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Submission in response to the Exposure Draft of the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 ("The Bill") dated 1 October 2020

Introduction, Biographical details

I am a barrister practising in insolvency law at the Victorian Bar. As a barrister of twelve years standing, and a solicitor of 13 years standing before being called to the Bar, I have been in practise in insolvency law since 1994. I maintain a website commenting on insolvency law, securities law and commercial law at markmckillopbarrister.com and regularly lecture and publish in the area to the profession. I have published two short articles discussing the Bill which appear on my site.

This short submission focusses on a few points arising out of my review of the Bill and reaction from clients, readers and other commentators.

Submissions

1. **The calculation of the debt threshold** What sort of debts are to count is a real issue:

    a. Future debts: any company with long lease obligations for land or equipment may qualify for the debt threshold if future lease payments are counted;
    b. Contingent debts: likewise, companies which are subject to liquidated damages) claims in operating contracts (eg a construction subcontract) may also reach the threshold with such claims.

Careful thought needs to be given to the basket of companies the government is really looking to protect. If the government is really looking to carve out those companies which make up (by number) the bulk of insolvencies, which typically do not (or should

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not) involve much work by the insolvency practitioner due to low levels of assets, then the debt threshold ought to be lower. The objective for these companies may be to "speed" through the process of getting in and distributing assets and to turn over a new leaf so the business transforms into a debt free existence.

The prejudice to creditors of a very simplified process is not unwarranted since, for such companies, there would normally be little or no return to creditors anyway. Such a policy objective would be aided by a low threshold of say $250,000 not including future or contingent claims.

2. It is **undesirable to have the law on issues of substance left to separate regulations**. Large parts of the Bill leave substantive issues to be made by regulation. It is preferable to have much of the law once passed contained in one place for ease of reference, not just for lawyers, but for businesses using or exposed to the law as debtors or creditors. Whilst it is understandable that such an approach be taken to prepare the exposure draft to save time, I strongly suggest that the final draft of the Bill incorporate as much of the amendments in the text of the Act as possible. In particular:

    a. Powers of the Court in Part 1 Division 6;
    b. Provisions in s.453E and s.456G generally, particularly with regard to defining the rights, obligations and liabilities of the restructuring practitioner;
    c. Debt criteria for determining companies that can participate in a restructuring in s. 456G and in simplified liquidation in s.500AA(1)(d);
    d. Form, content, making, implementation, varying, lapsing, voiding, contravention and termination of restructuring plans: see Division 3 generally.
    e. Limitations on Voidable Transactions in Debt Restructuring in s.500AE.

3. **Priority of Debts incurred in Restructuring** A practical problem is how a business which enters restructuring can operate in the 35-day period before the restructuring is completed. Who is liable for debts incurred in that period? The restructuring practitioner will not be. What about the directors? If not the directors, then what protection will creditors who give credit in this period have? Will they have priority over all other pre appointment creditors? It is difficult to see how the business will receive any credit in this period which may end up killing the business off. **I consider the best solution is**

probably to give debts incurred in the ordinary course in the restructuring period a higher priority than pre appointment debts.

4. **Limit Court applications but permit the Courts to set the limits by requiring leave.** The extent of supervision by the Court of the restructuring process and the simplified liquidation process is not currently provided for in the Bill. It is to be left to regulation which have not been published. It may hamper the purpose of the Bill to freely permit a wide range of applications to the Court, as to do so would add to the uncertainty of the process and its cost. It is difficult to be proscriptive about what sort of applications should be excluded. Instead a better approach may be to allow the Court a wide power to intervene in a restructuring process where it is just and equitable to do so, but to set a range of discretionary matters that the Court should take into account before intervening. Those factors would reflect the purpose of the Part: for example, cost, return to creditors, time to conclude the restructuring plan, likely success of the restructuring plan, survival of the business of the company, presence of fraud etc. It would also be sensible to require applications to be dealt with expeditiously and perhaps to devise some amendments to the uniform corporations rules for observance by the Courts to facilitate it.

5. The Bill does not currently provide for the **transition of an unsuccessful restructuring process, or failed restructuring plan**, to another form of insolvency. If the proposed restructuring plan is rejected, the creditors ought to have an option that the company be wound up as a creditor's voluntary liquidation, either on the ordinary or simplified basis. **There ought not be an option for the company to continue to trade**. **There does not seem to be any utility in converting to a voluntary administration where there is a simple rejection of a compromise restructuring plan**. If a subsequent liquidator believes a voluntary administration is warranted, that liquidator would be able to make an appointment under s 436B.

6. The Bill does not currently provide for **reporting obligations in the restructuring period**, other than to allow future regulation (see Part 1 Div 5). Again, like Court supervision, it is a balancing exercise between cost of compliance and protection of creditors and the public. In my view restructuring practitioners **ought to have the same powers at least as a voluntary administrator to <u>access</u> and copy documents**, save for the power to take possession of them since the debtor company remains in control.

Otherwise creditors will have little confidence that there is independent oversight and verification of the contents of any restructuring plan. **Further, the restructuring practitioner must have some independent reporting obligation to creditors to give their view of the proposed restructuring plan, and a fulsome statement of their reasons for that view**. Whilst the obligations to report might not be as extensive as a report to creditors at the decision meeting in voluntary administration, the fact that the eligible companies are small should mean that a report evaluating the proposal by reference to the company's records and the restructuring practitioner's evaluation of financial position and prospects ought still be possible without excessive cost. If the report is not substantive and independent, creditors will be less likely to buy in.

7. **Scrap entitlements and tax lodgment requirements** The Bill requires all employee entitlements to be paid before it can be used. In my view this requirement ought to be scrapped. If the Bill is intended to deal with victims of the pandemic, how many of them will be in a position to make these payments? Some sure, but many will not. It seems to me to be a device to prefer the entitlements guarantee fund. Similarly, the requirement to have ATO lodgements up to date ought be scrapped- it is a unnecessary barrier. If the government wishes to protect employee entitlements or the revenue, then there are other methods available which are more efficient. What may end up happening is that truly destitute companies that need to access the process, but cannot meet these requirements, will be forced into voluntary administration or liquidation instead.

8. **Use a naming convention once a restructuring plan is passed.** Is it intended for companies that have a restructuring plan accepted to have the words (subject to restructuring plan) added to their company name during the period of the plan? It seems to me that they should.

9. **Delay the passage of the Bill to work on it more thoroughly.** The commencement of the Bill ought to be delayed in my view, to 1 March 2021. The time is necessary to allow proper development of the Bill and the policy behind it. It would still be possible to allow Companies to indicate an intention to activate the process from 1 January 2021 as is currently intended. As I understand it elements of the Bill have been borrowed from ARITA who is largely supportive of the overall policy idea. Consultation with ARITA in

particular, and others, should be made as to the practical need for some elements of the Bill and refinement of the drafting.

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