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Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

The Australian Institute of Credit Management (AICM) appreciates the opportunity to participate in the consultation process on the Insolvency Reforms to Support Small Business as detailed in the Exposure Draft Bill.

The AICM represents over 2,600 credit professionals who contribute to a resilient economy and drive successful business outcomes by mitigating risk, maximising growth and applying sound credit principles and practices.

Without our members, businesses are exposed to reputational damage, poor cash flow management, inefficient processes, breaching regulatory requirements and risk of not getting paid for hard won sales and services delivered. Our members are the custodians of cash flow. They assess and mitigate credit risk in all sectors and manage credit terms for the supply of goods, services and finance.

AICM has long supported calls for reform of the insolvency regime in Australia with a key concern of members being poor dividends from formal processes and delays in businesses engaging in meaningful restructure. We provide the following views of members with the objective of supporting the reform to achieve outcomes that address these issues for our members and therefore supporting economic recovery.

Whilst supportive of the intent of these measures, AICM members have raised concerns with the proposals that may lead to a reduction in trade credit provided to small business. Primarily these concerns arise from:

- Compromise of guarantees and PPSR securities.
- Apparent inconsistent treatment of PPSR securities.
- Uncertainty related to credit provided during the restructuring period.
- Delay between commencement and ability of debtors to engage a restructuring advisor.
- The qualifications of the Restructuring Practitioner.
- Potential for increased unfair preference claim risk.



Expanded further in the **attachment**, our members have reported that the consequences of these concerns materialising may require them to take steps to mitigate the increased credit risk. Mitigation would include reducing credit terms offered to small businesses examples include but not limited to:

- only trading on Payment before delivery terms;
- withdrawing credit terms when viable businesses need it the most; and
- being unwilling to support business as usual trade during the restructuring period.

Our submission details recommendations related to the draft legislation and formulation of the following regulations.

We welcome the opportunity to discuss our submission further.

Yours sincerely

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1 - New Debt Restructuring process

AICM supports the intention to create an opportunity for debtor companies to restructure with low cost and maximum flexibility. Minimising disruption to business is specifically supportive of the role of the Restructuring Advisor.

Debtor in possession concept

While AICM members support the role of the Restructuring Advisor providing consent for transactions during the restricting period that are not in the ordinary course of business to ensure creditors interests are protected, clarity is sought on who is liable for debts incurred during this period and confirmation that any payments made to creditors will not be capable of being deemed preference payments.

AICM recommends – Credit obtained during this period is prioritised or guaranteed by the restructuring advisor. While hesitant to suggest the restructuring advisor bears liability, an unintended by-product may be that without certainty of payment creditors will be exposed to a direct risk of non-payment and will be inclined to either:

- withdraw supply of credit and move to a cash with order structure; or
- only supply the goods and services necessary to continue trading as normal during this period.

Additionally, incorporating this debt as part of restructuring may complicate and frustrate the formulating of a proposal.

AICM recommends – any payments received by un-related creditors during a restructuring period are explicitly exempt from being deemed a voidable preference claim. This will provide confidence to creditors to continue to trade with the business in as close as possible normal manner.

The potential of large orders to be entered prior to the appointment of a restructuring advisor is a concern for AICM members which may be detrimental to small business as credit providers may mitigate this risk by being less willing to provide supplies on credit terms above normal levels restricting businesses ability to respond to surges and growth potential. We note that the director's responsibility to avoid these transactions is too remote to provide creditors comfort.

Additionally, consideration is needed for suppliers of non-standard items (that cannot be sold to another party) who may be currently producing or have produced items prior to the restructuring period. Providing a priority to funds generated from these items will benefit all parties as the supplier will continue production and the business will be able to achieve the intended profit from sale or utilisation.

AICM recommends – a director liability for any trade that is outside the ordinary course of business for the 3-6 months prior to a restructuring process. Further, the AICM notes that payments made to creditors for supplies, arrears and aged debt is captured by the definition of ordinary course of business as these are made to obtain supplies and trade as normal, therefore it is not appropriate for these payments to be captured by a corresponding liability akin to a voidable preference payment.

