10 September 2021

Manager
Market Conduct Division
The Treasury
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Email: MCDInsolvency@treasury.gov.au

Dear Sir/Madam

Submission to Treasury – Improving schemes of arrangement to better support businesses.

Introduction

The Australian Credit Forum (**ACF**) welcomes the opportunity to make a submission to Treasury in respect of the potential reforms to improve schemes of arrangement to better support businesses.

The ACF was established in the early 1970's by a group of senior credit professionals. The group recognised the need to develop an association where members could meet on a regular basis to exchange thoughts and ideas to strengthen their own knowledge but also the standards of the industry.

The association meets on a regular basis to discuss and review existing and proposed changes to the Federal and State Governments legislation that might have an impact on their company's credit policies and practices in their day-to-day role as credit professionals.

The members of ACF are drawn from all areas of the credit profession across a range of industry groups including but not limited to senior credit managers, members of the legal profession, insolvency practitioners, credit insurance underwriters and brokers, mercantile agents and credit reporting agencies. The depth and diversity in experience of the members ensures that a broad cross section of the credit industry considers the impact of all relevant legislation.

Overview

The ACF, in collaboration with its members, will give professional insight for the proposed reforms in respect of the improvement of arrangement schemes.

This submission addresses the eleven (11) questions presented in the consultation paper, *Helping Companies Restructure by Improving Schemes of Arrangement – 1 August 2021*. Key issues pertaining to the effect's changes may have on creditors are detailed in response to Treasury questions below.

The ACF notes that there already an exists a power under section 411(16) of the *Corporations Act 2001* (Cth) for the court to stay actions by creditors, yet this power is rarely utilised. The proposed amendments seem to mirror the moratorium regime introduced in Singapore in 2017 under the *Companies Amendment Act 2017* (Singapore).

The ACF is conscious that the reforms in Singapore have created somewhat of a 'light touch' debtor in possession regime and has subsequently created a much more 'debtor friendly' environment. Consequently, a priority for the ACF is ensuring the appropriate level of creditor protection and transparency. In view of the overly debtor friendly landscape that would be created by the proposed amendments and the fact that the courts already have the power to stay actions by creditors, the ACF generally objects to proposed changes. Moreover, the automation component of the moratorium could likely lead to creditor's rights being abused without court consideration. Therefore, whilst the ACF does not consider the proposed changes necessary, if a moratorium was imposed it should only be possible through a court order as opposed to being automatic to protect creditor's rights.

Response to consultation paper

1. **Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? Further, should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?**

The ACF recommends that no automatic moratorium should apply with respect to a creditor's scheme of arrangement. Although the ACF understands a creditor's scheme of arrangement is used to help financially distressed but solvent companies restructure their balance sheets, an automatic moratorium will prevent secured creditor's enforcing security interests and creditor's commencing enforcement proceedings against the company during this period. Consequently, this would substantially delay a creditor's recovery of a debt. However, the ACF would recommend that if an automatic moratorium was to apply, the court should be granted the power to modify and vary the automatic stay. Furthermore, it should instead apply from the date of the first court hearing to minimise the period in which creditors would be unable to recover debts owed.

2. **Would the moratorium applied during voluntary administration be a suitable model on which to base an automatic moratorium applied during a scheme of arrangement? Further, are there adjustments to this regime required to account for the scheme of arrangement? Should the Courts be granted the power to modify and vary the automatic stay?**

Although the ACF generally opposes the implementation of an automatic moratorium, if a moratorium was to apply to creditor's schemes of arrangement, the voluntary administration model would be a suitable and logical model to build from. The primary recommended difference is that the moratorium with respect to a creditor's scheme of arrangement should not be automatic as is the case with the voluntary administration moratorium. Furthermore, the ACF does recommend that the courts should be granted the power to modify and vary the automatic stay.

