the Federal Government admitting that the scheme was operating in breach of the law.

Published 09/02/2023

Class Actions

What advice can a financial counsellor provide a client who may be eligible to participate in a class action?

It is critical to check with the lawyers running the case to understand how the case is being funded, and if any costs will be incurred by members. Ask for documentation and review it carefully. There are two scenarios:

- The most likely scenario is that participating as a member in a class action will not require a person to incur any upfront or ongoing costs or be exposed to any cost risk if the action is unsuccessful. On that basis, being involved in a class action holds few risks.
- However, while unusual, sometimes a law firm may request a fee for signing a person up to a class action or require them to contribute to the costs of running the class action. If any cost may be incurred, your client should seek legal advice, or simply decide not to participate.

If there are no costs to participating as a member, your client will be no worse off by being a member and may benefit if there is a settlement. However, there are no guarantees as to whether a class action will be successful, or how much any settlement may be.

As a class member, your client will not be required to and almost never are they asked to participate in any court proceedings. If a class member is asked to play a role in a court proceeding, that will only be with their consent and only after they have been fully informed by the class lawyers about what is expected.

Clients also need to be aware that if they participate in a class action, they will not be able to sue the defendant individually.

Published 09/02/2023

The content of this document was prepared by Financial Counselling Australia

Things to consider…

Facing commercial lease eviction

Retail leases in Victoria are governed by the *Retail Leases Act 2003*, which imposes a range of rights and obligations on retail tenants and landlords. In addition, the *Commercial Tenancy Relief Scheme Act 2021* was established in response to the pandemic. Although repealed on 30 April 2022, regulations made under that Act applied through to 30 October 2022.

Laws governing retail leases can be complex. If a small business tenant is at risk of eviction, seeking legal advice may be warranted and beneficial.

If there is sufficient time to assess the client's financial situation:

1. Assess client's financial situation.
2. Read and understand the lease document, particularly special conditions, and any documentation relating to rent waivers/deferrals.
3. Understand why the lock out/eviction is planned.
4. Seek to negotiate with landlord on payment plans or delays to gain some breathing space for the client and/or potentially rectify the issue triggering the lockout. This could include seeking the landlord's agreement to delay the lockout while mediation takes place.
5. If there are underlying issues generating dispute between landlord and tenant, including the impact of rent deferral/waiver scheme during COVID, apply for mediation via the Victorian Small Business Commission (VSBC) help portal.
6. Client should be informed that if the lockout proceeds, although entitled to do so even if the lock out occurs, it will be difficult for the client to extract its assets – stock, personal goods, etc. – so encourage removing these before the lockout is effected.

If there is insufficient time to assess the client's financial situation:

1. Seek to understand why the lock out/eviction is planned. Review documents, including lease (particularly special conditions) and any documentation relating to rent waivers/deferrals.
2. Contact VSBC to discuss whether applying for mediation may be appropriate. VSBC can prioritise matters for mediation when an eviction is possible.
3. Where time is of the essence, the client may need to seek an injunction at VCAT to delay the lockout pending VSBC mediation. Legal advice may need to be sought.
4. Client should be informed that if the lockout proceeds, although entitled to do so even if the lock out occurs, it will be difficult for the client to extract its assets – stock, personal goods, etc. – so encourage removing these before the lockout is effected.

VSBC Contact Information

13 87 22

vsbc.vic.gov.au

Published 08/03/2023

Things to consider...

Understanding small business debt restructuring

This process is a 'debtor-in-possession' model that enables directors to remain in control of the company.

In brief

- Liabilities must be less than $1m (excluding employee entitlements)
- Companies must be up to date with payment of all employee entitlements, and all tax lodgements
- On appointment of a small business debt restructuring practitioner (SBRP), there are protections for directors and the company against creditor actions
- There is a short 20 day period for a company to work with a SBRP to plan to restructure company debts and prepare documents for consideration of creditors
- Creditors then have 15 days to submit proof of debt and vote on the restructuring plan
- Secured creditors may still have a right to pursue their interest via receivership
- An approved plan requires support by at least 50% of creditors (by debt value)
- If approved, the directors continue to operate the business, in accordance with the plan
- The SBRP monitors/administers the plan
- The plan terminates if it is not complied with
- If not approved, other external administration avenues may proceed.

Detail

As part of insolvency law reforms aimed at assisting small businesses facing financial distress to survive following the impact of COVID-19, the Australian Government announced a new, simpler formal debt restructuring process. Incorporated small businesses that are insolvent or at risk of insolvency may use this process to restructure their debts and maximise their chance to remain viable. An alternative to traditional insolvency administration pathways, the process draws heavily on the established voluntary administration framework and shares many of its features. However, it is intended to serve as an easier, cheaper, faster and more flexible model catering specifically for small businesses.