Concerns relating to Guarantees and PPSR securities not enforceable during restructuring

While the limiting directors liability encourages use of the restructuring process and may improve the potential for the plan to not be frustrated this is a significant concern with members seeking clarity on directors and relatives liability under guarantees to the shortfall of debts not paid under the plan.

The AICM notes that restricting enforcement of guarantees outside the restructuring period will further devalue the security represented by the guarantee and may minimise the director's motivation to formulate the best possible return for creditors. By devaluing the guarantee creditors may:

- Seek other guarantees e.g. from shareholders other than the director and other 3rd parties;
- Seek bank guarantees which will increase cost of the credit provided, delay businesses access to credit and reduce their ability to switch suppliers;
- Restrictive credit terms or require payment before delivery; and
- Be more hesitant to support businesses displaying signs of potential insolvency.

AICM recommends – clarifying that all guarantees can be pursued outside the restructuring process as directors and appropriately qualified Small Business Restructuring Professionals (SBRP) can quantify and incorporate this in their formulation of a plan producing the best outcome for all stakeholders. The alternative will limit growth, undermine viable businesses and create additional insolvencies.

The stay on PPSR securities raises the following concerns for AICM members:

- Loss of right to proceeds from stock sold during the restructuring period.

AICM recommends – clarifying that creditors right to proceeds is maintained during the restructuring period.

- The debtor company may inadvertently benefit from consignment stock located on the customers customer's premises which the supplier cannot easily restrict access to, recover or quarantine on short notice. Further the supplier may be forced into being an unwilling creditor.

It was noted by members that the ATO is not expressly prevented from issuing Director Penalty Notices should be addressed to ensure the ability to formulate a plan is not frustrated.

Inconsistent treatment of vesting of PPSR securities interests – 588FL Corporations Act ("CA") and 267 Personal Property Securities Act ("PPSA")

In the draft legislation, there is an intended amendment/extension of s.588FL CA Act such that "green" registrations are caught and vest in the Company upon the appoint of a SBRP, subject to the courts retaining their normal discretion to extend the prescribed 20 business days period.

There is no mention in the draft legislation as to any amendments to s.267 PPSA, which vests any unregistered security interests upon the appointment of a voluntary administrator or liquidator.

This creates an anomaly whereby late "green" registrations vest (but can be validated by the courts), but unregistered security interests do not vest. There appears to be no reason for this distinction, and which operates unfairly to registered (though late) PPSR security interests and properly timely registered PPSR security interests.

AICM recommends - that such anomaly be rectified such that either:

- The proposed amendments/ extension of s.588FL CA to the appointment of a SBRP be removed; or
- Suitable amendments to s.267 PPSA also be made such that unregistered security interests also vest upon the appointment of a SBRP.

Company is taken to be insolvent when it proposes a restructuring plan to its creditors

Given the point of insolvency is a major determinant in unfair preference payments AICM members seek clarity that payments received during this period will not be captured by preference claims namely payments received:

- During the restructuring period;
- After a plan is approved; or
- If restructuring ends and the company returned to directors.

Without clarity that payments will be exempt creditors will be hesitant to trade with the business and seek security and trading conditions that complicate and delay access to credit.

Absence of meetings of creditors and efficient access to timely information

Creditors play a significant role in determining the appropriate course of action and this decision making requires access to sufficient and timely information.

Members commented that achieving the formulation of a comprehensive restructuring plan in a short time frame whilst continuing to trade as normal may present time restrictions for the Restructuring Advisor and small business directors. These time restrictions could make it inefficient or difficult for creditors requests for information and questions to be responded to in a timely manner, potentially resulting in a reduction in confidence in the restructuring plan.

Additionally, meetings with creditors may enable the restructuring advisor and directors to better understand creditors positions and receive information and facts they are able to contribute.

While the current insolvency process requires creditors reasonable requests to be responded to within 20 days, insolvency professionals sight increased costs created by this process and AICM members advise that delays and resistance is still encountered obtaining responses.

Members also noted there is continuing difficulty obtaining lists of creditors from some insolvency professionals. This information is important in all processes and increasingly so during a restructuring process as it facilitates creditors interaction and achieving consensus in an efficient manner.

AICM members believe that optional virtual meetings can be cost and time efficient ways to address these concerns.

