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Introduction

In view of the very short timeframe, and the overly extensive delegation of matters to Regulations not yet produced, it has been impossible to comment on all the aspects, but I am aware of more detailed submissions from the Law Council of Australia and endorse those.

The small business restructuring process will be of some use in a small number of cases where the significant eligibility requirements foreshadowed in the announcement can be met, and where the timeframe enables a restructuring practitioner (RP) to obtain the information from directors in a form and extent which will be required in order to advise.

The safe harbour regime introduced in 2017 was supposed to provide directors with the breathing space to explore bona fide restructuring, without the fear of insolvent trading liability. The effectiveness and operation of this was due for statutory review from July 2019 but this has not yet been undertaken, and it is unfortunate that this new initiative has not had the benefit of such review.

Business Viability

The difficult problem is how to identify viable businesses from those that should go into liquidation, and how these can be advised and restructured (if possible) at low cost relative to VA. Failure to do so will mean that this new procedure merely delays inevitable liquidation, to the detriment of creditors, and prolongs the build-up of liquidations particularly in 2021.

Government assistance is required to fund and facilitate viability assessments, as noted by the ASBEO, and building on the ATO Viability Assessment Tool. Therefore recommendation 1 of the ASBEO Insolvency Inquiry report should be adopted in full.

In addition, the attitude of the ATO, and the continued ability to use Director Penalty Notices, and garnishee notices, could undermine any benefit of this new process. Therefore they should have to enter into a protocol setting out their approach to companies entering into the small business restructuring practice.

New Small Business Restructuring Procedure

It is important that the restructuring practitioner (RP) be a registered liquidator. ASIC and other bodies have expressed concern about pre-insolvency advisors operating under the current law, and the SBRP might exacerbate this unless the RPs are sufficiently regulated to ensure that they have the integrity, independence and expertise commensurate with the role envisaged for advising and monitoring the restructuring of SMEs. The new UK moratorium has a monitor who is a full and unrestricted licensed insolvency practitioner, and that is also the position in Canada for debtor Proposals. But at the same time, if the Regulations, as the ED would seem to suggest, place duties

and liabilities upon the RP that are akin to the administrator's role in a VA (as the ED provisions would seem to suggest), then it will be unlikely that cost savings would be that significant.

There seems to be an ambivalence in the ED as to whether the company is really remaining in control, or whether it is a more simplified form of external administration/VA. The suggestion that this is a 'Debtor in Possession' regime where the business stays in control is undermined by the proposed extent of involvement of the RP, including as consent to transactions, the role of the RP as 'officer' and 'agent' of the company (in contrast to the monitor in the UK), and, for example, amendment to s589(5). Moreover, while the ED's proposed amendments do provide that the SBRP is being treated as 'external administration' within Chapter 5 Corporations Act and the Insolvency Practice Schedule, other provisions in the ED seem inconsistent with that idea (eg clause 31). There is an irony in the procedure being included as 'external administration' (and the restructuring practitioner correspondingly being an 'external administrator), while at the same time providing that the purpose is to enable the company to stay in control and stating that this is a DIP model, which seems the antithesis of 'external administration'. It will be important that the RP's role is explicitly advisory and of a monitoring/oversight nature only, and that the RP will not be held liable for breach of duties as an officer or shadow director of the company, which is not clear from the ED at present, given the range of duties that being an 'officer' entails under the Corporations Act. However, since the ED states that the Regulations will detail the powers and liabilities of the RP, more detailed comment is not possible here.

Problems with specific provisions of the Bill:

Definition of 'restructuring' - s435A only states when it starts and finishes, yet clause 11 amending s9, suggests that restructuring 'has a meaning given by s435A'

S435B- why is the test for entry 'reasonable grounds for suspecting insolvency' when the test for entry into VA in 436A(1) is merely 'the opinion of the directors'? This makes the insolvency test higher, and more objective, for entry into SBRP than it does for VA.

Items 29-31- Provisions about Public company AGMs or debentures are not relevant given eligibility criteria will effectively limit this procedure to proprietary companies

Item 56 amending s588FE(2B) , 2C(d) seems to introduce the 'ordinary course of business' test into voidable transactions law, particularly preferences, after it was deliberately removed in the 1993 reforms. The 'ordinary course of business' test has a particular jurisprudence in the context of preferences which it would be unfortunate to reintroduce by the back door here.

Consequential amendments to other Commonwealth legislation:

Item 60- Amending s588FL. Given this amendment, which shows an intention to treat the procedure in the same way as a VA and DOCA in this resepect, it will be necessary to amend s267 Personal Property Securities Act 2009(Cth) to include entry into the small business restructuring, and entry into a restructuring plan, as vesting events under s267.

Cross-Border Insolvency Act 2008(Cth) s8(b) will also need amending to expressly include, or exclude, Part 5.3B, as a policy choice.

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