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By email: insolvency@treasury.gov.au

Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017

Thank you for the opportunity to submit our views on the draft legislation.

It is the AICM's view that reform is needed in a number of areas related to insolvency to minimise unfavourable and unproductive outcomes of the insolvency process and facilitate successful restructuring of business where this is possible.

We will address the safe harbour and Ipso Facto amendments in turn.

SAFE HARBOUR FOR INSOLVENT TRADING

The AICM acknowledges that there are circumstances where otherwise recoverable businesses have entered formal insolvency never to return. However, in our opinion, these are the minority and the majority of cases involve businesses with irrecoverable business and financial problems. Although the majority in number of insolvencies involve liabilities of less than \$250,000 this does not diminish the need for focus on this end of the spectrum. Small to medium businesses are seen as inherently high risk, reducing this perception/reality of high risk will enable trade creditors to provide further support to this vital section of the economy.

General Concerns with draft legislation

Two current concerns of our members relevant to this amendment are:

- The majority of companies do trade whilst insolvent.
- Legislation requires/allows insolvency professionals to pursue preferential payment claims for payments collected using reasonable business practices.

Addressing these issues is important to ensure trade creditors continue to provide a significant portion of the finance pool required for businesses of all sizes to grow efficiently.

Majority of companies do trade whilst insolvent

A report from ASIC (REPORT 507: Insolvency statistics: External administrators' reports (July 2015 to June 2016)) identified that insolvent trading was identified in 5,736 reports (over 60% of reports) with most being supported by evidence. This indicates a serious financial impact on creditors to these companies. The AICM notes that information on enforcement action of this behaviour was primarily limited to that taken by insolvency practitioners and there are very few actions taken.

While various parties argue strongly that the “reasonable grounds of insolvency” definition leads to directors placing otherwise recoverable businesses into formal insolvency for fear of personal liability, these statistics indicate that the majority are not concerned about the personal liability and continue to trade whilst insolvent. Considering there is very limited recovery from the insolvency process and/or enforcement of directors liability, the cost of insolvent trading is borne by creditors.

It would seem directors are aware that their personal liability only arises during actual insolvency and as a result are most likely operating under one of three approaches:

- They are optimistic about their ability to recover to a solvency.
- The threat of insolvent trading liability pales in comparison to their other personal liabilities that will arise on liquidation of the business meaning there is no downside to trading whilst insolvent as a claim will only add to their already significant deficit.
- They may be willing to run the risk of insolvent trading knowing that ASIC is unlikely to prosecute and claims from liquidators can be frustrated or settled.

Further, it is likely that a significant portion of these directors that trade whilst insolvent do so under the guidance of unregulated pre-insolvency advisors who often charge exorbitant costs and/or advise directors to avoid their creditors and remove the ability for the entity to continue by transferring assets from the insolvent company.

While supportive of a safe harbour that enables the small proportion of businesses that do lose the ability to restructure by entering a formal insolvency process the current draft legislation creates significant concern that it will have a negative cultural change and result in the rise of insolvent trading and reduce what barriers currently exist to deter this behaviour.

Preference payments

Directors availing themselves of the safe harbour will naturally make further payments to creditors, these payments generally meet the definition of a preferential payment. Considering the safe harbor course of action does not need to lead to a return to solvency these payments will be subject to preference claims.

When creditors are acting at arm’s length, in good faith, without any undue pressure or special position, and essentially supported the restructure it is unreasonable for them to be subject to preference claims which result in additional financial issues and significant time and legal fees expenses. These issues are amplified by the fact a claim may be made up to 3 years later, long after a creditor can be expected to have retained specific knowledge of the transaction (considering staff turnover) let alone a provision for the liability.

To illustrate our point:

- In order to prevent a creditor taking recovery action and therefore frustrating the restructure, a payment of \$100,000 may be prioritised for one creditor over others. This payment may be deemed preferential but is unlikely to have occurred if the safe harbour were not available.
- The creditor may accept this payment as a sign of solvency and continue to trade incurring a further \$200,000 in debt.
- Presume the restructuring is unsuccessful and the subsequent formal insolvency and liquidation.
- Up to 3 years later the liquidator instigates legal action to recover the preference.
- A lengthy, costly and legal battle follows.
- Any amounts recovered by the liquidator used to cover costs of the liquidation with little or none of the recovery benefiting.