AICM recommends:

- Restructuring advisor providing the option for creditors to attend a virtual meeting held after a proposal is put to creditors and before a decision or vote is required. The purpose of the meeting is to:
 - o Receive a briefing from the restructuring advisor and/or Directors as to the reasons for insolvency, progress of developing a plan, factors that support the business is capable of being restructured;
 - o Allow creditors to ask questions relating to the briefing;
 - o Allow all creditors to hear concerns raised by others; and
 - o Allow creditors to provide their views on options for the restructuring plan and their expectations, including tabling a restructuring plan by any creditors (if they wish to).
- A list of creditors should be provided as soon as reasonably practical after appointment of the restructuring advisor and not more than 5 days after.

As an accurate understanding of the company's liabilities is essential for determining eligibility for the process providing this list promptly and to relevant stakeholders will improve the integrity of the process and viability of the plan.

Options on rejection of the proposal

Considering the company has been declared insolvent once a proposal is put to creditors members believe it is not viable for directors to be given the autonomy to decide on the next step.

Allowing the directors to retain in possession and control of a business that has been declared insolvent is not appropriate with the following concerns noted:

- When is the company no longer deemed insolvent?;
- Supplies will only be provided on payment before delivery terms unless significant security is provided;

- Potential employee and tax obligations will not be met;
- Potential for assets to be stripped prior to formal insolvency; and
- Potential for the business not to continue trading or being wound up i.e. creating debt laden “zombie companies”.

AICM Recommends – Once a proposal is rejected creditors vote on the next stage which could include:

- Extension of time to formulate a plan;

May be appropriate if the return was too low or too ambitious or uncertain (such as relying on a sale of an asset or other outcome) allowing directors an opportunity to substantiate the plan;

- Voluntary Administration;

Appropriate if a creditors believe a better proposal could be formulated and a Deed of Company Arrangement formulated; and/or

- Simplified Liquidation or Liquidation.

Simplified liquidation may be the most likely outcome on rejection of a restructuring plan, however inclusion of other options ensures this is the avenue of last resort.

Full liquidation should be an option available to creditors to exercise when there are grounds to require full investigation.

\$1 million liabilities threshold

Members felt the debt threshold was not an appropriate measure to restrict the process to small un-complicated businesses noting that in some industries medium to large businesses would be captured but in others it would more clearly only capture small businesses.

Overwhelmingly members supported the government adopting a uniform definition of a small business which would provide significant clarity and efficiency benefits.

AICM recommends – lowering the threshold to \$500,000 for implementation and thorough industry consultation undertake to review or implement an appropriate alternative measure.

Qualifications of the Restructuring Advisor

AICM members expressed concern at the prospect of the restructuring advisor qualifications being reduced.



The standing of the restructuring advisor is fundamental to creditors engaging with the process and having confidence that their interests have been appropriately considered when formulating a proposal. Lack of suitable qualifications and professional standing of a SBRP could lead to otherwise viable plans being rejected due to uncertainty.

The qualifications, integrity and oversight of the restructuring advisor is vital as a safeguard to limit the potential of abuse such as illegal phoenix activity.

Timing of restructuring

AICM Members commented the 35 business days to formulate a restructuring plan is longer and therefore more burdensome on creditors than the current voluntary administration (VA) process which can deliver a decision for a DOCA in 15 to 25 business days

Review of the process

Considering the tight time frames for delivering a perfected legislation, regulations and rules we strongly recommend the amendment lapses if a comprehensive review is not implemented, responded to by government and tabled in parliament. This review should be commenced and completed 12-24 months after commencement.

Additionally, while this incremental reform is supported (subject to our concerns and recommendations) the AICM believes a thorough and complete review of the Australian corporate insolvency regime to ensure the system is fit for purpose and supports economic development and capacity to be responsive to future challenges.



2 - Temporary relief for companies seeking a restructuring practitioner

This measure seeks to extend the current temporary insolvency protections (“moratoriums”) expire on 31 December 2020. In October 2020, 205 AICM members responded to a survey following the announcement of the extension, this survey revealed:

- The extension is opposed by 67% of respondents;
- Confidence to provide credit terms was reduced for 70% of respondents;
- Confidence to provide repayment arrangement or deferrals was reduced for 64% of respondents; and
- Increased risk of preference claims has negatively impacted 70% of respondent’s ability to provide credit terms and payment arrangements.

