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The Manager
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Dear Sir/Madam

Insolvency reforms to support small business

Thank you for the opportunity to provide a response to the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 and associated Draft Explanatory Materials.

Jones Day supports the legislative reforms proposed. Many small businesses facing solvency issues simply do not have the resources to take advantage of the restructuring processes currently available to them, to the detriment of those businesses and the jobs they provide. The Bill addresses that issue by providing small businesses with alternatives that are simpler, quicker and cheaper than the existing processes, and are specifically tailored for their requirements.

We have a small number of key points and suggestions that we wish to raise with respect to the Bill. The intention of these key points and suggestions is to strengthen the current drafting of the Bill, and maximise the prospects of the new processes helping small businesses to survive.

1. Debts incurred after the appointment of the restructuring practitioner should have priority over unsecured debts incurred before the restructuring

It will be difficult for small businesses to retain staff and maintain relationships with key suppliers during the restructuring period unless those employees and suppliers have sufficient comfort that they will be paid. In a voluntary administration, creditors obtain that comfort from the voluntary administrators personal liability and lien over the assets of the business in question. For the reasons noted under point 4 below, we do not think that is appropriate for the new restructuring process. Instead, we suggest that the Bill be amended such that:

(a) debts incurred during the restructuring period must be paid in full prior to any payment of unsecured debts incurred before the restructuring; and

(b) debts incurred during the restructuring period have the same priority under section 556 as those incurred by a "relevant authority".

2. The period of the restructuring should be clearly defined

The duration of the restructuring is critical to a number of provisions in the Bill. We recommend that section 453A of the Bill be amended to clearly specify two stages in the restructuring process:

(a) (**restructuring period**) the period of time which runs from the appointment of the restructuring practitioner to the acceptance or rejection of the restructuring plan or, if earlier, termination by the restructuring practitioner under section 453J; and

(b) (**restructuring plan implementation**) if the restructuring plan is accepted, the period of time which runs from the time of the acceptance until the fulfilment of the terms of the restructuring plan.

We suggest that the majority of the protections for the company which are contemplated by the Bill, such as the moratorium on enforcement and safe harbour for insolvent trading, should only extend through the restructuring period.

3. The restructuring practitioner should oversee compliance with the restructuring plan

We think it is important, particularly for the protection of creditors, for the company's compliance with the restructuring plan to be monitored by a third party. We suggest that the restructuring practitioner would be best placed to fill that role. We also think it is important to set out the consequences of any non-compliance.

If that is accepted, the Bill or the regulations should provide clear guidance on:

(a) the extent of the duties of the restructuring practitioner in monitoring compliance with the plan;

(b) the consequences of non-compliance with the plan, including non-compliance by parties to the plan other than the company, or the plan not completing for any reason, including as a result of any non-compliance; and

(c) the powers of creditors to terminate the plan or seek to enforce a restructuring plan.

Given the new restructuring process is intended to be a low-cost process, if the regulations require the restructuring practitioner to oversee the implementation of the plan, we also suggest that any restructuring plan must be completed within a maximum specified period. We suggest that 3 months may be an appropriate maximum period. Given the role and likely remuneration basis for the restructuring practitioner, we expect that any requirement for oversight from the restructuring practitioner beyond a relatively short period may prove problematic,

4. The duties and liabilities of restructuring practitioners should be commensurate with the scope of their role, powers and remuneration

The Bill currently amends section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to include restructuring practitioners in the definition of *"officer"*. We suggest that this is not appropriate for a debtor-in-possession model like that proposed under the Bill given the control of the company and conduct of its business remains with the directors.

Being an officer exposes the restructuring practitioner to directors' duties under the Corporations Act and potentially significant liabilities under workplace/occupational health and safety (**WHS**) and environmental laws. These duties and liabilities will act as a disincentive to

practitioners in accepting appointments, and are not commensurate with their control of the business or their remuneration. To the extent that practitioners do accept appointments, they are likely to want to complete investigations and diligence similar to that which a voluntary administrator would complete in relation to those matters upon appointment, in order to satisfy themselves that appropriate measures are in place to manage these risks (e.g. by reviewing WHS and environmental policies and procedures). This would be inconsistent with the aim for the new restructuring process to provide a quick and cheap alternative to voluntary administration.

For similar reasons, we also suggest that:

(a) the restructuring practitioner does not have a general overarching duty to act in the interests of creditors, provided they act in good faith. While a restructuring practitioner has obligations under the Bill to only exercise certain powers in the interests of creditors, the limited scope of the restructuring practitioner's role does not warrant a residual liability to act in the interests of creditors similar to that imposed on a voluntary administrator; and

(b) the restructuring practitioner is not personally liable for any debts incurred during the restructuring period or restructuring plan implementation, at least to the extent that they did not specifically approve or consent to those debts being incurred in accordance with section 453L(2)(b).

5. Creditors should be explicitly notified of the restructuring

We suggest that a positive duty is imposed on the company to notify its creditors immediately upon appointing a restructuring practitioner, and to notify all potential future creditors of the appointment of the restructuring practitioner. The obligation should continue until the restructuring plan is accepted or approved.

While the restructuring practitioner must notify creditors of any relevant relationships under section 456F and the company must include *"restructuring practitioner appointed"* in any public documents under section 457B of the Bill, many small businesses operate in a way which means that those formal notifications may not be effective. For example, creditors may place orders with the business in person or via telephone, or correspond with the business via text message or email.

6. Third party property rights should remain frozen throughout the restructuring

The Bill does not appear to include an equivalent to section 443B(2) of the Corporations Act. Given the restructuring period will be considerably shorter than a voluntary administration, and is intended to be a simple process, we are supportive of the new restructuring process having no equivalent to section 443B(2) and the restrictions imposed by section 453Q remaining for the duration of the restructuring period. In order to give business the best prospects of surviving a restructure, to the extent that liabilities are incurred in relation to third party property during the restructuring period, those liabilities should have the same priority as liabilities incurred before the appointment of the restructuring practitioner.

7. The restructuring plan should lead to a better outcome for the company

Part 5.3A of the Corporations Act requires a voluntary administrator to investigate the company's affairs with a view to forming opinions about certain matters and reporting to creditors accordingly. This ensures that creditors are able to make an informed decision when voting on any deed of company arrangement that may be proposed.

While a similar requirement in a restructuring would not be consistent with the intention for the restructuring process to be quicker and cheaper than a voluntary administration, the restructuring plan should nonetheless lead to a better outcome than the alternatives, and creditors should be advised of that.

We therefore suggest that a similar test is adopted to that under section 588GA of the Corporations Act – i.e. that the restructuring plan is reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator, or liquidator, of the company. The directors should provide a declaration to creditors that any proposed restructuring plan satisfies that test, and the restructuring practitioner should confirm that in his or her view it is reasonably likely to satisfy that test.

8. The eligibility criteria for restructuring must be clear and easily determined

In order to encourage small businesses to utilise the new processes, the eligibility criteria must be as clear and easily calculable as possible. We therefore recommend that the regulations are fairly prescriptive in this regard.

In determining eligibility, it may also be appropriate for the liabilities of companies within a group to be aggregated. For example, it is not uncommon for businesses to employ staff through one corporate entity but trade through another corporate entity.

Please do not hesitate to contact us if you have any questions about the above key points or wish to discuss further. We welcome the opportunity to contribute to the development and implementation of the proposed reforms and look forward to continue working with you.

Yours sincerely

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