

7 May 2021

Manager
Market Conduct Division
Treasury
Langton Crescent
PARKES ACT 2600

Via email: MCDInsolvency@Treasury.gov.au

CONSEQUENTIAL AMENDMENTS TO SMALL BUSINESS INSOLVENCY REFORMS

Dear Sir or Madam,

Thank you for the opportunity to provide a submission in response to the Australian Government's *Consequential amendments to small business insolvency reforms*. As you are aware, the Shopping Centre Council of Australia (SCCA) represents Australia's major shopping centre companies and has an inherent interest in these reforms.

The SCCA previously engaged with The Treasury in response to consultation on the exposure draft subordinate legislation and explanatory material. Our previous submission detailed specific recommendations as well as concerns relating to potential unintended consequences of the Draft Regulations.

On review, the SCCA is now broadly comfortable with the proposed package of reforms, however we suggest one change relating to the following provisions of the existing regulations:

- **5.3B.40 Restructuring practitioner acts as company's agent** When performing a function or duty, or exercising a power, as restructuring practitioner for a company's restructuring plan, the restructuring practitioner is taken to be acting as the company's agent.
- **5.3B.41 Restructuring practitioner has qualified privilege** A person who is or has been the restructuring practitioner for a company's restructuring plan has qualified privilege in respect of a statement that the person has made, whether orally or in writing, in the course of performing or exercising any of the person's functions and powers relating to the plan.

The Draft Regulations and Draft Bill repeal **5.3B.40** and **5.3B.41**, respectively, and insert them separately in the proposed Act and Regulations as follows:

- The Draft Regulations include **5.3B.40** as an insertion **(aa)** following **5.3B.15(3)(a)**.
- **5.3B.41** becomes **456LA Restructuring practitioner has qualified privilege** in the Draft Bill.

As **5.3B.42 Protection from liability** remains in the Act the SCCA is comfortable with these changes in principle, however we are unclear as to why they have been separated and would instead recommend that they both be placed within the Act. We further recommend the elements of 5.3B.42 be expressly drafted into 456LA to make it clear that the qualified privilege is subject to the requirements of statements being made in good faith and without negligence. We propose the following drafting:

"A person who is or has been the restructuring practitioner for a company's restructuring plan has qualified privilege in respect of a statement that the person has made, whether orally or in writing, **in good faith and without negligence** in the course of performing or exercising any of the person's functions and powers relating to the plan."

Additional reform comments

The SCCA notes the Treasurer's Media Release dated 3 May 2021, outlining 'Further insolvency reforms to support business dynamism', which highlights that the Australian Government will conduct further reviews into insolvency reforms, including:

"...whether the insolvent trading safe-harbour provisions, which were introduced in 2017 and designed to promote a culture of entrepreneurship and innovation by providing breathing space for distressed businesses, remain fit for purpose."

As highlighted in our previous submission, the SCCA has fundamental concerns relating to the issue of the potential extinguishment of contingent claims for future rent arising from the *Lam Soon Australia Pty Ltd v Molit (No. 55) Pty Ltd [1996] 70 FCR 34* decision, which is now being relied upon by insolvency practitioners as a precedent to inform this issue.

Specifically, we consider it appropriate that The Treasury consider further amendments to the Act and the Regulations to ensure that future rent and other future occupancy costs under an existing lease are not capable of being bound by a Deed of Company Arrangement or a Restructuring Plan, so that a lessee is not, without express landlord consent, released from the obligation to pay future rent where there is subsequent trading under the existing lease post the administration or restructuring period.

We look forward to engaging with The Treasury as it consults on further insolvency reforms. Please do not hesitate to contact me on 0408 079 184 or at anardi@scca.org.au as required.

Yours sincerely,

Angus Nardi
Executive Director