Key reasons for these results are:

- Creditors are unable to distinguish viable businesses from the businesses that are insolvent and not viable but haven’t entered an insolvency process due to the moratorium;
- Lack of adverse information such as other creditors including the ATO initiating enforcement action;
- They would support viable businesses without these moratoriums; and
- A significant number of customers are sighting the moratoriums as they actively avoid paying valid debts.

The Transparency of business tax debts¹ measure passed by the government on 22 October 2019 would allow creditors to be fully informed when assessing risk and enable fully informed credit decisions when trading with businesses during this time. To clarify:

- Creditors would be able to enter discussions with business that have outstanding tax debts reported to a credit reporting bureaus (CRBs) to determine if the business is viable and provide support in line with the creditors risk appetite and not expose the creditor to additional risk.
- Creditors would be provided significant comfort to trade with businesses that do not have outstanding tax debts reported to CRBs. These businesses would benefit from better credit terms and less restrictive requirements for repayment arrangements.

The AICM recommends - the ATO urgently implements this measure immediately and at the latest before 1 January 2021. To minimise unintended consequences and provide immediate benefit to creditors reporting could commence with presenting as clearly insolvent and not viable. For example, initial focus could be businesses with outstanding tax debts prior to March 2020 (onset of economic impacts of COVID-19) and not in bushfire affected regions that have not effectively engaged with the ATO.

¹ Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019



By implementing the transparency of business tax debts creditors will be able to self-quarantine from losses that could threaten their solvency and viable businesses will have better access to the support they need. Any viable businesses reported will be in no worse position as the impact on their credit risk profile will be equivalent to the lodging of a notice of intent (or actual use) to use the Restructuring Process which provides a continued moratorium on enforcement.

AICM members raised concerns about the following elements announced in the Insolvency Reforms to Small Business – Fact Sheet:

- *An eligible small business will be able to declare its intention to access the simplified restructuring process to its creditors, including through ASIC's published notices website.*

Members concerns:

- The company's ability to continue to trade will be prevented as creditors will be on notice that the business is insolvent and therefore not willing to provide future supplies without payment before delivery and/or payment of all arrears.
 - Creditors will be exposed to preference claims for any funds received from this point as they will be on notice of insolvency. This will further limit the company's ability to trade as the creditor may seek protections from preference claims e.g. bank/3rd party guarantees or payment by 3rd parties.
- *Following the declaration, the existing temporary insolvency relief (relief from insolvent trading liability and around responding to statutory demands from creditors) would then apply to the business for a maximum period of 3 months, until they are able to access a small business restructuring practitioner or other insolvency practitioner. Relief would only apply to an individual business once a declaration is made.*

Members concerns:

- This will be used by customers seeking to actively avoid paying debts for personal gain i.e. benefit from the restrictions to creditors issuing statutory demands.
 - Assets and value of the business are likely to be eroded preventing a successful restructure plan being formulated.
- *As a transitional measure, the ability to declare such an intention will be available until 31 March 2020.*

We understand that will allow businesses to declare intention and receive protection until 30 June 2021

Members concerns:



- This extends creditors period of uncertainty and therefore hesitation when seeking to support small businesses as they may be prevented from enforcement which is resulting in debtors using this to actively avoid paying their liabilities

AICM recommendation – Considering these concerns and the significantly eroded asset position of companies it may be more appropriate that the temporary relief is provided for those seeking to use the simplified liquidation with viable companies using the period until commencement to seek arrangements with creditors and work with SBRP in advance of the 30 December 2020 expiry as best practice directors have been doing.

3 - Simplified Liquidation

AICM Members broadly support the implementation of a simplified liquidation process that reduces the requirement of liquidators to undertake work with little or no benefit to stakeholders.

A primary concern of AICM members is the growing incidence of insolvent trading which increases the burden and risk on credit providers. ASIC's statistics report that 71% of reports by administrators in July 2018 to June 2019 identified a misconduct of insolvent trading, this has increased from 69% in July 2017 to June 2018 and 63% in July 2017 to June 2018².

Whilst liquidation costs are increased due to investigations, the AICM is concerned that a by not investigating and questioning this behaviour ASIC will not be informed to adequately act to deter this activity.

