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12 October 2020

BY ELECTRONIC MAIL: MCDInsolvency@Treasury.gov.au

Manager
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

Dear Sir/Madam,

RE: CORPORATIONS AMENDMENT (CORPORATE INSOLVENCY REFORMS) BILL 2020

Detailed below is our submission in relation to parts of the above legislation.

Whilst we understand the extraordinary circumstances created by COVID-19 and the significant effect it has had on the economy and small businesses, this proposed legislation is **permanent, not temporary**, and accordingly it is disappointing that such significant legislation is proposed to become law in such haste, with less than a week provided for interested parties to lodge submissions. Further, the information provided to enable submissions to be made, excludes the proposed Regulations that accompany the Legislation. It is noted that significant information integral to the Legislation is contained in the yet to be seen Regulations.

In these circumstances we have limited our submission to the proposed Simplified Liquidation Process and the new class of registered liquidators qualifications.

ABOUT DYE & CO PTY LTD

Dye & Co Pty Ltd is an accounting practices which solely provides Insolvency Services. It boasts five Registered Liquidators and two Trustees in Bankruptcy. The company has been providing insolvency services since 1978. Further details about Dye & Co Pty Ltd can be found on our website www.dyeco.com.au

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SIMPLIFIED LIQUIDATION PROCESS

COSTS

These Insolvency Reforms are being introduced, amongst other things, to reduce the costs of simple liquidations.

Often companies are wound up as a Creditor Voluntary Liquidation in circumstances where they have little or no assets whilst having significant liabilities.

In circumstances where there are little or no assets, indemnity funding or payment up front is sought from an associated entity to meet the costs of the liquidation.

Should the Simplified Liquidation Process be introduced, and a company had little or no assets, an indemnity or payment upfront would continue to be sought to liquidate the company, however at a lesser sum, to reflect the reduced cost structure, but that lesser sum would not be substantial as there are little cost savings available in the proposed legislation, discussed later in this submission.

The proposed legislation provides various triggers where the simplified liquidation could convert to a “full” or “traditional” liquidation, which would require additional work to be performed by the liquidator.

It is unlikely that the company directors, associated entity or creditors would meet such costs, resulting in the registered liquidator being required to perform a significant amount of unfunded work.

It is not clear whether the Simplified Liquidation” can be performed by the new (less qualified liquidator, who is not registered to perform “full” or “traditional” liquidations). If they can, which registered liquidator would consent to act in circumstances where a trigger event has occurred and there are no available funds to meet his / her remuneration.

A possible solution could be for ASIC to have a “Government Registered Liquidator” to do this unfunded work, similar to there being an option in Bankruptcy for a debtor to file for Bankruptcy and have a government appointed Trustee administer the Bankrupt Estate at no cost to the debtor. Should ASIC not want to incur this overhead in administering liquidations, provision should be provided, similar to the Assetless Administration Fund, which funds liquidators to investigate and report director misconduct including director banning reports.

NEW CLASS OF REGISTERED LIQUIDATORS

It is proposed that in addition to Registered Liquidators, a new class of less qualified registered liquidators would be created, who could solely act in respect of the new restructuring process.

Details of what the appropriate qualifications of this new class of registered liquidator are not in the Draft Legislation.

We believe that to maintain the integrity of the Insolvency System that only licence and registered liquidators be allowed to undertake the role as an SBRP.

The proposed SBRP is likely to require cashflow analysis, budgets and a level of financial analysis including current trading to enable creditors to make an informed decision on the viability of any proposal and their anticipated return.

These are not tasks which can readily be undertaken by persons without specialised insolvency experience that is held by a registered liquidator.

However should the Government seek to erroneously allow for a new class of liquidator then registration should be subject to:

- The same control and regulation from ASIC as Registered Liquidators
- Subject to payment of ASIC Industry Funding Metric Fees
- Provide evidence of appropriate and an adequate level of Professional Indemnity Insurance
- Comply with a definition of a Fit and Propper Person which would include certifying that they and any associated entities do not provide pre insolvency restructuring advice akin to Phoenix Transactions

It is also important that this new class of liquidator possess sufficient skill and knowledge to understand various offences in the Corporations Act and claims available in a liquidation.

It is possible that it is proposed that such requirements are provided for in the Regulations, but without the benefit of being provided with the Regulations in this narrow consultation period, we raise this for completeness.

SIMPLIFYING INVESTIGATION REPORTING REQUIREMENTS

We acknowledge that the simplified liquidation pathway proposed to dispense to Section 533 and replace it with "*regulations [that] will prescribe rules relating to the giving of information, providing reports and producing documents to ASIC*." But if Section 533 is "*often not fit for purpose*" and if its requirements are "*often…disproportionate to any benefit*" (all quotes from the Draft Explanatory Memoranda), why not address Section 533 directly to provide system-wide improvement?

Although the requirement for a liquidator to report offences is a requirement of Section 533 of the Corporations Act 2001, it is ASIC that has designed the form that is to be submitted to comply with the statutory requirement.