- The creditor left with a loss of the \$100,000 preferential payment, \$200,000 debt at time of liquidation (less any dividend) and hefty legal bills.

The productivity commissions report into business set up, transfer and closure No. 75 30 September 2015, recommended that the period for preference claims to be brought and the pursuit of unfair preference claims be limited to those within three months of insolvency and of material amounts. The duty to pursue unfair preferences should be explicitly removed unless there is a clear net benefit and it will not impede conclusion of the liquidation.

Our position on preference claims generally is outlined in Annexure A “Practices permitted by Corporations Act” and we strongly urge amendments to rectify these issues in conjunction with the safe harbour amendments as outcomes that lead to an increase in preference claims will adversely impact the provision of trade credit.

We raise the above concerns to highlight the spectrum of issues that need to be considered and urge caution in the introduction of a safe harbour that leads to greater detriment than it does good.

Specific concerns with draft legislation

With regards to the draft legislation as it stands our concerns focus on the weakness of some of the safeguards which if strengthened could ensure the safe harbour defence is effective for directors and not lead to further risk for creditors.

We agree on the approach which allows a range of indicators that can be used to evidence the appropriateness of the directors actions however we firmly believe that an increase in the prescribed requirements will ensure the safe harbour is only relied upon in appropriate circumstances and there is no decrease in the enforcement of insolvent trading when it is used inappropriately.

Need for increased clarity

While the current amendments allow for saleability, we feel the current structure of the safe harbour will lead to essentially removing all barriers to insolvent trading

Currently very few insolvent trading breaches identified by liquidators lead to enforcement of the director’s personal liability. The current considerations that limit these claims will be compounded by the future use of the safe harbour defence (whether validly available or not) and resulting in an increase the complexity and cost of litigation. Not only will this effectively remove director’s liability for insolvent trading it will further reduce the likelihood of any return to creditors.

We feel further prescribed measures rather than indicators will address this, such as the requirement for an external advisor, a time limit and personal liability of the advisor.

Advice from appropriately qualified professional.

The AICM acknowledges that it is advantageous to ensure an appropriate level of advice is obtained dependant on the size and complexity of the business. Our concern is that this is not an essential criteria and the advisor is not required to be external/at arm’s length.

Conceptually, the requirement to obtain advice from an external professional is akin to a sick person, an independent totally impartial and detached expert (or team of experts dependent on the illness) is required to make decisions based on facts to prevent the illness being life threatening. There is very little argument that this approach should be taken for a person and it extends to a business.

As currently drafted directors of some small businesses may be able to rely on the advice of a related party such as an internal accountant, a family member or a shareholder with appropriate qualifications.

Considering the current regime is not deterring directors from engaging in insolvent trading, strong mechanisms are required to ensure the safe harbour defence does not remove the only safeguards in place. This is specific concern where the parties may hold overly optimistic views of their future prospects.

While the legislation sends a strong message that large/complex businesses will require external advisor/s e.g. insolvency professionals, we feel the requirement for an external appropriately qualified professional should be

a requirement to ensure businesses of all sizes take this fundamental step when faced with solvency uncertainty.

Further, to give clarity the appropriate qualifications we recommend that the advisor be required to hold professional indemnity insurance that covers that entity for the provision of relevant advice. This will further ensure an independent assessment has been made of the appropriateness of the professional to provide the advice.

This should not be a significant cost or time impact on directors as most will have existing relationships that would qualify. This would also increase the quality of the course of action and with less risk imposed on creditors.

Reasonably likely to lead to a better outcome for the company and creditors

We acknowledge that the “better outcome” current structure allows the orderly sale of assets which is likely to lead to a much superior return to creditors than if sold during a formal insolvency process. However, the ability for directors to pursue a course of action that is only likely to marginally improve the return is a significant concern to our members as this may lead to them unknowingly accepting risks beyond their tolerance.

