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Treasury Laws Amendment (2017 Enterprise Incentives No.2 Bill) Bill No. X 2017

Draft Legislation Request for Submission – NISA Improving Corporate Insolvency Law

24th April 2017

Contact Mr Eric Milne
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24th April 2017

The Hon Kelly O'Dwyer MP
The Minister for Revenue and Financial Services
Parliament House
CANBERRA ACT 2600

By email: department@treasury.gov.au

RE: Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 No. X, 2017

Dear Mr. O'Dwyer,

The Australian Credit Forum was established in 1965 by a group of senior Credit Professionals, Lawyers, Solicitors, Liquidators, Senior Executives from various Mercantile & Debt Collection Agencies and Credit Reporting Bureau.

Further information on The Forum, its aims and objectives and current membership details can be found on our website:

www.australiancreditforum.com.au

The current membership consists of senior Credit Professionals and Managers from a broad range of major Australian and International Companies. Some of the members have over 40 years' experience as Credit Managers. In our day to day roles, we naturally encounter instances of businesses and companies being placed into Administration or Liquidation owing significant amounts to creditors.

As such the member's extensive exposure to company collapse/failure makes The Forum an excellent platform to submit their concerns and suggestions regards the proposed bill.

The Forum is uncomfortable with any changes that would lessen the obligations of Directors. A recent submission from The Forum to the **Senate Standing Committee on Economics - Superannuation Guarantee Non-Payment** amongst other suggestions and proposals urged the Government to tighten and enforce Director's obligations and liabilities in relation to unpaid SG.

The recent announcement that the Government intended to enforce the repayment of outstanding student loans from former students who, having completed their studies, then move overseas to (in some not all instances) avoid their obligations regarding the repayment of their student loans is a move in the right direction.

The Forum feels that, like unpaid student loans, the repeated failure of ASIC to take legal recovery action against Directors of insolvent companies who fail to remit the SG to their employer's nominated Super Funds instead retaining the SG funds for their own of their company's benefit should be held accountable for their actions/failure and suffer the consequences to the full extent of the law including Bankruptcy EVEN IF THERE IS LITTLE OR NO CHANCE OF RECOVERY!

Instead of making things easier for Directors to avoid their obligations the Government should be cracking down and enforcing their obligations!

Recent Government enquiries into Phoenix companies seems to have produced no noticeable change in the instances of company failure followed almost immediately (if not before) of the formation of a phoenix company to carry on the business under the direction of the former Director of the insolvent company.

One Forum member (Mr Geoff McDonald Barrister) has highlighted the NZ legislation dealing with Phoenix companies as quoted from an article by NZ Firm McDonald Vague:

A phoenix company is defined as one that has been known by the same, or a similar, name or trading name as a company in liquidation (at any time before or within five years after the date of liquidation). A person cannot be a director of a phoenix company within five years after the insolvent company's liquidation without the court's approval, with one major exception. This is where the phoenix company has bought the business from the insolvent company's liquidator or receiver, **and** the directors notify all creditors of the insolvent company of this situation in writing. There is a strict 20 working day deadline to issue a 'successor company notice' (or apply to the court for a dispensation).

A further exception is where the phoenix company has already traded for at least 12 months prior to the insolvent company's liquidation with the same/similar name or trading name.

Should a company/person commence under a phoenix arrangement prior to or shortly after the liquidation of the failed company, that company/person must apply to the Court for an exemption from prohibition within five working days after the commencement of the liquidation of the failed company. A recent case has shown that this deadline will be strictly enforced.

Where the rules are not followed at all, it is possible that suppliers end up trading with one company without being aware that the previous company has failed. This is particularly an issue when trading is conducted on behalf of an entity that is described as "trading as", and the original entity is not formally liquidated, leaving a supplier potentially without any agreed trading terms with the new entity.

The NZ legislation also provides penalties for breaches of the legislation covering Phoenix companies.

386A Director of failed company must not be director, etc, of phoenix company with same or substantially similar name

(1) Except with the permission of the court, or unless one of the exceptions in sections 386D to 386F applies, a director of a failed company must not, for a period of 5 years after the date of commencement of the liquidation of the failed company,—

(a) be a director of a phoenix company; or

(b) directly or indirectly be concerned in or take part in the promotion, formation, or management of a phoenix company; or

(c) directly or indirectly be concerned in or take part in the carrying on of a business that has the same name as the failed company's pre-liquidation name or a similar name.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to the penalty set out in section 373(4)

With the above comments in mind and The Forum's strong views that the Government should not water down any legislation that affords Directors of Insolvent companies an opportunity to avoid their obligations as Directors we submit the following comments from our members for your consideration.

Proposal:

´The amendments will create a "safe harbour" for company Directors from personal liability for insolvent trading if the company is undertaking a restructure in certain circumstances. This will drive cultural change amongst company Directors by encouraging them to engage early with financial hardship, keep control of their company and take reasonable risks to facilitate the company's recovery instead of placing the company into voluntary administration or Liquidation."

Comment – Ms Gaynor Lawler, Regional Director Credit, Vertivco Pty Ltd

If the Director does decide to "restructure" then there must be a 3rd party involved to ensure the restructure is sound and all creditors will receive a copy of the restructure plan. There needs to be a specialist business adviser(s) perhaps Government Certified that take on this role to review and approve the "restructure" plan to ensure it is sound.

Proposal:

"the amendments will also make "ipso facto" clauses unenforceable if a company has entered into a formal insolvency process. Currently, "ipso facto" clauses allow contracts to be terminated solely due to an insolvency event. The aim of this reform is to prevent these types of clauses from reducing the scope for a successful restructure or preventing the sale of the business as a going concern".

Comment – Ms Gaynor Lawler, Regional Director Credit, Vertivco Pty Ltd

1) If termination clauses relating to insolvency events cannot be triggered then there must be some form of security introduced for the creditor who is forcefully dragged on to thee Director's journey to save his company. What will stop the creditor from incurring further debts if the Director cannot turn the company around. The creditor under contract must be entitled to renegotiation terms to shorter payment terms to some other means to minimise their risk. And there needs to be comfort for the creditor that the change in terms is not interpreted as preference payment if in fact the company still fails.
2) In the case of "restructure" or "resale" there needs to be an assurance/novation that the arrangement must be acceptable to the creditor to proceed (or still give the option for termination) as with a novation their needs to be certain criteria met and the creditor has the option to reject.

Comment – Mr John Petersen, Managing Director, AMBA Commercial Collections

There is a potential for creditors to no longer have the option of standard termination contract terms in the case of an insolvency event where there is a formal restructure or resale.

As pointed out at the start of this submission the Forum, as stated in earlier submissions, believes that the Government should not make it easy for Directors to evade and simply walk away from their legal (moral) obligations regards continuing to trade whilst their company is insolvent.

Yours sincerely

Eric R Milne LICM CCE
Chairman