The ASIC form is very broad in the information it requires. However, the simple reporting of an offence and notification of intentions with respect to conducting examinations would meet the requirements of Section 533, if ASIC accepted it.

We compare the regulation of Bankruptcy which:

- Also has a requirement to report offences (Section 19, Bankruptcy Act 1966).
- Does not involve the submission of a form with batteries of questions, but allows the practitioner to exercise their judgement and isolate the matter of concern that is relevant to report.
- Additionally, in bankruptcy, there is a “pre-referral” service, to save the expense of preparing a fully documented and substantiated referral if it is likely no prosecution or action is to arise from the referral in any event.

Aligning corporate with bankruptcy practice would not require any law change, just a different approach taken in implementation of the current law.

Whilst the requirement to lodge a Section 533 report with ASIC is intended to decrease the costs of the administration, practically speaking the preparation and content in the Statutory Report to Creditors, required within three months of the appointment of the liquidator, requires significant investigation, which would mitigate a lot of the cost savings as well.

COST SAVINGS?

The SBRP process and the Simplified Liquidation process still require two substantive reports to creditors and as such there is little or no cost saving generated from the process as proposed.

The removal of the obligation to convene meetings of creditors, whilst welcome, will not have a significant cost savings benefit, as since the advent of the Insolvency Law Reform Act 2016 most creditors voluntary liquidations do not conduct meetings and seek approval of resolutions by way of proposals without a meeting.

The removal of Committee of Inspections and Reviewing Liquidators, whilst welcome, also will not have a significant cost savings benefit, as they are not often appointed in simple liquidations.

It is difficult to see what costs savings are to be achieved simplifying the dividend process given: (1) dividends are already paid on a proportionate basis; (2) the onus is already on the creditor to prove their claim; (3) it is already the case that the liquidator can assess and accept or reject the claim, and the onus is on the creditor to appeal the decision.

As above, it is difficult to see what costs savings are to be achieved through the investigation requirement changes as presently framed.

In this context, it is unclear why a liquidator would elect to enter the simplified liquidation pathway if the only substantive difference were to artificially restrict their capacity to recover voidable transactions.

There will likely be additional systemic compliance costs in (1) continuous assessment of eligibility for the simplified liquidation pathway (for example, every time a new proof of debt is filed by a creditor); (2) administrative requirements in the instances where the simplified liquidation pathway is found to be not appropriate.

Where the majority of costs would be externalised (onto the practitioner or other creditors), every disgruntled creditor will seek to require the more involved process be adopted. The proposed Section 500AB creditor request for the liquidator to not follow the simplified liquidation process is likely to give yet another venue for dispute with disgruntled creditors which adds a further possibility for increased costs. Given the intention is for a streamlined, more cost effective system, will there still be an ability for creditors to go to court to challenge the liquidators decision? A more appropriate and cost effective approach would be for an independent arbitrator to adjudicate on disputes, similar to the Inspector General in Bankruptcy as occurs in personal insolvency.

CHANGES TO VOIDABLE TRANSACTIONS

We note that unfair preferences are not to be recovered in certain circumstances.

We agree that preventing recovery of payments of less than a certain amount would avoid unnecessary costs where there is no commercial benefit in the recovery of such claims, safe guards should be put in place where “non related, yet essential suppliers” should not be immune from preference recovery action in circumstances that they are paid in preference to other unrelated creditors.

ELIGIBILITY CRITERIA

We are unable to provide any meaningful feedback in relation to the Eligibility Criteria, given that a significant portion of the detail is contained in the yet to be released Regulations.

We consider that the director declaration of eligibility ought to be given before the resolution for winding-up, comparable to members’ voluntary liquidation where the declaration of solvency is made prior to winding-up (recommended change to Section 498(2)(a)). It would seem to make sense that the option of a simplified liquidation be included as an alternate to accepting the proposal such that the process of a Simplified Liquidation can be adopted immediately if a resolution on the proposal fails.

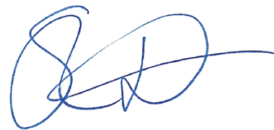
Without the benefit of the applicable Regulations being released, more clarification is required in respect the calculation of creditors claims if there is a dispute, which may be relevant in determining whether greater the 25% of creditors opt out of the simplified liquidation system or when paying a dividend.

Examples of where creditors' claims are often misstated include:
- Poor record keeping from the company in liquidation
- Failure to account for interest and costs on a judgement debt
- Contingent claims that arise as a result of a breach of contract (e.g. failure to comply with the terms of a premises lease
- Failure to include penalties and interest on tax office debt.

Given the intention is for a streamlined, more cost effective system, will there be an ability for creditors to go to court to challenge the liquidators decision. A more appropriate and cost effective approach would be for n independent arbitrator to adjudicate on disputes, similar to the Inspector General in Bankruptcy, as occurs in personal insolvency.

Should you have any queries in relation to this submission, do not hesitate to contact us.

Yours faithfully



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REGISTERED LIQUIDATOR

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REGISTERED LIQUIDATOR