Use of this criteria other than a return to solvency is a significant concern to our members.

We recommend this is amended to, in order of preference:

- “Reasonably likely to lead to a return to solvency”,
- “Reasonably likely to lead to a return to solvency or full payment of the majority of secured and unsecured creditors”, or
- “Reasonably likely to lead to a significantly better outcome”.

As long as course of action continues to be reasonably likely to lead to better outcome

We are concerned that as currently drafted creditors may be unreasonably at risk of an adverse outcome the longer the course of action continues. For example a businesses with good potential to provide a better outcome for creditors by using the safe harbour but with significant downside risk may continue to trade at this level or deteriorating further.

The consequences of an open ended course of action exposes to creditors who are unaware of the restructuring to increased risk and loss. Further, business value may be reduced and other restructuring opportunities lost leading to a much worse outcome for the business and creditors.

We suggest a measure that requires improvement over time such as allowing the defence to be relied on:

- for a period of 120 days and whilst the course of action continues to be reasonably likely to lead to a better outcome
- further periods of 120 days if the actual outcome or probability of an improved outcome has improved.

Essentially any business unable to show that after 120 days the course of action hasn't significantly improved the position for the company and creditors it should come to an end, however if it has improved or has a better chance of improving the outcome the directors will be able to continue to rely on the defence and follow the course of action.

Liability of the advisor

In addition to our recommendation that the requirement to seek advice from an external advisor with appropriate qualifications be mandatory, we feel that it is essential that the advisor be subject to personal liability should the advice be unreasonable, faulty, negligent or overly optimistic.

The potential liability of the advisor for advising a course of action that does not meet the requirements of the legislation (returning to solvency or better outcome) is important to ensure proper consideration of all the factors and the advisor is confident of their capacity to assist the business.

While it is hoped that the professionals will be those that are members of professional bodies and or subject to regulatory oversight and therefore face appropriate consequences, the fact this is not a requirement means this needs to be addressed through personal liability of some degree. To illustrate the point an advisor with

qualifications and prior practicing experience may be seen as an appropriate advisor however as they are no longer practicing in this capacity therefore not subject to appropriate oversight.

Many pre-insolvency advisors that have or do provide advise on how to defeat creditors would fall into the category of an appropriately qualified professional. Including a specific liability in this legislation would provide a mechanism pro-actively limit this behaviour as well as taking enforcement action reactively.

Summary

We are supportive of efforts that enable directors to address solvency issues and avoid formal insolvency while at the same time feel the current regime has controls to ensure directors are responsible for their businesses. For most businesses the time for restructure is prior to the point where there are reasonable grounds to suspect insolvency and for a small hand full that are impacted by a single event there is some benefit of allowing a further period past this point for restructure. To ensure the safe harbour benefits those that it is intended to and not be abused by those that are not following good business practices we strongly encourage amendment to the draft legislation as outlined above.

STAY ON ENFORCING RIGHTS MERELY BECAUSE OF ARRANGEMENTS OR RESTRUCTURES “IPSO FACTO CLAUSES”

The AICM broadly agrees with the intention of this initiative which we see as maximising the likelihood of businesses emerging from formal insolvency processes and/or achieving an orderly sale of a going concern, as this benefits all parties and maintaining critical supply arrangements is critical to this. However the draft legislation transfers an unnecessary amount of power to insolvency professionals whilst removing the ability of suppliers to make their own business decisions and achieve satisfactory commercial outcomes without detriment to the business or other creditors.

Our preference is for a regime that that allows administrators to make an assessment of the suppliers that are essential and put them on notice that their continued supply is deemed significantly important to the continuation of the business and therefore void any Ipsos Facto Clauses.

We recommend the criteria required to be considered include:

- Availability of alternative suppliers
- Cost and timeliness of sourcing alternatives
- Impact on continuing operations
- The supplier has relied on the Ipsos Facto Clause and offered continued supply at higher than commercial terms.

