SHOPPING CENTRE
COUNCIL OF AUSTRALIA

12 October 2020

Manager
Market Conduct Division
Treasury
Langton Crescent
PARKES ACT 2600

Via email: MCDInsolvency@Treasury.gov.au

CORPORATIONS AMENDMENT (CORPORATE INSOLVENCY REFORMS) BILL 2020

Dear Sir or Madam

Thank you for the opportunity to provide a submission on the *Exposure Draft Corporations Amendment (Corporate Insolvency Reforms) Bill 2020*, however we flag that the incredibly short timeframe that Treasury has provided for consultation is inadequate given the volume of material that has been provided to review.

We have recommended amendments to certain sections of the Draft Bill for Treasury's consideration.

As is noted below, we request that (subject to the passage of the Bill) when draft Regulations are prepared that Treasury undertakes adequate consultation with our industry.

Our experience in recent times in respect of various Regulations released by States and Territory governments in relation to retail leases is that there has been grossly inadequate consultation and engagement. This has resulted in an increase in confusion and unwarranted complexity, a propensity for less commercially minded parties to take positions shrouded in legal pedantry, and gaps which are simply not being addressed.

We are pleased that the focus of the corporate insolvency reforms is to assist small business by providing a simplified and streamlined opportunity to attempt debt restructuring for business continuity.

Our members have been a key creditor group in some well-publicised insolvencies in Australia, including in 2020.

The effects of the outcomes of various insolvencies throughout 2020 has varied significantly.

Negative outcomes have included significant portfolios of shops being left vacant and leases continuing without a right for our members to receive rent, and a propensity by parties to take advantage of legal loopholes to the detriment of our members.

Positive outcomes have included a focus on commercial dealings designed to enhance strong future-looking relationships being enhanced by co-operation and constant engagement from both directors and insolvency practitioners during the administration process.

It is in the context of this background that we have reviewed the materials provided for consultation including the Bill and Explanatory Memorandum. In the timeframe provided - less than a week - we have been unable to give detailed consideration to the proposed amendments or consult deeply across our membership.

We note that much of the detail in the proposed regime will be deferred to future Regulations.

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We are pleased to provide the following comments.

Please note that our position and comments are on the basis that the liabilities of a company are less than $1 million, and the importance of maintaining a limit to avoid the restructure process being used by companies in a way that is not the intent of the reforms.

1. *Support for the restructuring regime and simplified liquidation generally* - we consider that both the Explanatory Materials and the Exposure Draft amendments achieve the desired outcome of creating a streamlined and less expensive process focussing on small business.

   We also consider that utilising the framework of the existing Part 5.3A process is a positive initiative which allows the business community to transition to this new regime from a position of familiarity, with the benefit of having a considerable body of jurisprudence to support a number of the key concepts.

2. *Section 453L(3)(b)* – **we recommend that this section is amended.** As we know, ADI's commonly reserve the right to unilaterally shift funds from accounts in creditor to accounts in debit, regardless of whether or not an account is backed by a particular security. It is our understanding that an ADI would commonly consider such practice part of the "ordinary course of the ADI's banking business".

   We query whether allowing such practices to occur during a restructuring is within the spirit of the proposed regime of promoting survival of small business and whether is it "in the interest of the creditors" generally. The availability of cash to both the company under restructuring and the restructuring practitioner should be of paramount importance. Preventing account "sweeping" may go further to achieving the stated outcomes of the reforms. Cash is also important for the payment of ongoing employee entitlements.

Furthermore, in a proposed liquidation regime which sees a reduced focus on investigation and reporting, it is less likely that payment might be recovered as preferences.

3. *Section 454M(1)(b)* – we are concerned about the inclusion of the words "**...or the company later begins to be under restructuring**". The inclusion of s453Q reflects s.440B of Part 5.3A. However, this additional phrasing gives cause for concern and generally concern for those holding property rights. These words bluntly interfere with fundamental contractual and common law rights enjoyed by counterparties to transactions involving real property and real estate in Australia. It is difficult to conceive, in circumstances where party has properly exercised property rights outside of an insolvency regime, why those rights should be subsequently disturbed. We also consider that this wording promotes a lack of vigilance on the part of Directors who ought to be acting to protect the assets of the company by entering into restructuring, rather than leaving it to a "hindsight" approach.

Should it be determined that this element of the section is to be retained in the section, we would suggest an amendment to restrict the timeframe – at present the reference to "later" is open-ended.

4. *Section 454P(c)(ii) and 454P(2)(c)* - we request a clarification of the term "**the company's financial position**" to clarify that that does not mean that a landlord is prevented from terminating a lease for non-payment of rent once a resolution for winding up has been made. It is fundamental to both mitigation of loss and the continued operation of our client's shopping centres that where a company is to be wound up, landlords can move forward to deal with premises. This is not only in the interests of landlords, but also other creditors. This is particularly so because a landlord often a major creditor, can act to attempt to mitigate its loss and reduce any proof of debt. Our members are also concerned to avoid a scenario where premises are used by liquidators to undertake a "fire sale" but pay no rent.

5. *The "Lam Soon" problem* - under Part 5.3A and, it appears under the proposed restructuring regime, a landlord may lose its right to future rents where contingent claims are released. The case of *Lam Soon Australia Pty Ltd v Molit (No.55) Pty Ltd 1996)* 70 FCR 34 creates a risk for landlords where a lease continues after administration, that is, where the company trades on under a DoCA. More specifically, the right of a landlord to claim future rent – a contingent claim as at the date of appointment of an administrator – can, on common DoCA drafting and without vigilance, be a claim extinguished by the DoCA. This risks a scenario that a tenant trading on can effectively trade on under the lease without paying rent in circumstances where the landlord could have done little (i.e. didn't have the voting power) to prevent such an outcome.

We recommend a section is inserted in the Bill which preserves a landlords right to receive future rent (and outgoings) where the company trades on under the lease, unless the landlord has specifically consented otherwise. Not only does this create fairness for all parties in a post restructuring environment, but it will reduce the debt burden in a restructuring (i.e. only arrears under a lease come into play rather than full contingent debt) and prevent subsequent disputes and minimise applications to set aside restructuring plans. (As an aside, we would also seek this amendment in Part 5.3A).

We'd welcome an opportunity to discuss the issues raised in this submission, and I will contact Treasury to arrange a time.

We would also welcome the opportunity to provide feedback on the eligibility criteria generally including any treatment of other creditor classes such as the ATO and financial institutions.

Finally, we again request that, on release of proposed Regulations, that we be given adequate time to consider and provide a submission on that draft.

Please don't hesitate to contact me if required.

Yours sincerely,

Angus Nardi
Executive Director