Mr James Mason
Financial System Division
The Treasury

NATIONAL INNOVATION AND SCIENCE AGENDA - IMPROVING CORPORATE INSOLVENCY LAW 28 March 2017 | Exposure Draft

I refer to your invitation to comment on the consultation papers made available in relation to the above.

I am predominantly concerned with the provision of advice and support to trade credit suppliers and, against this background, have concerns regarding the proposed *section 451E(6)* relating to *ipso facto* clauses, wherein it states:

> *If one or more rights of an entity against a company are not enforceable for a period because of subsection (1), any right under a contract, agreement or arrangement that the company has against the entity for the provision of additional credit is, by force of this subsection, not enforceable during the same period.*

My specific concern relates to the use of the word '*additional*', which is undefined, open to differing interpretations, and, thus, subjects trade credit suppliers to significant uncertainty as to their rights in circumstances where an *ipso facto* clause may have been triggered.

Scenario: At some point in the past, a trade credit supplier has granted a $50,000 credit facility to a customer. At a point when $30,000 worth of goods has been supplied and full payment for those goods is outstanding, the supplier's *ipso facto* clause is triggered.

In this context, does the provision of *additional credit* mean credit over and above the $30,000 already made available – in which case no further deliveries would need to be made – or does it refer to credit, additional to the initial $50,000 facility agreed at the commencement of the trading relationship between the two parties – in which case the supplier might be obliged to supply up to a further $20,000 worth of goods?

Regardless as to which interpretation is intended it is also unclear whether payments made *after* the *ipso facto* clause trigger have the effect of 're-setting' the amount of credit that should continue to be granted.

For example, would a post *ipso facto* trigger payment from customer to supplier of, say, $10,000 necessitate fresh supply of an equivalent value of goods or services (if required by the customer) given that such a supply would not be *additional* to either the initial credit facility agreed or the credit actually granted immediately prior to the *ipso facto* trigger?

My preferred interpretation would be that suppliers would not be required to extend any credit once their *ipso facto* clause had been triggered – this would be achieved by removing the term "additional" from *section 451E(6)*.

Yours

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