INSTITUTE OF
PUBLIC
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Submission to The Treasury: Helping Companies Restructure by Improving Schemes of Arrangement

September 2021

13 September 2021

The Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: dave.baker@treasury.gov.au and MCDInsolvency@treasury.gov.au

Dear Sir/ Madam

Helping companies restructure by improving schemes of arrangement

The Institute of Public Accountants (IPA) welcomes the opportunity to comment on the proposed changes to help companies restructure by improving schemes of arrangement.

In preparing this submission we have undertaken consultation with IPA members who are Registered Liquidators and have extensive experience in this field. We would especially like to thank Adrian Hunter of Brooke Bird.

The IPA is one of the three professional accounting bodies in Australia, representing over 46,000 accountants, business advisers, academics, and students throughout Australia and internationally. Three-quarters of the IPA's members work in or are advisers to small business and SMEs.

Our responses follow the questions in the consultation paper.

Question 1: Should an automatic moratorium apply from the time that a company proposes a scheme of arrangement? Should the automatic moratorium apply to debt incurred by the company in the automatic moratorium period?

IPA is of the view that an automatic moratorium is unnecessary. Given this process has an ongoing interaction with the Courts, we believe that a specific provision should be inserted to allow for application to the Court for a moratorium to apply while a scheme is negotiated, including a restriction on the exercise of ipso facto clauses. This will allow the applicant the opportunity to justify to the Court why a moratorium is applicable as part of its wider application for Court approval of the scheme process.

With respect to who will bear responsibility for debts during the moratorium, it should not be the appointed insolvency practitioner with personal liability – to avoid any creditors post application suffering from not being paid and issues around who is going to be bound by the scheme. We suggest that the company must continue to pay post-moratorium debts without a payment holiday. Any pre-moratorium debts which have services rendered or goods delivered during the operation of the moratorium however should also be paid to avoid any abuse of process (ie to prevent large pre-scheme orders for delivery after appointment).

Question 2: Would the moratorium applied during voluntary administration be a suitable model on which to base an automatic moratorium applied during a scheme of arrangement? Are any adjustments to this regime required to account for the scheme context? Should the Court be granted the power to modify or vary the automatic stay?

Similar to other external administrations (particularly the voluntary administration process), there should be a moratorium on creditor enforcement actions during the formation of schemes of arrangement. This should be aligned with the approach used in voluntary administrations. However, given the Court has a significant involvement in the scheme process, the Courts should also be given the explicit power to lift all or part of the moratorium in circumstances where its application would lead to unjust outcomes. The Court should be satisfied that the moratorium should be in place and that it should be adopted. For example, there could be a specific area in the Act where these enforcement restrictions are set out and the Court can decide whether they are to be adopted or not based upon the company's submissions – like Schedule 8A of the Corporations Act which is used for Deeds of Company Arrangement (Prescribed Provisions).

Question 3: When should the automatic moratorium commence and terminate? Are complementary measures (for example, further requirements to notify creditors) necessary to support its commencement?

The latest time for commencement should be the lodgment of documents for the first Court appearance. The moratorium should terminate when the scheme commences – that is, when approved by the Court unless there is some provision which delays commencement. However, there should be a maximum period that the moratorium can continue post the Court's approval to prevent protracted delays that compromise creditors' enforcement rights.

Notice to creditors ought to be mandated in the same way as during a small business restructuring (SBR).

Question 4: How long should the automatic moratorium last? Should its continued application be reviewed by the Court at each hearing?

The moratorium should last until the next hearing of the matter and then at that time the Court should decide if the moratorium should continue through to the next hearing date unless it decides otherwise.

Question 5: Are additional protections against liability for insolvent trading required to support any automatic moratorium?

There should be a safe harbour from insolvent trading liability, as occurs during an SBR, once the moratorium commences.

Question 6: What, if any, additional safeguards should be introduced to protect creditors who extend credit to the company during the automatic moratorium period?

To ensure that the process is not abused by directors, there should be an ability to recover director-related antecedent transactions and related-party transactions in schemes unless the Court or creditors agree otherwise.

Question 7: Should the insolvency practitioners assisting the company with the scheme of arrangement be permitted to act as the Voluntary Administrators of the company on scheme failure?

No, unless the Court specifically consents. Independence in the voluntary administration process is critical. This is on the basis that a scheme is very similar to the existing SBR process where the Scheme Administrator is assisting the directors/company. In a SBR the appointed Restructuring Practitioner cannot be the subsequent liquidator. If the subsequent voluntary administration in a scheme was to result in the company going into liquidation, then it would be inappropriate for a liquidator to investigate his/her conduct during the scheme process.

Question 8: Is the current threshold for creditor approval of a scheme appropriate? If not, what would be an appropriate threshold?

To keep the scheme process consistent with the SBR and voluntary administration processes, then we suggest the removal of related party voting in a scheme of arrangement and reduction of voting requirements to a majority threshold in line with those in a voluntary administration/deed of company arrangement. However, the Court should be provided with the ability to over-ride these thresholds where it thinks this is appropriate.

Question 9: Should rescue, or 'debtor-in-possession' (DIP), finance be considered in the Australian creditors' scheme context?

Yes. Statutory protections/priority provisions should be made for DIP financing during the operation of a scheme to promote the ability of the company to obtain the necessary finance to restructure. Without this priority the ability to secure new finance would be constrained, thereby negatively impacting upon the ability of the company to survive.

Question 10: What other issues should be considered to improve creditors' schemes?

One suggestion, consistent with bankruptcy situations, is that votes that are based upon debts that have been purchased should be limited to the value of consideration paid.

If you have any queries or require further information, please don't hesitate to contact Vicki Stylianou, Group Executive, Advocacy & Policy, either at vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733.

Yours faithfully

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