The new process commenced from 1 January 2021 and is available to all companies with liabilities of less than $1 million (excluding employee entitlements). However, a range of criteria need to be met for a company to access the process.

Published 09/02/2023

Things to consider…

Understanding small business debt restructuring

Key aspects of the small business restructuring process

Key aspects include:

- An eligible small business facing financial distress approaches a new class of independent external advisor called a small business restructuring practitioner (SBRP) to discuss options. All registered liquidators can act as an SBRP and there is also a special registration for people who can only act as an SBRP. The SBRP advises whether the company is eligible for a restructuring plan and proposes a flat fee to develop the plan.
- Directors of the company then pass a resolution to formally appoint the SBRP to their business and approve the fees for the restructuring. Once this occurs, the company and its directors are protected by a moratorium on actions by creditors while the restructuring process is underway. Unsecured and some secured creditors are restricted from taking legal action against the company, personal guarantees may not be enforced against directors or their relatives during the restructuring, and the business is protected from ipso facto contract clauses which allow creditors, such as suppliers or landlords, to terminate contracts because of an insolvency event. A notice that the process has commenced is provided to creditors with details on how they may access further information.
- The company directors/business owners have **20 days** to work collaboratively with the SBRP to develop a plan to restructure business debts (including a remuneration proposal covering the SBRP's fees to manage the plan once it is in place) and prepare documentation to be considered by creditors. During this time period, the business is able to continue trading in the ordinary course of business under the control of the directors.
- **Companies must ensure all employee entitlements that are due and payable have been paid in full, and all tax record lodgements are up to date** before the plan can be put to creditors. Directors must make a declaration confirming this before the plan can be sent to creditors. This may prove to be a significant obstacle to some financially distressed businesses seeking to access the process.
- The SBRP certifies that the business can meet the proposed repayments and has properly disclosed its affairs, and sends the plan and supporting documents to creditors.
- Creditors then have 15 business days to submit a proof of debt and vote on the plan and, if necessary, dispute the amount that the company states is owing. Related creditors (such as directors, shareholders, relatives or their associated companies) are not entitled to vote.

Published 09/02/2023

Understanding small business debt restructuring

- If a 50% majority of all creditors (by $ value of debt owed) vote in favour, the restructuring plan is approved and binds all unsecured creditors. Secured creditors are only bound to the extent that their debt exceeds the realisable value of their security interest (this means that secured creditors may still have a right to initiate a receivership or other claims relating to secured assets).
- The directors then continue operating the business and the SBRP administers the plan by collecting payments under the plan, and making periodic payments to creditors in accordance with its terms, but control of the company's management and day to day trade remains with directors.
- If the plan is not approved by creditors, the small business restructuring process ends and the company's directors may choose to undertake an alternative form of external administration – namely either voluntary administration or creditor's voluntary liquidation. The company may be eligible for a simplified small business liquidation process.
- The plan can continue for a period of up to three years and can terminate if the company fails to comply with the terms of the plan. If the restructuring plan is terminated, creditors' debts unpaid under the plan become payable immediately. The company's directors may choose to place the company into an alternative form of external administration.
- To prevent misuse of the small business restructuring process for phoenix activity, unfair preference payments or creditor-defeating dispositions, the SBRP will have power to stop the restructuring process if corporate misconduct is identified.

Pros and cons of the small business restructuring process

This new small business debt restructuring process has a number of advantages over voluntary administration:

- Rather than handing control over to the administrator, as in the case of voluntary administration or liquidation, it permits directors to retain control of the company and business operations during the process – this is called a debtor-in-possession model.
- It allows the business owners (ie. company directors and management) to continue operating the business and trading as usual while a restructuring plan is developed and implemented – this minimises potential disruption and further losses and maximises the potential for the business to trade out of difficulties and remain viable.

Published 09/02/2023

Understanding small business debt restructuring

- The process may have a lower cost than voluntary administration (although there will still be a cost involved in engaging the SBRP and the law requires the SBRP to undertake a variety of tasks).
- The process may be quicker than a voluntary administration — 20 business days for the development of a restructuring plan followed by 15 business days for creditors to vote on the plan. However, some voluntary administrations could be finalised within 20 business days from appointment if creditors made a decision at the second meeting.
- The options to go into a voluntary administration or liquidation (including the option to use the simplified small business liquidation pathway) still exist as backups if the restructuring plan is voted down by creditors.
- Only 50% of creditors must agree to the plan.
- During the debt restructure process the directors don't have to worry about insolvent trading and personal guarantees cannot be enforced (without leave of the court).

