

24 November 2020

Manager
Market Conduct Division
Treasury
Langton Crescent
Parkes ACT 2600

Via email: MCDInsolvency@Treasury.gov.au

Dear Manager,

Insolvency reforms to support small business – subordinate legislation

Thank you for the opportunity to provide a submission on the subordinate legislation to the *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Exposure Draft)*, including the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 (Draft Regulations)* and the *Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 (Draft Rules)*.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community: while 192 of the nation's ASX 200 companies have one or more AICD members serving on their board, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

As mentioned in our submission on the Exposure Draft dated 12 October 2020, the AICD has long taken the view that the primary objective of Australia's insolvency regime should be corporate recovery. This is all the more important given the particular challenges faced by businesses in light of COVID-19. Against this background, the AICD welcomed the Government's announcement to introduce reforms to support small business, including the simplified restructuring process.

The AICD has limited its comments in this submission to aspects of the Draft Regulations and Draft Rules that impact: directors and their role in the restructuring process; and access to a restructuring practitioner.

The AICD has engaged with legal and restructuring experts as part of its consultation. The common view is that the simplified restructuring process appears to be relatively complex and may not be as flexible and accessible for small businesses, as intended by the Government. The AICD considers this is largely because the Exposure Draft, Draft Regulations and Draft Rules incorporate many of the provisions that currently apply to voluntary administrations.

Draft Regulations

Previous use of a debt restructuring process or a simplified liquidation process (proposed sections 453C(1)(b) and 500AA(1)(e) of the Corporations Act and Schedule 1, item 2, regulation 5.5.03 of the Draft Regulations)

As mentioned in our submission on the Exposure Draft, the AICD is concerned about the eligibility criteria proposed by section 453C(1)(b) of the Exposure Draft. This requires that no director of the company has been a director of a company that has been the subject of a debt restructuring process or a simplified liquidation process during the period prescribed by the regulations.

The AICD appreciates that the eligibility criteria are an important safeguard to prevent a pattern of behaviour from directors that could indicate illegal phoenixing activity. Nonetheless, we are concerned that this will mean that SMEs, particularly start-ups, may be needlessly excluded from the simplified restructuring and/or liquidation regime.

The AICD commends the inclusion in the Draft Regulations (Schedule 1, item 1, regulation 5.3B.03(2) to (4)) that allow different companies within a body corporate group to enter into the restructuring process at the same time. However, the AICD urges a further exemption be included in the Draft Regulations to ensure companies are not excluded in circumstances where two small businesses are unrelated and may only have one director in common.

For example, consider an individual who is a non-executive director on the board of multiple companies, such as an investment professional in the private equity or venture capital industry who is a director of each of their investee companies. These investment professionals often take roles on start-up boards and provide valuable expertise to these small businesses. It would not be appropriate to exclude all small businesses from both the simplified restructuring and liquidation processes solely because another, unrelated company in that investment professional's portfolio had used the process during the prescribed period.

Draft Rules

Small business restructuring practitioner (proposed section 456B of the Corporations Act and Schedule 1, item 5, section 20 of the Draft Rules)

While we support steps taken to allow for a new classification of small business restructuring practitioner (**SBRP**) to include accountants that have demonstrated the capacity to perform the functions and duties of a liquidator, we remain concerned that the requirements are too restrictive.

As previously mentioned, we consider it crucial that a broader range of qualified persons be available to help companies and their directors restructure, noting that liquidators' skill-set and experience is focused on liquidating a company and distributing assets rather than overseeing a restructuring process, which is the intended scope of the proposed legislation. In our view, requiring SBRPs to be registered liquidators would significantly harm the flexibility, practicality and scalability of the proposed simplified restructuring process, and potentially render it ineffective.

The reality is that in many instances the best people to assist directors with restructuring their business will be a local trusted accountant or adviser, particularly in rural or suburban settings. Enabling a broader range of persons to be SBRPs will increase access to the proposed regime given the large

number of small businesses that may avail themselves of this process, relative to the number of liquidators. Some directors may also be deterred from utilising the process due to the stigma associated with engaging a registered liquidator.

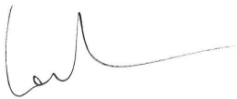
To this end, the AICD suggests an expanded list of criteria be considered that might include SBRPs:

- being a member of an appropriate professional association with a code of ethics;
- being an appropriately skilled and competent to perform the task, and have adequate professional indemnity insurance;
- being a 'fit and proper person' (i.e. never been convicted of a financial crime, be an undisclosed bankrupt, have previously been bankrupt, etc); and
- agreeing to participate in an appropriate disciplinary process and/or alternate dispute resolution at their cost (e.g. through the professional association referred to above).

Next steps

We hope our comments on the Draft Regulations and Draft Rules will be of assistance as you undertake this important consultation. If you would like to discuss any aspects further, please contact Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au or Christian Gergis, Head of Policy, at cgergis@aicd.com.au.

Yours sincerely,



Louise Petschler GAICD

General Manager, Advocacy