3. **When should the automatic moratorium commence and terminate? Are complementary measures (for example, further requirements to notify creditors) necessary to support its commencement?**

The ACF recommends that if imposed, the automatic moratorium should commence from the date of the first court hearing as opposed to commencing once the company has prepared an explanatory statement. However, all creditors should be notified of the potential scheme of arrangement as soon as the company has prepared the explanatory statement to allow maximum time to recover debt before the moratorium is imposed.

4. **How long should the automatic moratorium last? Should its continued application be reviewed by the Court at each hearing?**

The ACF recommends that if an automatic moratorium is imposed it should last no more than 30 days as is the case with *Companies Amendment Act 2017* (Singapore). Furthermore, it should continue to be reviewed by the court at each hearing whereby the court would have the power to lift the moratorium in circumstances where unjust outcomes for creditors could be created. A longer moratorium could unnecessarily further delay a creditors recovery of debts.

5. Are additional protections against liability for insolvent trading required to support any automatic moratorium?

The ACF does not observe the need for additional protections against liability for insolvent trading required to support an automatic moratorium.

6. What, if any, additional safeguards should be introduced to protect creditors who extend credit to the Company during the automatic moratorium period?

The ACF recommends that an additional safeguard that could be introduced to protect creditors is the requirement of a debtor to provide evidence of creditor support in favour of the moratorium as opposed to it automatically being imposed. This is a similar safeguard that exists within section 211B(4)(a) of *the Singapore Companies Act*. Furthermore, the moratorium should be created by court order as opposed to being automated so the court could consider the possible unjust outcomes that may potentially stem from the moratorium.

7. Should the insolvency practitioners assisting the Company with the scheme of arrangement be permitted to act as the Voluntary Administrators of the Company on scheme failure?

The ACF does not oppose permitting insolvency practitioners to act as voluntary administrators should the creditor's scheme of arrangement fail.

8. Is the current threshold for creditor approval of a scheme appropriate? If not, what would be an appropriate threshold?

The ACF identifies no issue with the currently required voting threshold of 75% of the total amount of debts and claims of the creditors present and voting in the relevant class. A lower threshold would likely have the potential to create unjust outcomes for creditors.

9. Should rescue, or 'debtor-in-possession', finance be considered to improve creditors' schemes?

The ACF recommends that rescue or 'debtor-in-possession' finance should not be considered. Although the ACF understands it may, on occasion, have the ability to rescue distressed companies, it can also jeopardise the position of existing creditors. Consequently, unjust outcomes for creditors could likely flow from introducing these financing options.

10. What other issues should be considered to improve creditor's schemes?

The ACF does not have any further comments on this matter.

11. Are there any other potential impacts that should be considered, for example on particular parties or programs? If so, are additional safeguards required in response to those impacts?

By nature of the ACF's position, we encourage the Treasury to seriously consider the particular impacts these proposed changes may have on Australian creditors. The ACF understands the

reforms could further support Australian businesses, which would in turn make Australia a more attractive place to do business. However, the ACF suggests that a regime that is overly debtor friendly will instead have adverse effects on the attractiveness of Australia's business landscape due to the integral role that creditors play in a strong business economy. Consequently, there should be additional safeguards to protect creditors such as the requirement of a court order to commence the moratorium as opposed to it being automatic. Further the debtor should have to exhibit to the court that the commencement of the moratorium has creditor support, similar to a debtor needing creditor support to enact a creditor's scheme of arrangement in the first place.

Observations

The ACF observes that the purpose of the proposed changes is to help financially distressed but solvent companies restructure their balance sheets to avoid voluntary administration and liquidation. However, the proposed changes, by creating a more 'debtor friendly' landscape in Australia, are likely to create unjust outcomes for creditors. This is primarily due to the automated nature of the proposed moratorium. Furthermore, the ACF acknowledges that the court already has the power to stay actions by creditors under s 411(16) of the *Corporations Act 2001* (Cth). Consequently, the ACF observes that there is currently no need for the proposed changes, in particular an automatic moratorium in a creditor's scheme of arrangement.

In the ACF's view the schemes are already infrequently used, and therefore it is unlikely that the amendments will significantly change the position.

Anna Taylor
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Australian Credit Forum