



Insurance Council  
of Australia

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Manager  
Market Conduct Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**Submitted via email: [MCDinsolvency@treasury.gov.au](mailto:MCDinsolvency@treasury.gov.au)**

To whom it may concern

### **HELPING COMPANIES RESTRUCTURE BY IMPROVING SCHEMES OF ARRANGEMENT**

The Insurance Council of Australia (ICA) welcomes the opportunity to provide a submission to the Treasury's consultation paper [Helping Companies Restructure by Improving Schemes of Arrangement](#) (the consultation paper).

The ICA is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of \$53.9 billion per annum and on average pays out \$166.2 million in claims each working day (\$41.5 billion per year).

The ICA recognises that in the current pandemic environment many companies are facing challenging business conditions and, in some cases, financial distress and an increased risk of insolvency. We welcome the Government's commitment as outlined in the consultation paper to facilitate the successful restructuring of companies so that they can survive and continue trading. This can benefit employees, creditors and suppliers and will contribute towards Australia's economic recovery over the longer term.

The ICA notes the Government's recent insolvency reforms<sup>1</sup> designed to support eligible small businesses by providing greater flexibility and reducing the costs of external administration. We consider that reforms to the operation of creditors' schemes of arrangement (schemes) will further improve accessibility to the insolvency framework for small businesses experiencing distress, while also helping larger companies.

Schemes facilitate the ability for companies to restructure their affairs and avoid the stigma of an external administration (such as voluntary administration or liquidation). Similar to the formal debt restructuring processes introduced by the Government's recent insolvency reforms, Schemes also allow a company's board and management to remain in control of its businesses while developing a plan to restructure their debt.

As the consultation paper highlights, historical data indicates that Schemes are not often used as a way of addressing financial restructuring compared to other insolvency options. By reducing complexity and cost and creating more flexible and streamlined tools, more businesses, small and large, will be able to more easily use and access the insolvency framework where needed.

ICA members include trade credit insurance providers. Trade credit insurers specialise in assessing the risk that purchasers will not pay their debts – this supports credit risk management by providing an early warning system for bad payers or poor trading risks, supporting business growth. With this particular

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<sup>1</sup> Corporations Amendment (Corporate Insolvency Reforms) Act 2020.

expertise in credit risk management, we suggest below some changes to improve the accessibility of Schemes, drawing upon overseas models.<sup>2</sup>

## Automatic moratorium

The ICA supports the provision of an automatic creditor moratorium as highlighted in the consultation paper. We consider this reform to the current regime for Schemes would provide the company with appropriate time to focus on restructuring its liabilities without the pressure of simultaneously dealing with proceedings against it. We suggest the framework should provide for the following elements.

- An automatic moratorium commencing from the date the company files an application to the court for a moratorium to propose a Scheme to creditors. The moratorium should be for 30 days (or 20 business days) or up until the application for a Scheme is heard by the Court if this is earlier. This timeframe would provide some respite for management to focus on, and formulate, a Scheme proposal.
- The moratorium should include an automatic stay of proceedings relating to any enforcement action against the company by creditors / lessors that may disrupt the restructuring process.
- The moratorium should only apply to debts incurred prior to the date of filing. Any debts incurred during the moratorium period should be paid under normal terms of trade.
- The court have the power to modify or extend the automatic moratorium upon application by the company. Creditors should be given the opportunity to object to such an application if they believe there is no reasonable prospect of restructuring, or if it may compromise their enforcement rights.
- In granting any modification or extension, the court should also be empowered to order that the company is restrained from disposing of any assets other than in the ordinary course of business. This would provide a mechanism to ensure creditors interests are protected.
- The company should also be required to submit financial information to enable its creditors to assess the Scheme proposal.

## Simplifying the Scheme process

To simplify the current process, particularly for small businesses, the ICA suggests consideration could be given to providing for the appointment of an independent Scheme Manager (by the company or the Court) for non-complex restructuring cases.

Currently, the Scheme process is a court-supervised process and the Australian Securities and Investments Commission (ASIC) is involved in several aspects in order to oversee the protection of the interests of any creditors affected by the Scheme<sup>3</sup>. The appointment of a Scheme Manager (who should be a registered liquidator) would enable ASIC's resources to be devoted to more complex proposals and could also minimise direct court involvement.