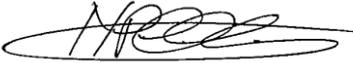
Further, structured in this way creditors retain control when the exercising of this control does not detriment the business. Additionally, it addresses the potential of a creditor offering essentially identical supply at uncommercial terms by taking advantage of their superior bargaining position while retaining the ability to adjust their supply when the circumstances surrounding the supply change significantly. For example, a supply which was significantly discounted due to the long term or high volume nature should be capable of adjustment at the point where this nature is no longer reasonable to expect. This supplier should be entitled to vary the cost to similar to what other suppliers would offer for the same circumstances but no higher. In numerous occasions this ability is essential to enable suppliers to recover some of the costs incurred to establish the supply that can no longer be expected to be recovered or will be admitted by the administrator as a valid debt. Requiring the adjustment to be within commercial limits and the administrators rights to declare the supply as essential will ensure the creditor does not abuse a superior bargaining position.

We note that Administrators retain the ability to terminate agreements solely due to their appointment therefore it seems in appropriate that this right is entirely removed from creditors.

Thank you once again for the opportunity to provide these comments and emphasise that the AICM and its members are focused on fostering innovation and growth of Australian businesses and as such have included commentary of an initiative that could effectively motivate creditors to support the innovation and entrepreneurship of Australian start-ups.

We believe the implementation of a safe harbour and controlling the use of Ipso Facto clauses can provide beneficial outcomes if structured appropriately and welcome the opportunity to collaborate with all stake holders to achieve this.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Pilavidis', with a long horizontal flourish extending to the right.

Nick Pilavidis

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Annexure

About the AICM

The Australian Institute of Credit Management (AICM) is Australia's leading professional member body for commercial and consumer credit management professionals across all industries and sectors, and the only credit industry specific Registered Training Organisation in Australia.

We have developed an accreditation process for credit executives to recognise current knowledge and practice in the credit industry. Today we have 121 members holding the title Certified Credit Executive.

The AICM was founded in 1937, incorporated in 1967 and has established a trusted reputation as the professional body for setting professional standards and providing for the education, career needs and interests of all who work in the credit industry.

The AICM represents, develops and recognises the experience of over 2,400 individual members working in over 1,300 companies including 34 of the ASX 100 and global organisations in all industries and sectors.

Our members are credit professionals in roles relating to consumer and commercial credit including the obtaining or providing credit, collecting debts, financing invoices, enforcement of payment obligations, credit scoring and managing security interests.

While the AICM membership represents businesses of all types, including banking and finance, this submission is made with a focus from the view point of our members in businesses that supply goods and/or services on extended payment terms i.e. they are credit/finance suppliers as a result of their core business. We refer to these organisations, as Trade Credit Providers ("TCP's) who (aside from PPSA rights) would be unsecured creditors in an insolvency.

We are very keen to be involved with the ongoing development of these proposals and welcome your direct contact.

Practices permitted by Corporations Act

Our members regularly experience actions that are in accordance with the *Corporations Act* but which are clearly unfair, inefficient and of no benefit to the majority of stakeholders. Further, our members regularly state that as unsecured creditors they unfairly bear the cost of the liquidation process.

Considering the changes proposed by the safe harbour defence there is escalated need to address the issue and implement reform is due in respect of unfair preferences.

The ASIC in its information sheet 45, "*Liquidation a guide for creditors*" defines a Preference payment as "*a creditor receives an unfair preference if, during the six months prior to liquidation, the company is insolvent, the creditor suspects the company is insolvent, and receives payment of their debt (or part of it) ahead of other creditors. To be an unfair preference, the payment must put the creditor receiving it in a more favourable position than other unsecured creditors.*"

The ATO define a preference payment as "*Unfair preferences usually involve transactions that discriminate in favour of one creditor at the expense of other creditors. The aim of the law outlined below is to ensure creditors are treated equally by preventing any unsecured creditors from receiving an advantage over others.*" <https://www.ato.gov.au/tax-professionals/your-practice/insolvency-practitioners/preference-payments/preference-payments-for-companies/> accessed 3/7/15.

