

9 September 2021

Manager
Market Conduct Division
The Treasury
Langdon Crescent
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By email: MCDinsolvency@treasury.gov.au

Dear Manager

Improving schemes of arrangement to better support business

Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia, the major accounting bodies, represent more than 300,000 professional accountants in over 100 countries, supported by more than 19 offices globally. We make this joint submission to the *Improving schemes of arrangement to better support business* Consultation Paper (the "Consultation Paper") on behalf of our members and in the broader public interest.

We support amendments to existing legislation that will enable more Australian businesses to remain viable. Critically, we consider that any amendments to existing legislation, including for a restructuring process, must be viewed in holistic terms and not in isolation, and more specifically, not as a reaction to current economic conditions. Improving schemes of arrangement should represent the beginning of a holistic review of insolvency law to align stakeholder expectations with a focus on the restructuring of viable businesses, rather than a focus on terminal wind up.

We provide feedback on the specific matters raised in the Consultation Paper.

Improving the effectiveness and uptake of Schemes:

We support the view that amendments to creditor schemes of arrangement (Schemes) administered under the Corporations Act 2001 (Cth) (the 'Act') should aim to facilitate the ability for more of our larger companies, such as those listed in the ASX 200, to restructure and continue trading.

United States Chapter 11

Australia's insolvency laws, being based on the Commonwealth framework, do not support a blanket adoption of the United States Chapter 11 Bankruptcy Code. The current Australian judicial system does not have the requisite specialisation to undertake the entirety of a Chapter 11 model.

While the current Court process for Schemes appears cost prohibitive for most companies, the role of the Court in Schemes is crucial for transparency and to preserve creditors rights. We would encourage greater insolvency specialisation in the Australian judiciary to drive a more streamlined process, to minimise the cost and increase access for more companies to undertake legitimate restructures.

We recommend that Treasury examine the Companies Act (Singapore), which is also based on the Commonwealth framework. Amendments were made to this Act in 2017 which incorporated aspects of the US Chapter 11 Bankruptcy Code. These amendments included the introduction of an enhanced moratorium, cross-class cram-down, pre-packed schemes of arrangements and super-priority financing.

Since its inception, the adoption of a Scheme by incorporated companies in Singapore has increased as follows¹:

Period	Number of Schemes
1996-2005	9
2006-2015	12
2016-2019	14

Most notably, the average number of schemes per year dramatically increased following the amendments.

Period	No. Years	No. Schemes	No. per year
1996-2005	9	9	1.0
2006-2015	9	12	1.3
2016-2019	3	14	4.6

Moratorium

We support the introduction of an automatic moratorium. A moratorium provides the company with sufficient breathing space to formulate a restructuring plan. This moratorium should be modelled on the existing framework for a voluntary administration and automatically commence on the approval of the initial Court Application by the company. A moratorium commensurate to the voluntary administration framework would enable a comparison of options for a company experiencing financial distress. The moratorium should cease, or be extended, as sanctioned by the Court at the second hearing, on a case-by-case basis.

We note that any proposed legislation should be mindful of the impact on all creditors to the company. Should the provision of an automatic moratorium be inserted into the Act, it should deal with only those creditors which the Scheme may affect. For example, if the Scheme only affects one class of creditor, all classes should not have their rights affected in the ordinary course of business.

Role of Registered Liquidators

We consider that a Registered Liquidator ('RL') has an important role in a Scheme. RLs are regulated practitioners with regulatory oversight provided by the Australian Securities and Investments Commission (ASIC) and the RL's relevant professional associations. A RL has the expertise to interpret the financial restructure proposed by the company and the requisite skills to manage assets of the company for the greatest benefit of all stakeholders.

Where a RL has an advisory role in a Scheme, or is the Scheme Administrator, they should not be permitted to undertake any subsequent appointments such as voluntary administrator. Subsequent appointments would not align with the requirements of the Accounting Professional & Ethical Standards Board standard, APES 330 *Insolvency Services* with which our members, who provide insolvency services, must comply. Further, it may breach the independence requirements placed on RLs as they would be reviewing their own advice to the company.

Rescue financing

We support making provisions for rescue financing, where the providers of the finance have priority if a Scheme fails and the company enters external administration. We acknowledge such financing can be an expensive option but consider such a provision may make Schemes more available to a greater number of larger companies in Australia, such as ASX 200 companies.

Other issues

Key to any amendments being successful will be the acknowledgment within government agencies that a Scheme is a valid and reliable debtor-in-possession restructuring process. Government agencies must be cognisant of the Scheme process, which has Court oversight to assess its viability and preserve creditors rights.

For example, feedback from our members indicates that some members have found that the Deputy Commissioner of Taxation will not consider a compromise of a principal debt, except within an external administration process. This reflects the need for a holistic review to engage with, and consider the role of, each stakeholder in restructuring and insolvency processes, to ensure any amendment improves access to and outcomes of these processes.

Finally, as part of a holistic review, we seek a better resolution to restructuring processes in Australia through changes to debt collection policy and consideration of Governments' payments of employee redundancy costs.

Please do not hesitate to reach out to Karen McWilliams of CA ANZ on (612) 8078 5451 or at karen.mcwilliams@charteredaccountantsanz.com and Kristen Beadle of CPA Australia on 0413 883 581 or at Kristen.Beadle@cpaaustralia.com.au to discuss how best to harness the knowledge held by our members.

Yours sincerely



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¹ City University of Hong Kong School of Law Legal Studies Research Paper No. 2020-019 / City University of Hong Kong Centre for Chinese and Comparative Law Research Paper Series Paper No. 2020/016: 'Schemes of Arrangement in Singapore: Empirical and Comparative Analyses, Page 50