CAMAC Enquiry

Rehabilitating large and complex enterprises in financial difficulties.

Section 2

Voluntary Administration

2.1 Objects

Once it has been established that a company cannot be made profitable and pay all its creditors 100 cents in the $ the stated objective is OK.

We believe however that a better initial objective to assist the rehabilitation of companies would be:

> maximise the chances of the company, or as much as possible of its business, continuing in existence, AND
>
> return to creditors 100% of what they are owed or as much as of this as is possible.

Moratorium

2.6 This clause apart from the section in brackets would be appropriate to consider for the BTA's turnaround model.

2.7 This clause would also appropriate to consider for the BTA's turnaround model.

Personal liability of administrator

2.8 Under the BTA model the directors would not need an indemnity during the turnaround model. There would also be in the BTA model an amended definition of the solvency requirement (please see our model outline)

Major Meeting of creditors

2.10 Under the BTA model the directors would call a meeting of creditors within 21 days after the Turnaround Panel had granted a moratorium to explain the planned actions for the company's rehabilitation. If any substantial creditor did not agree with the plan they could make a submission to the Turnaround Panel. If the Panel decided that the submission contained new and significant information which would alter

their opinion about the turnaround plan being successful they could withdraw or alter the terms of the moratorium.

Deed of company arrangement

2.13 Under the BTA model if a company could not repay all its creditors (pre moratorium and moratorium) in the normal course of its business at the end of the moratorium period, but the company had turned itself around and was operating profitability, then a deed of company arrangement would be put into place to repay creditors. This deed could be similar to the alternatives available under the VA system.

Role of the court

2.17 Currently we do not see the court normally having a role in the BTA turnaround model. The Turnaround Panel would deal with all turnaround issues.

Insolvency / solvency

2.28 to 2.30 The BTA handles this issue by saying that the directors believe that the company may become insolvent within the next 12 months.

Rights that override a VA

2.39 to 2.60 The general approach of the BTA in the establishment of the Turnaround model was to not interfere in any major way with secured creditors. The reasoning behind this was that in general terms, large financial institutions made up the majority of the creditors who had secured charges. We believe that the experience in most of the VAs that have occurred in Australia is that the large financial institutions have not acted precipitously in appointing receivers over the top of VAs when there was a good plan for rehabilitation.

The BTA does not believe that if this policy continues that the major financial institutions will not support a creditable turnaround model such as we proposed. The major financial institutions we believe generally only appoint receivers when it appears to them that the company is not capable of fulfilling its obligations to its lenders.

In our turnaround model if the financial or other secured creditors started to override good commercial practice then we would recommend that the government took the appropriate action.

Timing issues

2.61 to 2.76 The timing issues for a VA could in themselves be improved. For instance, many companies going into VA do not have their books and records up to date so not all creditors receive notice of the first

meeting. Additionally many creditors have not had time to consider the issues of the company and what their response should be.

The most important issue however from the BTA point of view is that the timing of the VA procedure does not allow the company to undergo a turnaround before the composition with creditors is generally agreed.

If a company can undergo a turnaround and become profitable, we believe that the returns to creditors could be substantially greater than they are under the current VA legislation.

In our opinion the current practise of administrators means that companies that are suitable for VA are the ones that would benefit from financial engineering and do not have a substantial operating business.

Notifying pre-commencement creditors

2.77 to 2.81 In the BTA turnaround model the role of reviewing the company current situation is undertaken by the Turnaround Panel. The Panel in deciding to grant or not grant a moratorium has to consider the likely probability of the turnaround success. They would also consider the risk that is being taken with unsecured creditors current return and the likely increase in this return if the turnaround is successful.

This being the case we believe that if the Turnaround Panel believes that much better returns can be obtained for creditors, it is in the creditors interests that the turnaround process starts as soon as possible.

To keep creditors informed of the aims and timing of the plan, under the BTA model a creditors information meeting would be held about I month after the moratorium was granted.

It must be remembered that for the BTA model to be successful in general the company must maintain good trading relations with creditors, this involves telling them of the plan and getting their cooperation.

Lending to a company under administration

2.81 to 2.100 As a generalisation the people who have most to gain from the successful turnaround of a distressed company are the existing creditors, bankers and shareholders. This being the case this is the group who should be approached first to assist with any necessary new loan funds. This group also should know the activities of the company and be able to make the fastest decision about any additional loans.

The existing laws regarding the borrowing of loans by VAs would appear to be satisfactory.

Remuneration of administrator

2.112 to 2.12 A most important issue that is related to this is that in effect there is no body or group that has the power to monitor the activities of the VA and ensure that fair value is received by the company for work that is of real value to it and creditors.
We believe that a group such as the Turnaround Panel could play a valuable role in over viewing large companies that are undergoing a turnaround.

Voiding antecedent transactions

2.127 to 2.133 The BTA would not anticipate that with the turnaround model of incorporating a Turnaround Panel that there would be a need to have the ability to apply to the court re antecedent transactions

Debt for equity swaps

2.134 to 2.140 The VA Reform proposals seem sensible; the qualification for the debt for equity swaps is that, consideration should be given to have an appropriate independent qualified adviser express an opinion on the proposal.

Effect of takeover provisions

2.144 to 2.160 This is always going to be a difficult area. On the one hand we do not want to stop the turnaround of a company even if it technically cuts across normal takeover rules, on the other hand we do not want unscrupulous people taking advantage of the situation.

Our BTA turnaround model recommendation would be that reconstructions were exempt from takeover provisions if the Takeover Panel approved the scheme.

Courts powers to give directions

2.161 to 2.167 If the administrator as an officer of the court has the protection of the business judgement rule, it would appear that the only way he/she could be liable is under the “statutory duty of good faith”. Perhaps the easiest way to solve the issue is to better define this duty.

If the BTA turnaround model was accepted, it may be an option to have the CEO who was approved by the Turnaround Panel to be given protection from the “business judgement rule”

Pooling of group companies

2.176 to 2.190 In to-days commercial climate we believe there is a tendency for most companies to try and simplify for administrative and

cost reasons their corporate structures. In some cases the existence of different corporate identities in a group is for the reason of quarantining liabilities. Recent changes to the Corporations Act have we understand made holding company directors responsible for new debts of subsidiaries if those subsidiaries have traded while insolvent. In order to encourage responsible trading by holding companies there may be a case to say that in general holding companies are responsible for the debts of subsidiaries. This is a complex issue and needs debate as it modifies the general principal of limited liability.

Ipso Facto clauses

2.191 to 2206

Under the BTA proposal Ipso Facto clauses would not stop a turnaround, which had been approved by the Turnaround Panel.

3. Creditors' schemes of arrangements

3.1 to 3.12

Creditors schemes are not that common for the reasons outlined in 3.10 and 3.11.

Under the BTA proposal for company turnarounds, the basis is that it is important to get the company back into a profitable trading position as soon as possible (if that is possible).

Spending valuable time and available cash on endeavouring to get a creditors compromise before it is established that creditors really need to compromise seems not to be productive and puts at risk the company being profitable at all in the future.