VANTAGE
PERFORMANCE
STRONGER, MORE RESILIENT BUSINESSES

memo

Date: 9 October 2020

To: Manager, Market Conduct Division, Treasury
MCDInsolvency@Treasury.gov.au

From: Vantage Performance

Re: **Insolvency Reform to Support Small Business**
Proposed new Part 5.3B Corporations Act 2001 – Restructuring of a company

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Dear Manager, Market Conduct Division Treasury

We write regarding the proposed new law to be introduced under the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 published as follows:

Exposure Draft Bill 1.08 MB
Exposure Draft Explanatory Materials 896.36 KB

1. Executive summary

In order to maximise the prospect of companies being turned around and saving jobs, and to maximise the value to creditors in the event of any 'restructuring', Vantage Performance submits that the following changes are critical:

- The use of the term "Restructuring" and "Restructuring Plan" to be deleted through out and replaced with an alternative term not currently associated with the work that the turnaround industry undertakes outside of formal insolvency processes. For example "Corporate Insolvency Process", "Corporate Insolvency Practitioner" and "Corporate Insolvency Agreement" (utilising terms similar to the alternative bankruptcy process, Person Insolvency Agreement), or see section 3 for further examples.
- If Treasury does not agree with the above, then section 588GA(2)(e) of the Corporations Act to be amended – "restructuring" to be deleted and replaced with "reorganising" or similar.
- The insolvency deeming provision should be deleted. Alternatively, as drafted it appears to operate retrospectively. In any event, we submit that it should expressly exclude any deemed insolvency prior to the section 513CA date (the commencement of the new Part 5.3B process). For example, s455A to read "(2) The company is taken to be insolvent if the company does so, from the date prescribed by subsection (3) but not before ***the section 513CA day***."

Further detail is provided below.

2. Vantage Performance

Vantage Performance provides business improvement solutions to SMEs and large companies in the areas of cash flow improvement, revenue improvement, cost management, productivity improvement, and business process improvement. We work with businesses who are facing critical challenges with the overarching goal of building stronger more resilient businesses.
See our website at: https://www.vantageperformance.com.au/

Our Executive Director profiles are at: https://www.vantageperformance.com.au/our-people/

We do not act as registered liquidators.

Our business focuses on turning companies around and saving jobs. If we identify that we are unable to assist companies to turn around, without utilising a formal insolvency process such as voluntary administration (VA) and deed of company arrangement (DOCA), then we will work closely with companies to assist them to develop a plan. That plan will then be delivered to a person who is qualified to consent to the role of VA, to review and implement. Our business does not involve consenting to act as VA. Our business model is to be distinguished from the lion's share of our competitors in this regard.

3. Usage of the term "Restructuring" and "Restructuring Plan"

3.1 The term 'restructuring' is an ordinary common use term, that is currently associated with an industry focused on saving businesses and jobs.

If the term is used as proposed, it will no longer be identified in connection with saving jobs, but in connection with insolvency. This adverse impact will be problematic across the industry, not just in connection with small businesses.

It is our experience, that company directors are reluctant to engage third parties early to assist them with their business critical challenges. They tend not to admit the problem early. Early engagement however gives the company the best prospect of successfully being turned around. As such, a large part of our work involves communicating to companies the benefits of early engagement and early 'restructuring efforts' outside of, and to avoid, formal insolvency processes.

Use of the term 'restructuring' in connection with an insolvency process, will work against our efforts, and instead entrench the views of the corporate community that 'restructuring' is bad. It will become an admission of insolvency, so making the work of those seeking to engage with the community early to save jobs, that much harder. Indeed, we will no longer be able to use the term 'restructuring'.

We would urge Treasury to allow 'restructuring' to remain a positive early intervention tool available to directors, and instead utilise different language for the new insolvency process. For example, "Corporate Insolvency Process", "Corporate Insolvency Practitioner" and "Corporate Insolvency Agreement" (utilising terms similar to the alternative bankruptcy process, Person Insolvency Agreement). Alternatively, it is a debtor in possession model, and so DIP language might be appropriate, eg DIP Process, DIP Plan and DIP Practitioner. The point is, a new term ought to be engineered, so as not to interfere with common use industry language used in the context of avoiding insolvency and saving businesses and jobs.

3.2 If Treasury does not agree, then we submit that the term 'restructuring' in section 588GA(2)(e) be changed, to avoid confusion and unhelpful legal arguments in practice.

Where section 588GA(2)(e) currently reads "is developing or implementing a plan for restructuring the company to improve its financial position", restructuring will need to read "reorganising" or similar. This is critical, when considered in the context of section 4.

4. Insolvency Deeming provision, section 455A(2)

4.1 It is unclear to us why section 455A(2) is necessary, deeming the company to be insolvent if it proposes a restructuring plan to its creditors. We submit that it be deleted.