Conceptually the preference payment regime seems reasonable but in practice it results in undue burden on businesses. The AICM's concerns are best summarised as:

1. The time frame for liquidators to commence recovery action is currently 3 years from the commencement of insolvency. This time period is unreasonable as demonstrated by the example below.
2. Preference claims are routinely pursued and which result in no return to unsecured creditors, effectively meaning unsecured creditors are funding the insolvency process.
3. The test of suspicion of insolvency is too onerous.
4. Organisations that undertake effective collections activity are penalised in favour of other organisations that may not have taken any collections activity.

In summary the current regime is unproductive and burdensome on organisations that are following normal commercial practice.

The AICM strongly holds the position that the *Corporations Act* should be amended to:

- Limit the time period for liquidators to commence action to recover preference claims to 12 months from the commencement of the liquidation.
- Exclude payments made to third party creditors in the normal process of recovering a valid debt from the definition of a preferential payment.
- Limit preference claims to circumstances where the creditor was a related party and was actually aware of insolvency (rather than reason to suspect insolvency).

The AICM notes the definition of preference claims in New Zealand is in line with this recommendation.

- Limit preference claims to circumstances where the creditor was aware of insolvency and used influence other than that available to creditors generally.

This would limit the liability to circumstances where the creditor has used their unique position in order to obtain a preference over general creditors. An example may be a creditor supplying a unique component withholds supply and seeks payment earlier than it has previously or the franchising example noted in the next section.

The AICM acknowledges that an impact of this recommendation may be the reduction in the options available to fund the insolvency process. However this does not justify the current arrangements which see unpaid third party creditors or “victims” of insolvency, they regularly receive no return, bearing significant cost of the insolvency and are the lowest priority in terms of distribution.

The small liquidation recommendation and increasing the funding of the asset less administration fund as recommended in the draft report are significant measures that could be used to address this funding issue.

The unfair preferential payments regime definitely has a place but we feel this should be limited to situation where the creditor is not at arm’s length or has used a position or tactics not in line with those reasonably expected by a creditor in the normal course of business.

Incentive to extend credit to start ups

Our members are the controllers of the financial quality of their firm’s accounts receivable asset and are responsible for protecting this asset and to in due course convert it to cash. Our members are often closer to their customers than their bankers and have a detailed understanding of these customers industries and funding needs.

A current constraint in the Australian economy is the reliance upon the ownership of real property as security before credit will be granted. This impacts the ability of business owners to access funds at competitive rates. This situation is ameliorated once a business matures and reaches a certain size.

For a credit manager to open a credit account they must test the creditworthiness of the customer and consider appropriate security such as a personal guarantee of the director(s).

This work is all undertaken from the perspective that the credit manager and these processes are a cost to the business and that the granting of credit is necessary to support to sales. This is balanced with the fact that there is no incentive to the business owners to take unnecessary risk when their competitors also follow the same strategy.

Our members have access to further credit facilities which could be deployed to assist with the transformation of the economy to a more entrepreneurial and jobs growth focus, stimulating innovation and economic prosperity. The Reserve Bank's September 2013 paper "The Use of Trade Credit by Businesses" calculated that in March 2013 trade credit owed by Australian businesses exceeded \$80 billion.

As noted by Senator Amanda Vanstone in her address to the AICM's National Conference as far back as May 2000, "training is essential for staff to correctly identify fraud in credit applications." Fraud and credit management and therefore specific skills used by our members and competent, qualified credit managers. A qualified credit manager (those holding a minimum of Certified Credit Executive and/or Diploma status) could be encouraged to increase their credit risk to start-up businesses if there were favourable taxation consequences. The qualified credit executive would review the credit application and based on defined taxation criteria would be entitled to a 150% tax write off of the debt should that entity become insolvent and the debt not be recovered from the guarantor.

Our initial proposal for businesses to be included in this incentive would be:

1. Business assessed for credit by approved reviewer to prevent fraud, and
2. Trading for less than 5 years before insolvency, and
3. Personal guarantee is held which is not recoverable.

This tax incentive would be available across all non-banking sectors thereby giving all trade credit suppliers with appropriately qualified risk controllers the incentive to support emerging businesses particularly those without real property asset backing in start-up mode.