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By Email; MCDInsolvency@Treasury.gov.au

Dear Sir/Madam,

I hereby make the following submission to Treasury in respect of the proposed **Regulations** relating to the **Insolvency Reforms to Support Small Business** ("*Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*").

I note, in red, the following period of times and the consequences/obligations proposed within the above Regulations:

5.3B.15 Meaning of proposal period

(1) *The proposal period, in relation to a company that is under restructuring, is the period of 20 business days beginning on the day the restructuring begins.*

5.3B.02 When restructuring ends

(1) *For the purposes of paragraph 453A(b) of the Act, the restructuring of a company ends if:*

(b) *the company fails to propose a restructuring plan within the proposal period;*

5.3B.12 How a restructuring plan is proposed

(1) *A company under restructuring proposes a restructuring plan if:*

(a) *the company prepares:*

(i) *a restructuring plan that complies with the requirements in regulation 5.3B.13; and*

(ii) *a restructuring proposal statement that complies with the requirements in regulation 5.3B.14; and*

(b) *the company executes the restructuring plan during the proposal period; and*

(c) *the company's restructuring practitioner prepares and signs a certificate in accordance with regulation 5.3B.16; and*

(d) *the restructuring practitioner gives the restructuring plan and certificate in accordance with regulation 5.3B.19; and*

(e) *immediately before the restructuring practitioner gives the plan and certificate in accordance with regulation 5.3B.19, regulation 5.3B.22 is satisfied in relation to the company.*

5.3B.19 Proposing a restructuring plan to creditors

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(1) *As soon as practicable after a company executes a restructuring plan, the restructuring practitioner for the company must do the following:*
(a) *give to as many of the company's affected creditors as reasonably practicable a copy*

(3) *In this regulation: acceptance period means: (a) the period of 15 business days beginning on the day the company's restructuring practitioner gives documents*

5.3B.23 Acceptance of restructuring plan When restructuring plan is accepted

(1) *A company's restructuring plan is accepted if a majority in value of the company's affected creditors who reply before the end of the acceptance period state that the restructuring plan should be accepted.*

In my opinion, there needs to be three (3) very clearly identified periods, which follow on, from each other:

1. When the company must provide the restructuring plan* to the restructuring practitioner, and
2. When the restructuring practitioner must provide the restructuring plan* to the creditors, and
3. When the creditors must reply to the restructuring practitioner with their acceptance (or otherwise).

* together with other prescribed documents/reports etc.

My suggestion is to make each period 10 business days.

The reasons for this suggestion are:

1. Simplicity
2. Consistency
3. Each period is sufficient for each party to do what is needed
4. The combined periods are much short than the current proposal
5. Also, the time limit should only apply to the conduct of the person affected by the time limit (see Reg. 5.3B.12, which requires the restructuring practitioner to do things, for the company to have done something)

I suggest these changes to the proposed Regulations:

5.3B.15 Meaning of proposal period

(1) *The proposal period, in relation to a company that is under restructuring, is the period of 10 business days beginning on the day the restructuring begins.*

5.3B.12 How a restructuring plan is proposed

(1) *A company under restructuring proposes a restructuring plan if:*

(a) *the company prepares:*

(i) *a restructuring plan that complies with the requirements in regulation 5.3B.13; and*

- (ii) a restructuring proposal statement that complies with the requirements in regulation 5.3B.14; and
(b) the company executes the restructuring plan during the proposal period; and
(c) the above plan and statement are provided to the restructuring practitioner
~~(c) the company's restructuring practitioner prepares and signs a certificate in accordance with regulation 5.3B.16; and
(d) the restructuring practitioner gives the restructuring plan and certificate in accordance with regulation 5.3B.19; and
(e) immediately before the restructuring practitioner gives the plan and certificate in accordance with regulation 5.3B.19, regulation 5.3B.22 is satisfied in relation to the company.~~


5.3B.19 Proposing a restructuring plan to creditors

- (1) **Within 10 business days of receiving the document under 5.3B.12(c),** the restructuring practitioner for the company must do the following:
(a) give to as many of the company's affected creditors as reasonably practicable a copy

(3) In this regulation: acceptance period means: (a) the period of **10** business days beginning on the day the company's restructuring practitioner gives documents.

These are my thoughts on this subject, within the limited time allowed to make these submissions.

Yours Truly



Geoffrey McDonald
Barrister at Law,
23 November 2020

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Dear Sir/Madam,

I refer to my submission to Treasury in respect of the **Insolvency Reforms to Support Small Business** (“the Reforms”) dated 12 October 2020.

In that submission, I focussed upon one particular issue and that is the **conflict of interest and lack of independence of the Restructuring Practitioner**.

Herein, I make a submission in respect of insolvency reforms to support small business – subordinate legislation and, in particular, the proposed *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*.

I am sorry, but the obligations of the Restructuring Practitioner under the proposed Regulations exacerbate the position of conflict which I complained about in my letter of 12 October 2020.

You will recall that the functions, duties and powers of the Restructuring Practitioner are set out with the Reforms:

453E Functions, duties and powers of the restructuring practitioner

(1) *The functions of the restructuring practitioner for a company under restructuring are:*

- (a) *to provide advice to the company on matters relating to restructuring; and*
- (b) *to assist the company to prepare a restructuring plan; and*
- (c) *to make a declaration to creditors in accordance with the regulations in relation to a restructuring plan proposed to the creditors; and*
- (d) *any other functions given to the restructuring practitioner under this Act.*

In my opinion, if the Restructuring Practitioner is to assist the company in the preparation of a restructuring plan [see (b) above], he or she should not be the same person to make the declaration in relation to the restructuring plan [see (c) above (“Declaration”)]. The Declaration includes a declaration whether the company is likely to be able to discharge the obligations

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created by the plan as and when they become due and payable (see Regulation 5.3B.16 “Restructuring practitioner must certify restructuring plan (2)(a)(ii)”).

The Reforms entitle the directors to rely on the advice of the Restructuring Practitioner. The advice is expressly to include the preparation of a restructuring plan. This advice is likely to consider the terms of that plan and likely to have regard to the company’s ability to comply with the terms.

Under current proposals, the Restructuring Practitioner must, when forming an opinion on the company’s likelihood of discharging the obligations under the plan (as part of the Declaration), in effect, provide advice to creditors. The advice is about that same plan, which he or she assisted the company prepare.

The Restructuring Practitioner cannot criticise his or her own work. That is not independent.

The creditors expect independence in the report from the Restructuring Practitioner.

If the Restructuring Practitioner is the assistant to the Company, in preparing the restructuring plan, then to the creditors, there must be the appearance of biased.

Having regard to the proposed Regulations, my recommendation is to delete (b) from section 453E (noted above) and allow the company to obtain its own independent advice and assistance in preparing a restructuring plan (rather than having the Restructuring Practitioner provide that assistance).

There are many professionals, including Registered Liquidators, who would not be the Restructuring Practitioner of a particular company and who could provide independent advice and assistance to the company. The cost of that service would be a reasonable expense for the company to meet during the course of the Restructuring and would be no greater than the cost of the Restructuring Practitioner providing the same advice.

These are my thoughts on this subject, within the limited time allowed to make these submissions.

Yours Truly

A handwritten signature in black ink, appearing to read "Geoffrey McDonald". The signature is written in a cursive, flowing style.

Geoffrey McDonald
Barrister at Law,
24 November 2020