The Scheme Manager would be responsible for overseeing the process and the company's compliance with its obligations to effectuate the Scheme proposal and would also support the company in a range of administrative matters (for example, preparation of documents and chairing Scheme meetings). The Scheme Manager would also be required to report to the court on any matters of concern involving the

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<sup>2</sup> The International Monetary Fund (IMF) Working Paper *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-C19 Recovery*, 29 January 2021 (IMF working paper), notes several elements of debt resolution frameworks.

<sup>3</sup> For instance, ASIC has a role in the review and registration of scheme documents and reporting to the Court on any complex issues or possible areas of objection if the Scheme is unfair or unjust. Refer ASIC Regulatory Guide 60 *Schemes of arrangement* (September 2020).

Scheme and/or its participants. The Scheme Manager would not be involved in the day-to-day management of the company.

This process is not intended to change current requirements for creditors to vote on the Scheme proposal and for court approval of the Scheme.

An alternative to the appointment of a Scheme Manager could possibly be the appointment of an oversight Creditors Committee that includes representation from each major class of creditor. This may also assist to minimise the burden on the court system and ASIC.

## Additional suggested areas for improvement

The ICA suggests consideration could also be given to the following additional areas to further enhance the accessibility and operation of Schemes.

- **Protection against insolvent trading for directors:** appropriate safe-harbour provisions should be in place, similar to the Government's recent small business reforms for debt restructuring, to ensure that certain director actions undertaken while the company is under restructuring are not in breach of insolvent trading laws.
- **Cross-class cram down:** this mechanism would allow a company to 'cram down' or prevent a minority class of dissenting creditors from blocking a Scheme, essentially removing the 'veto' right for certain classes of creditors. However, appropriate safeguards should also be in place to ensure a Scheme does not discriminate unfairly between different classes of creditors and that dissenting creditors are not worse off under the Scheme compared to a liquidation scenario. For instance, court approval would be predicated on conditions being met (such as agreement by a majority of creditors and a fairness test) and a requirement that the claims of shareholders do not rank ahead of those of the dissenting creditors.
- **"Pre-packed" Schemes:** this mechanism would allow the court to approve a creditor scheme of arrangement without the need for a meeting of creditors. This more streamlined mechanism is expected to reduce the number of formal processes and the burden on the courts, also potentially saving time and costs. Again, safeguards should be in place including appropriate disclosure and the court being satisfied that the Scheme would have been approved had a creditors meeting and vote been held.
- **Super priority for rescue financing:** this enables a Court to order "super priority" for debts incurred by a company in respect of financing acquired to enable the company to restructure, meaning such rescue financing can be repaid ahead of existing secured, unsecured and preferential creditors. This priority would more readily facilitate and encourage financiers, lenders and suppliers to provide rescue financing necessary for the company to continue trading and remain as a going concern. Consideration could also be given to providing certain tax concessions to providers of rescue financing as an additional incentive.
- **Deferred payment of statutory obligations:** deferring such payments for the duration of the restructuring period could assist a company with its cash flow management. Deferral could also include, for instance, commitment to a repayment plan linked to the company's cash flow or some other form of repayment arrangement.
- **Voting on resolutions:** consideration could be given to reducing the threshold needed to pass a resolution from 75 percent in value to 50 percent (retaining the requirement for 50 percent in number) to align with other forms of administration. In addition, related parties should preferably be excluded from voting.
- **Claims for interest, costs and expenses:** consideration could be given to excluding claims for interest (whether default, penalty interest etc), costs and expenses accruing on participating Scheme

debts from the Scheme. However, this should not affect the rights of creditors to pursue for the full debt in the event the terms of the Scheme are not fulfilled.

- ***Dedicated insolvency court:*** as noted in the IMF working paper, some jurisdictions have increased the specialisation of the judiciary, including through the formation of dedicated insolvency courts. This could potentially facilitate efficiencies with the court solely focused on insolvency and restructuring matters for both large and smaller businesses.

If you have any questions in relation to our submission please contact Aparna Reddy, ICA General Manager, Policy – Regulatory Affairs, on 02 9253 5176 or [areddy@insurancecouncil.com.au](mailto:areddy@insurancecouncil.com.au).

Yours sincerely



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