We are concerned that the deemed insolvency provision will deter businesses from using the regime – there is a risk that directors will prefer to rely on the existing safe harbour under s588GA and proceed with a VA and DOCA.

If Treasury determines that it must remain, we submit that it would be helpful, and the EM should be amended, to provide context.

4.2 As currently draft, insolvency is deemed when a 'restructuring plan' is proposed (section 455A(2)). However, 'restructuring plan' means a plan executed under Part 5.3B or such a plan as varied and in force from time to time (consequential amendment to section 9). That is, the deemed date of insolvency does not arise unless a restructuring plan is later executed.

It is unclear, whether the deeming provision is only intended to take effect, retrospectively, if a restructuring plan is later executed, or whether something else is intended. If the later, the drafting needs to be altered. Questions arise: what if the plan is not executed? What if different plans are proposed on different dates? What if the process is terminated prior to any executed plan under section 453J?

It is possible that the answer lies in the regulations, namely it is intended to define a 'restructuring plan proposal' and set out the timeframe for the delivery of such document. Whilst that will clarify the meaning of section 455A, we submit given the seriousness of the consequence of the section, the plain effect of the section should stand alone irrespective of the regulations – such definitions ought to be in the Act.

4.3 As drafted and with currently available draft legislation (in the absence of regulations) it is unclear whether the deemed date of insolvency could arise prior to the commencement of the restructuring.

We submit that that should <u>not</u> be the case and that the legislation should be amended to make that plain. That is, we submit that section 455A(2) be amended to read:

> "(2) The company is taken to be insolvent if the company does so, from the date prescribed by subsection (3) but not before the section 513CA day."

This assumes that the regulations will in fact address the question. If not, then the amendment might provide:

> "(2) The company is taken to be insolvent if the company does so, from the date on which the company proposes the restructuring plan to its creditors, unless a date is prescribed by subsection (3) then on that date, but in either case not before the section 513CA day."

As mentioned above, if the answer lies in the regulations, we submit that it should be plain on the face of the Act.

From a practical perspective, we are mindful that a company might put a plan to different classes of creditors on different dates including ahead of any formal appointment. For example, a plan is proposed to key stakeholders first ahead of any 'restructuring' as part of pre-planning, and it is subsequently announced internally to staff, and then to all other creditors. If it is not the restructuring practitioner providing a report on a set date to all creditors (as occurs for a DOCA), but the company proposing the plan, the regulations will need to provide a clear process that acknowledges practice, to ensure the relevant date can be identified with clarity and that that date is not a date before the section 513CA day.

The issue also further exemplifies the need to steer clear of the term 'restructuring' (section 3) which is a commonly used term for pre-planning steps.

Why is this change important?

As mentioned above, although not our core work, we do sometimes utilise the external administration framework strategically, to maximise the prospect of saving businesses and jobs, whilst also taking into account the best interests of creditors and the return likely to be achieved by a plan. A common example is as follows:

- We provide expert safe harbour assistance to a company and develop a restructuring plan, which the company is implementing, however, we identify during the process that the better outcome is to be achieved in part via a DOCA. The DOCA is well planned and thought out, including to canvass the views of creditors prior to the appointment of an independent VA. This ensures the best prospects of success of that aspect of the plan, to the benefit of creditors and the company as a whole. The business survives and thrives post-DOCA.

It is critical to companies seeking to restructure with the consent of its stakeholders (outside of formal insolvency vehicles), that deemed insolvency provisions be avoided. First, the company might not be insolvent and second, the deeming will operate against the efforts to deliver the better outcome.

As drafted, if a 'restructuring plan' is first proposed to creditors prior to the 'restructuring', we are concerned that the deemed insolvency provision will take effect. In the above example, this could result in the frustration of the process. Specifically, creditors – wishing to avoid the stay provisions of the inevitable 'restructuring' – now relying on the breach trigger of 'insolvency' (something that is usually contested and difficult) - are equipped to enforce early rather than support the company's restructuring efforts.

In our experience, pre-planned insolvency processes deliver a better outcome compared to those that are not planned. Companies must retain the ability to develop restructuring plans outside of insolvency processes, with a view to approaching creditors to discuss them and if possible, implement them by consent, or garner feedback to enhance the plan, to produce the best possible outcome. Companies need to be able to engage early to seek advice on a possible plan, to consider its viability to creditors, ahead of making the decision to appoint.

Companies lose this ability, and will not be able to do this, if those pre-planning steps in practical terms, risk being construed by a court as 'proposing a restructuring plan to its creditors', which then triggers deemed insolvency.

In our submission, all pre-insolvency process steps must expressly (plainly) fall outside of any deemed insolvency provisions. This does not preclude a person evidencing insolvency at some earlier point in time, by reference to facts.

We are happy to discuss any aspect of this submission with you.

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