



8 October 2020

Our ref: 1000_insolvency reforms treasury submission

Manager
Market Conduct Division
Treasury
PARKES ACT 2600

Via email: MCDInsolvency@Treasury.gov.au

Submission regarding Exposure Draft Bill Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

Dear Sir/Madam

On behalf of SM Solvency Accountants, an insolvency practice providing corporate and personal insolvency administration services nationally, I submit the following feedback in regard to the Exposure Draft Bill Corporations Amendment (Corporate Insolvency Reforms) Bill 2020.

The feedback relates to the following three issues:

- Lack of detail in the material made available;
- Support for eligibility criteria; and
- Concerns about the intended time savings of the simplified liquidation process.

Lack of detail

The Exposure Draft Bill ("EDB") and Exposure Draft Explanatory Materials ("EDEM") refer to the possibility of various conditions, yet unfortunately do not commit to whether any such conditions will be included in the legislation. The following are examples of significant lacking detail:

- Section 500AA(2)(a) of the EDB states that the regulations may prescribe tests for eligibility for the simplified liquidation process based on a company's liabilities. However, the regulations have not been released for public review, hence there is uncertainty as to whether or not the eligibility criteria will actually include a liabilities threshold and how much the threshold would be.

- Section 500AE(3)(b) of the EDB states that the regulations may provide for circumstances in which a transaction is not voidable despite Section 588FE of the *Corporations Act 2001 (Cth)* (“the Act”). However, the regulations have not been provided, hence there is uncertainty as to whether or not the simplified liquidation process will enable a liquidator to recover funds on behalf of creditors by having declared void antecedent transactions (such as unfair preferential payments or unreasonable director-related transactions).
- Part 1.120 of the EDEM refers to eligibility criteria for presenting a restructuring plan and states that the regulations could require the company to firstly pay any employee entitlements which are due and payable. As noted above, regulations have not been provided and hence the actual position of this aspect of the draft legislation is unknown.

The lack of detail in the EDB and EDEM on important issues, such as those mentioned above, presents difficulties for me in providing comprehensive feedback.

Eligibility criteria

Based on an assumption that eligibility criteria to present a restructuring plan and to use the simplified liquidation process will include the criteria which is presently referenced only as possibilities in the EDB and EDEM, I support the eligibility criteria.

In order for a company to avail itself of proposed insolvency regimes which effectively serve to ‘short hand’ existing corporate insolvency administration processes, it is important that there be protections in place via eligibility criteria to reduce the prospect of disadvantage to creditors.

Concerns about intended time savings of simplified liquidation

The EDEM states that the intention of the proposed simplified liquidation process is to provide a faster and lower cost liquidation to increase returns for creditors. The existing creditor voluntary liquidation (“CVL”) framework offers effectively many of the proposed time saving measures contained in the proposed simplified liquidation process, including:

- A creditor meeting need not be held in a CVL, and it is (in my experience) highly unlikely for a liquidator to be compelled to hold a creditor meeting during a CVL.
- The simplified liquidation process outlined is unclear as to whether, or when, a liquidator is required to provide information to the Australian Securities and Investments Commission (“ASIC”) about matters such as alleged company officer misconduct. Typically, the primary report submitted by a liquidator to ASIC in a CVL is pursuant to Section 533(1) of the Act.



Typically (in my experience), the time required to prepare and lodge such a report in a CVL is up to sixty minutes.

Given the important information contained in a Section 533(1) report from the perspective of each winding-up, but also more generally in respect to the data provided to ASIC to assist it determine how best to allocate its resources to promote good corporate governance, the likely potential time saving appears immaterial and not in the public interest.

From a practical perspective, the types of investigations which a liquidator typically undertakes (in my experience) that form the basis of the content of a Section 533(1) report are likely to be undertaken irrespective of whether a traditional CVL or simplified liquidation is used. That is, the liquidator will irrespectively undertake tasks such as reviewing a company's financial records and making enquiries with the company's officers about the company's affairs and past activities.

- The simplified liquidation process avoids the possibility of there being a creditors Committee of Inspection. Typically (in my experience), it is highly unlikely for creditors to resolve to form a Committee of Inspection. Secondly, in those instances in which a Committee of Inspection is formed, they are more likely to involve liquidations with a high number of creditors, in which case the Committee of Inspection serves to reduce the time and cost of a liquidator in liaising with creditors. Accordingly, the removal of Committee of Inspections in the proposed simplified liquidation process appears to be potentially counter-productive.
- No empirical evidence is contained in the EDEM that justifies the latter part of the statement contained in part 3.72 that "...in the liquidation of a small company with limited assets, these [unfair preferences and voidable transactions] proceedings can take up time, money and resources, and have the potential to outweigh any benefit that might flow through to creditors".

Typically (in my experience), recoveries from unfair preferences and other voidable transactions facilitate the availability of surplus funds from which to declare dividends. It is typically a characteristic of a CVL involving a dividend declaration that there was at least one voidable transaction recovery.

Setting aside other objectives and principles (such as the public interest and fairness), on balance, I do not think that removal of voidable transaction provisions for the simplified liquidation process will be worthwhile from a commercial perspective.

Thank-you for the opportunity to provide feedback on the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020



Solvency Accountants

Should you wish to discuss this submission, please contact myself on 07 3308 4910
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Yours faithfully

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