AICM recommendation - specific funding be provided that will enable this behaviour to be investigated without delay or increased costs to the liquidation process. Further a requirement for ASIC to take action and report to creditors on action taken/intended or report to creditors why no action is being taken. This is in the interest of all stakeholders and ensures directors are encouraged to consider creditors and avoid insolvent trading.

Who determines if simplified liquidation is appropriate?

The requirement and ability for creditors to oppose a simplified liquidation is clear but it was not clear that the liquidator is also required to ensure the simplified process is appropriate. Considering creditors can often disengage from an insolvency process once it is known they will receive little or no return it is important that the liquidator is also empowered and responsible to oppose a simplified liquidation.

AICM Recommendation - there should be a requirement for the liquidator to adopt process if they have reasonable grounds to suspect directors have allowed the business to trade whilst insolvent or interests of creditors and other stakeholders (e.g. if liquidation is being triggered to avoid other obligations e.g. environmental issues, liabilities to customers etc) would be better served through normal liquidation. A review by a third party such as ASIC or an independent liquidator may be appropriate.

Reduced circumstances of unfair preferences claims

The AICM supports the intentions of the reduced circumstances liquidators are required to better target the sorts of unfair preferences that are pursued to circumstance where:

- A transaction of a certain value; or
- that transaction is voidable only if it occurred in a certain period.

AICM is a vocal advocate for reform of the unfair preference claims regime as currently the regime:

- Further detriments creditors that incur loss at the appointment of a liquidator;
- Penalises creditors who have supported the company in an attempt to avoid liquidation;
- Amplifies the ripple effects of insolvencies; and
- Reduces creditors capacity to support viable businesses that display signs of insolvency.

When businesses are displaying signs of insolvency creditors are on notice that there is a significant risk that payments received from this point may be subject to an unfair preference claim if the business is subsequently liquidated. This results in creditors taking reasonable steps to mitigate their risk with the corresponding affect being a reduction in support available to the business or delays accessing the support at a time when both parties would most benefit from simplicity.

The reasonable steps taken by creditors to mitigate unfair preference claim risks may include:

- Seeking additional security from the debtor company;
- Requiring more complex structuring or repayment arrangements; and
- Reducing credit terms offered or moving to cash before delivery terms.

ASIC statistics³ show that the current unfair preference claims doesn't support a better outcome for creditors with 92.1% of insolvencies expected to return zero cents in the dollar to unsecured creditors. Additionally, AICM members report that they are yet to see an unfair preference claim paid to a liquidator result in a benefit to creditors.

AICM recommends:

- Payments received by un-related creditors in the ordinary course of business should be exempt from unfair preference claims.

This is due to the time and cost to pursue claims including disputes regarding reasonable suspicion of insolvency *"can take up time, money and resources, and have the potential to outweigh any benefit that might flow through to creditors"*⁴.

Ordinary course of business, in AICM members view, includes all lawful and responsible actions including legal action an arm's length creditor employs to obtain payment.

- Creditor must have used undue pressure to obtain payment such as intimidation or harassment (i.e. excludes stop supply etc)

³ REPORT 645: Insolvency statistics: External administrators' reports (July 2018 to June 2019)

⁴ Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 Exposure Draft Explanatory Materials



- Requiring liquidator to substantiate their claim from first demand to enable quick and efficient negotiation.

This will reduce time and cost associated with disputes, negotiation, mediation and court action.

- Burden of proof explicitly stated to be on the liquidator.
- Reducing the time prior to point of insolvency during which payments are captured from 6 months to 3 months.
- Limiting the time to bring a claim to 12 months from 3 years.
- Excluding payments made during a Debt Restructuring Process
- Where an unfair preference claim is pursued a payment that did not put the creditor in a better position than other creditors should be exempt.

To expand, a creditor with aged debt of 6 months on appointment of a liquidator but other creditors aged debt is less than 30 days is not required to return a preference claim as this will further detriment the creditor in favour of creditors already in a better position.

- Review of the Assetless Administration Fund to increase funding and tailor access to funding to support the simplified liquidation process.