Against these perceived advantages, the main limitations of the scheme are:

- All employee entitlements that are due and payable must have been paid in full, and all tax record lodgements must be up to date.
- There is a very short period of time (20 days) for the directors and the SBRP to finalise a plan to go to creditors, particularly for more complex businesses.
- The fees to be charged by the SBRP to develop the plan, and then to oversight implementation of the plan, are difficult to determine in advance, which may make SBPRs reluctant to commit to such a process.
- The company can only deal in their normal trade unless they seek permission from the SBRP.
- The company may have limitations on how they can deal with their assets.
- Secured creditors may be hesitant to engage with the SBRP.

Published 09/02/2023

Things to consider…

Deregistering a company

If a company is solvent

A company that has ceased trading can be deregistered through a voluntary application to ASIC, provided eligibility criteria are met.

In order to voluntarily deregister the following conditions must be met:

- all members (ie. shareholders) of the company agree to deregister
- the company is not conducting business i.e. has ceased trading
- the company's assets are worth less than $1000
- the company has no outstanding liabilities (e.g. debts)
- the company is not involved in any legal proceedings
- the company has paid all fees and penalties payable to ASIC.

This summary is sourced from the ASIC website. For more information, go to https://asic.gov.au/for-business/closing-your-company/deregistration/.

Usually, all assets would be disposed of (i.e. converted to cash) and used to pay debts or otherwise distributed to shareholders prior to deregistration. On deregistration, if there are any company assets remaining, these become the property of ASIC (although there are some exceptions). See https://asic.gov.au/for-business/closing-your-company/effects-of-deregistration for more information.

NOTE: A court may reinstate a deregistered company if debts are subsequently identified and a creditor wishes the company to be subject to a formal liquidation process.

If a company is insolvent

Unfortunately, most financial counsellors engage with businesses that are, or are likely to be, insolvent.

If a director 'shuts the door and walks away', the company will continue to exist while it is registered. There are ongoing consequences, including fees, potential penalties, regulatory costs, continuing director duties/obligations, ASIC requirements to lodge forms, ATO requirements to lodge BAS, as well as likely continuing debt collection activity against the company and directors. In addition, the director may continue to be pursued by creditors, causing continued stress.

There must be at least one director of a private company. The final/sole director cannot resign as director, leaving no directors.

Published 09/02/2023

Things to consider…

Deregistering a company

Many small businesses in financial difficulty, or who are insolvent, do not meet the requirements for voluntary deregistration (usually because they have debt), and there are no assets to pay for the appointment of a liquidator so that the company can be deregistered. Creditors are also unlikely to incur the cost of appointing a liquidator if there are no or minimal assets to recover.

Unfortunately, it can be difficult to deregister or close a business unless it is driven by creditors/suppliers or, in some cases, ASIC.

ASIC-driven deregistration (strike-off) and 'abandoned companies'

ASIC **may** deregister a company if it is apparent that it has ceased trading, has outstanding ASIC fees and penalties, and has not responded to compliance notices or lodged documents. It can be 12 to 18 months before these factors become apparent. However, the decision to deregister a company in this situation is at the discretion of ASIC.

There is no formal 'application process' by which a company can request ASIC to deregister it. Further, if there remains an ATO debt, ASIC will consult with the ATO, and the ATO may or may not agree to the deregistration of the company. Even if ASIC deregisters the company, the ATO can have the company subsequently reinstated to allow it to lodge any default assessments and demand payment. A court may also reinstate a deregistered company if a creditor (including the ATO) wishes the company to be subject to a formal liquidation process.

In some cases, companies may be abandoned where employees have outstanding entitlements. The Fair Entitlements Guarantee (FEG) may help employees with unpaid entitlements if the employer (company) has been subject to an 'insolvency event'. ASIC may, in the appropriate circumstances, intervene to appoint a liquidator to wind up the company to allow employees to access the FEG. For more information, refer to ASIC's regulatory guide, ASIC's power to wind up abandoned companies, at https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-242-asic-s-power-to-wind-up-abandoned-companies/.

Failing ASIC discretion to deregister a non-trading company with net debts, the director/s remain director/s of the 'registered' company, despite its situation. Creditors will continue to pursue the company, and potentially the director/s, for company debts, while the company remains registered.

Published 09/02/2023

Deregistering a company

How can a financial counsellor assist in these situations?

Your client needs to be aware of their personal financial position and that of their company.

For many small business clients, there are no assets and little ability to refinance or inject more funds. If it is unlikely that creditors will take action (no or limited assets or funds) then it may be worth corresponding with ASIC to confirm that fees have not been paid and that the company is not operating (including the date it ceased trading), and to explain (and provide evidence if required) that there is no ability to pay, no/limited assets and no current [legal] actions in play. If the director/s are personally bankrupt, this may make the application to ASIC more likely to succeed, although that is not certain.

