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The Manager
Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
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27 May 2016

By email: insolvency@treasury.gov.au

Dear Sir

Improving bankruptcy and insolvency laws - Proposal Paper April 2016

This submission is made by KordaMentha. This submission supports the position outlined in the submission of the Australian Restructuring Insolvency and Turnaround Association ('ARITA') dated 27 May 2016.

We have not repeated ARITA's submission but would like to comment on the following:

2 Safe Harbour

We are concerned that the models being considered are too complex and will prove to be unworkable in practice. It doesn't address the root of the problem; directors personal liability.

We recommend to foster a culture of restructuring companies that the personal liability of directors under section 588G of the Corporations Act be removed.

Regardless of this view, we provide our comments on the current proposals.

2.2 – Safe Harbour Model A

In relation to the requirement of a likelihood that the company is able to be returned to solvency within a reasonable period of time, we support ARITA in its comments that this is not the appropriate test for the reasons outlined by ARITA. We suggest that wording similar to that in section 435A of the Corporations Act would be the appropriate test, for example:

> It would be a defence to s588G if, at the time when the debt was incurred, a reasonable director would have an expectation, based on advice provided by an appropriately experienced, qualified and informed restructuring adviser, that the chances of the company are maximised, or as much as possible of its business, to return to solvency in a reasonable period of time; or if it is not possible for the company or its business to return to solvency, the actions of the director are likely to result in a better return for the company's creditors and members than would result from placing the company into external administration.

2.2.1 The Restructuring Adviser

We support ARITA's recommendation that a restructuring adviser should be a member of an approved professional body.

We suggest a mechanism being in place to for a body to be approved by the Minister when it becomes a professional body whose members are appropriate to be restructuring advisers.

We are supportive of ARITA's comments on the independence of the restructuring adviser as, based on our experience, the continuity of the adviser invariably results in efficiencies and cost reductions for the company and ultimately, some of its stakeholders. As such, there should not be a limitation on a restructuring adviser being able to be appointed in a subsequent insolvency of the company provided they meet the other requirements of independence.

2.3 Safe Harbour Model B

We consider the requirement of the liquidator to show that a director had breached one of the three limbs would be more appropriate for the director to prove. There are few successful prosecutions under section 588G of the Corporations Act and this would make it more difficult for liquidators.

3.2.1 Anti-avoidance

In relation to the comments that counterparties would maintain a right to terminate, amend, accelerate or vary an agreement with the debtor company for any other reason, such as for a breach of non-payment or non-performance, we suggest that it should be clear that it does not relate to non-payment of pre-appointment amounts outstanding or amounts for property used or occupied by a voluntary administrator in the first 5 business days after the voluntary administration began as per section 443B(2) of the Corporations Act.

3.2.2 Exclusions

We recommend that a mechanism be included for a creditor to be able to apply for court for the exclusion of their clause from the ipso facto model.

Yours sincerely

Mark Korda
Partner