National Australia Bank

24 April 2017

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Mason,

The National Australia Bank (NAB) welcomes the opportunity to respond to the Government's draft legislation to amend the *Corporations Act 2001* reform Australia's corporate insolvency laws. We support the Federal Government's aim to promote a culture of entrepreneurship and innovation via the National Innovation and Science Agenda (NISA). As Australia's biggest business bank we endorse the stated aims of driving business growth, local jobs and global success.

As a member of the Australian Bankers Association (ABA), NAB has participated in the ABA's consultation process and is supportive of the ABA's submission.

This submission seeks to provide further brief commentary and guidance to Treasury on issues of importance to NAB.

1. Safe harbour for insolvent trading

Nab supports the Safe Harbour proposals as providing adequate and justified protection for directors who take appropriate actions to address the insolvency or potential insolvency of their company.

We believe that section 588DA (2) sets out a practical and useful set of guidelines for company directors. We suggest minor amendments to enhance protection:

- Sub-section 588DA(2) (b) – the reference to 'appropriately qualified person or entity' should not discriminate between the corporate form of the source of advice.
- Sub-section 588DA(2) (e) – should include a requirement to develop the plan in a "timely manner"

2. Ipso Facto – non-operability of insolvency event termination clauses

We support the general framework of an ipso facto restriction, to help keep a business operating as a whole whilst restructuring options are explored.

However, we are concerned that some of the changes will impact a lender's ability to ensure that their security is not diminished. There is we submit risk that the changes will result in:

- Pre-emptive appointments by secured creditors seeking to avoid being caught by the proposed stay – "first mover advantage"
- A change in secured lenders willingness to provide cashflow lending secured against business assets, because that security will be at risk of diminution.

Secured creditor's right to appoint a receiver

It appears that the ED Bill excludes a lender's ability to appoint a receiver from the ipso facto "carve outs."

In practical terms this will have the effect of providing secured lenders with a reason to decline to waive events of default, to ensure that that they have the option to appoint a receiver in the event that the directors will appoint a VA. That will be destabilising, and may in fact trigger insolvency on the borrower's part.

For the same reason the changes would appear to provide secured creditors with an incentive to avoid raising issues with borrowers, and seek to appoint receivers at an *earlier* stage to avoid the risk that directors might "beat them to" an appointment. Such a perverse outcome would be entirely contrary to the stated objectives of these proposed corporate insolvency law proposals.

Secured creditor's associated loss of value

The proposals raise additional issues in light of the 2015 decision of the Supreme Court of New South Wales in the matter of Bluenergy Group Limited (subject to a Deed of Company Arrangement) (administrator appointed) [2015] NSWSC 977 (21 July 2015) (see also at http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/977.html .

In that case the court held that a deed of company arrangement limited a secured creditor's security to the assets existing when the deed was entered into. That means that the secured creditor's charge would no longer capture "future assets" (for example: proceeds received when an invoice is collected). The consequence of that decision is that the secured creditor's security position will diminish from that point onwards.

Under the current law, secured creditors can avoid the risk of diminution by appointing receivers, but they must do so within the 10 day decision period set out in section 441A.

To maintain the secured creditor's current position NAB submits that there should be an amendment so that the decision period does not start until there is an event of default that the secured lender may rely upon.

Receivership and liquidation

Our view is that receivership and liquidation should receive ipso facto protection.

Any additional value generated through the ipso facto protection will first accrue to the secured lender in the case of non-circulating asset security, and to the employees in respect of circulating asset security; and then to trade creditors. We submit that it is unfair that employees should be in a less protected position because someone other than the directors initiates an insolvency appointment.

Non-reliance on ipso facto where insolvency has been cured by restructuring

The proposals render a stay unenforceable during the period of a restructure.

However there is nothing to stop the counter-party later relying on the clause even though the insolvency has been essentially "cured" by a restructuring. There should be specific protection so that the clause cannot be later reinvigorated and relied upon, where the restructure is successful. Otherwise, a successful restructure could be undone where an ipso facto clause is revived.

Exclusions from the ipso facto stay

We believe that the following should be excluded from the ipso facto stay:

A secured lender's right to accelerate and to appoint a receiver – for the reasons discussed above.

Margin lending

The enforcement of margin lending facilities is time critical. A significant stay to their normal operation would risk a significant change in risk appetite and availability.

Real Time Gross Settlement exclusion

The Real Time Gross Settlement exclusion should be expanded to read "and any other arrangement where participants in the Australian domestic clearing systems (such as the Australian Paper Clearing System (CS1) and the Bulk Electronic Clearing System (CS2)) settle obligations on behalf of other participants in those systems"

Financial markets products

We understand that the proposed changes are not intended to impact the *Payment Systems and Netting Act 1998*. We suggest that there should be a specific provision to that effect to avoid any uncertainty.

In conclusion, we appreciate the opportunity to respond to Treasury's draft legislation.

If you require further information concerning our response please contact me at t: 0414 249 722 e: justin.b.owen@nab.com.au

Yours sincerely,

JUSTIN OWEN
Senior Manager – Government Affairs & Public Policy
Business Banking