The client could write to all creditors advising the company has ceased trading and has no assets. Creditors can be invited to wind the company up by court order and that this will not be defended.

If creditors continue to pursue company debts with the director/s, response along the above lines should be repeated.

A discussion about the pros and cons of bankruptcy should be offered to the client, including that they cannot be a director of a company during bankruptcy, and there may be restrictions on operating a business.

Inform the client that deregistration of a company does not absolve its debts (as the company can be re-registered) unless it has been liquidated by an insolvency practitioner.

Referral to a registered liquidator for an initial free consultation should be encouraged. For further information, seethe FCVic factsheet *'Things to consider: Choosing an insolvency practitioner'*.

Published 09/02/2023

Things to consider…

Engaging an insolvency practitioner

Tips & questions to ask when choosing an advisor:

- ❏ Bear in mind the duty of the liquidator is to look after the interest of the creditors and the company over the director.
- ❏ You should expect to be treated with respect.
- ❏ Do you provide one or more free initial consultations? From your initial one or two free consultations, did you feel they were trustworthy, were you treated with respect, were they reliable?
- ❏ How experienced is the liquidator with small business liquidations? Does their experience correlate with your small business?
- ❏ Ensure the advice you are receiving is trustworthy. Look for reputable reviews and consider the reputation of the liquidator.
- ❏ Are you registered with ASIC as a registered liquidator? Check ASIC list – click here or visit https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-4a-registered-liquidator-lists/
- ❏ What are your costs? Will the cost be based on your billable hours, or do you charge a flat fee? If it is a flat fee, be sure to understand what services are covered and if there may be other costs. Some liquidators may complete tasks in less hours than others.
- ❏ If the director wants to save their company and remain in control, ask, “Is my business suitable for a small business debt restructure?”
- ❏ This could be a more commercially viable option for the client who hopes to continue trading.
- ❏ Do you specialise in a specific area of insolvency? E.g., voluntary administration. Depending about the client they may want an advisor most experienced in the procedure that will best suit their needs. E.g., voluntary administration, simplified liquidation,
- ❏ How many companies have you assisted with the simplified liquidation process? Or a small business debt restructure?
- ❏ What are your qualifications? Will you be handling this file? (Or will it be handled by a less qualified employee?)
- ❏ If you are concerned about privacy, you could ask how they store your personal information and if they share information with external organisations.
- ❏ Can you describe a timeline of events? How long should this process take?
- ❏ Is there a conflict of interest? Any personal bias?

Published 09/02/2023

Things to consider…

Engaging an insolvency practitioner

There can be serious consequences of accepting the wrong advice, including criminal charges. If a proposed solution to debt problems seems too good to be true, it probably is.

Things to be wary of:

Tell-tale signs that an insolvency advisor shouldn't be trusted include:

- ❏ promising a payment to get you out of bankruptcy within a few months
- ❏ recommending you include false, exaggerated, or fake debts in a bankruptcy application
- ❏ offering to organise your affairs so your property will be protected if you go bankrupt
- ❏ advising that bankruptcy or a debt agreement will not affect your credit rating.
- ❏ an advisor who persuades someone to hide or dispose of their assets before they enter into a debt agreement (AFSA, 2018) – to read more click here or visit https://www.afsa.gov.au/about-us/newsroom/getting-tough-untrustworthy-advisors

Is the recommended action lawful? For example, if the answer to this question makes you feel uncomfortable, e.g. "I haven't been caught before, don't worry". Seek advice from another advisor.

Watch out for advisors who are trying to cut everyone else, including you, out of the equation. You might notice:

- ❏ An advisor giving a trustee their own contact address as the contact address for the bankrupt and creditors
- ❏ An advisor insisting all enquiries by AFSA or Trustees' staff be done through them instead of the bankrupt or creditors
- ❏ Mortgages being taken out on property just prior to a person becoming bankrupt
- ❏ False companies being used to claim manufactured debts
- ❏ A high number of 'friendly' creditors recorded as unsecured debts
- ❏ A lack of supporting documents of debts owed
- ❏ Late inclusion/submission of proofs of debt in compositions or personal insolvency arrangements
- ❏ Potential misuse of the Personal Property Securities Register (PPSR). (AFSA, 2020)link here

AFSA acts against these advisors to protect the industry and those experiencing financial trouble.

https://www.afsa.gov.au/about-us/newsroom/getting-tough-untrustworthy-advisors
https://www.afsa.gov.au/about-us/newsroom/afsa-warns-people-steer-clear-dodgy-insolvency-advisors

Published 09/02/2023