It is a significant concern to AICM members that there is a large volume of businesses whose assets have been eroded whilst the moratoriums have been in place which may result in these businesses not being able to appoint a liquidator. Ensuring liquidators are able to access appropriate funding for the requirements of the simplified process will empower liquidators to adopt best practice when considering pursuing unfair preference claims.

These recommendations are consistent with observance of best practice liquidators' actions pursuing unfair preference claims including such as:

- Only pursuing significant amounts that will provide a meaning full distribution to creditors.
- Not issuing "scatter-gun claims" being claims issued to any creditor who received a payment within the relation back period without making any investigations or enquires as to the validity of the claim.
- Reviewing records and PPSR to validate claims prior to issuing demands.
- Entering open and honest discussions with creditors.

Meetings of creditors



Members raised concerns that information will be provided, and decisions reached without meetings. Low cost virtual meetings will enable:

- Liquidators to better communicate information included in reports;
- Allow creditors to ask questions and air concerns;
- All creditors have the opportunity to hear concerns of other creditors; and
- creditors make fully informed decisions.

AICM recommends – Meetings are held virtually after information is provided and before creditors are required to vote.

Clarifications sought

- How will creditors know simplified process undertaken? Will companies be referred to as (“in simplified liquidation”).

This will be important to ensure creditors are aware of a different process being in place.

- AICM members seek confirmation that current rights to request information are not eroded.

As noted under the restructuring process this is an important measure for creditors to obtain important information to discharge their responsibility to oversee the process, make decisions and protect their interests.

- Will a reduced time frame be implemented for responding to requests for information to creditors noting the current requirement is within 20 business days of the request being made, which may not be appropriate in a streamlined process.

Review of the process

Considering the tight time frames for delivering a perfected legislation, regulations and rules we strongly recommend the amendment lapses if a comprehensive review is not implemented, responded to by government and tabled in parliament. This review should be commenced and completed within 12-24 months of commencement.

4 – Refinements to the registration of liquidators

Despite potential benefits to cost reductions, AICM members are cautious to support lowering the bar for registration of liquidators.

As stated earlier the calibre and competency of insolvency professionals ensures creditors have confidence in the insolvency process and minimise potential for abuse.

5 – Virtual meetings and electronic communications

AICM members strongly support measures to reduce paper communications and need for physical meetings and enhance transparency of the restructuring process.

The insolvency professional should be effectively assisted to ensure transparency is enhanced and communications are received by an appropriate person or location.

AICM members noted concern at use of generic email addresses that maybe available to the insolvency professional such as:

- Email address of creditors/grantors on the PPSR

Creditors are unlikely to have this addressed by an appropriately experienced person to escalate the notice correctly.

- Email addresses held by the debtor for in accounts payable systems such as for sending remittance advices.

These addresses are often monitored by electronic systems or in-experienced staff.

AICM members renewed their call for a registered email address to be collected and published alongside registered company offices.

AICM supports insolvency professionals being able to rely on locations and methods used in previous appointments of the professional or their firm, provided an obligation remains to address and resolve the following promptly so as to not to disadvantage the creditor:

- Failed deliveries e.g. email no longer active, out of office alerts and other failures
- Advice that the details are no longer correct e.g. individual no longer responsible or authorised, providing new details etc

AICM members also noted that once they are notified of insolvency appointments by CRB's alert services they may proactively contact the appointed practitioner to provide a point of contact.



If the restructuring process and simplified liquidation process are to be effective and embraced by business and credit providers, then government should enable information to be cost efficiently accessible by SBRP, insolvency practitioners and creditors and their advisors. We suggest that this would be achievable by:

- The government creating a web based "portal" hosted by ASIC, in which a 24/7 folder of all companies subject to restructuring/ voluntary administration and liquidation is maintained;
- Only registered SBPR, voluntary administrators/ liquidators can create a folder for each of their appointments, and then manage the material lodged by it and others (eg in case of defamatory or malicious material being lodged by creditors or others);
- All government searches required by the appointee are provided for free eg PPSR and ASIC searches;
- Various key documents can be suitably lodged and accessed for free by SBRP, insolvency practitioners, creditors and their advisors, and proposers of alternative restructuring plans, including any notices of appointment, proofs of debt and reports/ proposals, and
- The costs of maintaining the register is covered by ASIC/ the government.