



22 September 2021

Manager
Market Conduct Division
The Treasury
By email MCDInsolvency@Treasury.gov.au

Dear Manager

Consultation Paper: Improving schemes of arrangement to better support businesses

The ABA welcomes proposals and reforms to assist with the successful restructure of companies. Ideally, such reforms should be focussed on reducing complexity, time and costs for all parties participating in the process to support better outcomes.

Set out below are our comments in response to the consultation questions.

Moratorium on creditor claims

The Consultation Paper proposes an automatic moratorium be introduced in connection with Schemes of arrangement to provide 'breathing space' to a company and its creditors.

As the Consultation Paper notes, there is a current power for the Court to grant a moratorium once a scheme is 'proposed'. In addition, rights cannot be enforced under ipso facto clauses based on an entity announcing it will apply to the Court for scheme orders¹.

As the introduction of an automatic moratorium would be a substantial addition to the existing regime, we would encourage consideration of the following factors to ensure any changes best achieve the desired outcomes:

- as the Productivity Commission has noted, for consistency, a Scheme moratorium should be aligned to the voluntary administration regime;
- a Scheme moratorium should be for a short period (for example, 2 months) with the ability for an extension by the Court. The moratorium could commence upon filing an application with the Court, be considered at each Court hearing, and have a sunset date to avoid delays during the Scheme process (for example, no more than 2 extensions and no longer than 6 months);
- the moratorium should include similar protections for the rights of creditors as exist in relation to the voluntary administration regime (for example, a short decision period for creditors with security over the whole or substantially the whole of the company's property to enforce their security, and the ability to take steps with consent of the company or leave of the Court); and
- while existing safe harbour rules might provide protection for directors, it would be appropriate to support a moratorium with an express safe harbour as a preliminary step to a Scheme (or other formal insolvency process). This is consistent with the small business restructuring regime and the introduction of section 588GAAB of the *Corporations Act 2001* (Cth).

¹ Corporations Act, section 415D.



Voting thresholds

The ABA notes that the Consultation Paper canvasses possible changes to voting thresholds (in particular, cross-class cram down) are being considered, and seeks feedback on the appropriate thresholds for creditor approval.

In our view, any proposed changes to thresholds should be accompanied by appropriate safeguards and be consistent with similar schemes in other jurisdictions. In particular, an 'absolute priority rule' (by which a senior class of creditors must be paid in full before junior classes of creditors and equity holders receive any value) would be preferable. This is consistent with the Chapter 11 regime in the United States and the scheme of arrangement regime in Singapore.

Rescue / debtor in possession financing

The Consultation Paper refers to provisions in some jurisdictions for 'rescue financing', and that such financing arrangements may impact other creditors and the terms upon which they provide credit. As such, appropriate safeguards should be put in place, including:

- approval of any rescue finance should be obtained from, at least, the Court (consistent with the Chapter 11 regime in the United States), and possibly also from creditors;
- any priority or security attached to that finance should only be granted if it can be proven that finance could not be obtained without that level of priority or security; and
- the Court should consider all of the circumstances in making a determination regarding rescue finance, including that the interests of creditors are not materially prejudiced, that existing creditors were given the opportunity to provide the finance on the same terms and that the rescue finance is necessary in the circumstances.

Additional comments on Court involvement in creditors' Schemes

Given the ability to cram down secured creditors and impact third party rights using a Scheme, we would recommend that creditors' Schemes continue to be supervised by the Court and voted on by creditors.

General comments on the Consultation Paper

The ABA suggests that in finalising the proposal an updated analysis of the existing Scheme regime would be of benefit to consider current market practices which may have evolved since the Productivity Commission's 2015 report 'Business Set-up, Transfer and Closure'.

The options considered in the Consultation Paper need to be considered holistically as part of a suite of potential reforms which should also include fine tuning safe harbour mechanisms to allow companies breathing space to negotiate with and manage their creditors and to plan for and effectively manage a restructure, including a Scheme. We note the separate consultation underway on 'Review of safe harbour from insolvent trading' and would recommend that the interactions of the reviews be considered together.

A number of our members have participated in significant corporate restructuring processes in the years since the Productivity Commission report and would be happy to discuss directly with Treasury their experience in how Schemes of arrangement operate in different jurisdictions and lessons learnt which can help with improving the current Australian provisions as well as their views on the evolving and maturing landscape of restructuring in Australia.

Please do not hesitate to contact me if you would like to discuss any of the issues raised above further.



Australian Banking
Association

Yours faithfully

A handwritten signature in black ink that reads "Jerome Davidson".

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