



13 May 2016

Manager  
Corporations and Schemes Unit  
Financial Systems Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [insolvency@treasury.gov.au](mailto:insolvency@treasury.gov.au)

Dear Mr Mason

### **Improving Bankruptcy and Insolvency Laws - Proposals Paper**

The Australian Financial Markets Association (AFMA) is responding to the National Innovation and Science Agenda – Improving Bankruptcy and Insolvency Laws Proposals Paper (Proposals Paper).

AFMA is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets. AFMA has more than 120 members reflecting the broad range of participants in financial markets, including Australian and international banks, leading brokers, securities companies, fund managers, energy traders and industry service providers.

Our comments are focussed on the third element of the proposed reforms to make 'ipso facto' clauses, which have the purpose of allowing contracts to be terminated solely due to an insolvency event unenforceable if a company is undertaking a restructure.

The Proposals Paper says that any term of a contract or agreement which terminates or amends any contract or agreement (or any term of any contract or agreement), by reason only that an 'insolvency event' has occurred would be void. Any provision in an agreement that has the effect of providing for, or permitting, anything that in substance is contrary to the above provision would be of no force or effect. The Proposal Paper goes on to say it intends to carve out certain 'prescribed financial contracts' (to be set in the regulation) where uncertainty around the ability to enforce that type of contract represents a material risk to the efficiency, stability and liquidity of the capital markets which depend on them. For example, swaps, certain derivatives, close-out netting arrangements under close-out netting contracts as protected under the Payment Systems and Netting Act 1998, or its foreign equivalents.

There are a broader range of financial contracts that would be affected by the proposed reform in its current simple form. AFMA considers that the proposal has major implications for financial market transactions which need careful and thorough assessment. We are particularly conscious of the need to avoid unintended consequences on capital raising and secured financial transactions.

Determining what contracts should be prescribed will require significant technical analysis. For example, a lender would not be able to terminate a facility agreement. Accordingly, the lender could be forced to continue to provide the defaulting company with funding. As a general principle, there should be no interference with the current right of a creditor with a security interest over the whole, or substantially the whole, of the property of a company under administration to take enforcement action. The ability of that type of creditor to stand outside the voluntary administration procedure is an important feature of the current law. It is aimed at ensuring the continued availability of reasonably priced secured credit, particularly from banks, by preserving their ability to move quickly to take control of secured property and minimise the risk of an erosion in the value of their security. Other financial arrangements will have to be carefully assessed.

In raising our concern with the implications of this reform, AFMA is cognisant of the recommendation by the Productivity Commission in its December 2015 Report - 'Business set-up, transfer and closure' in favour of restricting 'ipso facto' clauses and its rejection of earlier Corporations and Markets Advisory Committee 1998 and 2004 reports, which did not favour broad restriction of such clauses. The Productivity Commission's recommendation is based on a broader micro-economic reform policy objective. AFMA does not disagree with this objective but believes that implementation of this reform needs to be carefully calibrated to meet both the policy objective and avoid market disruption and affecting investor confidence.

Determining what contracts should be prescribed will require significant technical analysis. The short consultation period for these proposals does not allow for proper industry consideration about what contracts should be prescribed.

AFMA sees this proposal as the start of a process of policy work to produce workable draft legislation which requires close industry consultation. AFMA proposes that the government should set up an industry consultative group to provide expert legal and market practitioner analysis to develop a list of financial contracts to be prescribed. AFMA stands ready to participate in such work.

Please contact David Love either on 02 9776 7995 or by email [dlove@afma.com.au](mailto:dlove@afma.com.au) if further clarification or elaboration is desired.

Yours sincerely



**David Love**  
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