Mark Wellard

Academic
c/- P.O. Box 123
Broadway NSW 2007

24 November 2020

Manager
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

By email: MCDInsolvency@Treasury.gov.au

Dear Sir/Madam

Submission on "Insolvency reforms to support small business – subordinate legislation"

Thank you for the opportunity to provide a submission on the Exposure Draft of the Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 ("the Regulations"), the Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 ("the Rules") and associated Explanatory Materials. This submission is my own (as an independent academic) and should not be attributed to UTS or UTS Law.

Credentials

I am a Senior Lecturer in Law at UTS Law (Sydney). I am a published insolvency law academic and have been a lecturer in insolvency law for six years. Prior to academia and two years as ARITA's Legal Director, I spent 10 years as a solicitor in private practice with firms in Australia and the United Kingdom (qualified in both jurisdictions), specialising in insolvency law and commercial litigation.

In my current role at UTS Law, I am the Program Head and principal lecturer of the "ARITA Advanced Certification", a postgraduate-level course of study the completion of which fulfils the requirements laid down by the *Insolvency Practice Rules (Corporations) 2016* (Cth) ("IPR") s 20-1(2)(b) (academic requirements of applicants for registration as a liquidator).

Concerns regarding the Regulations and the Rules

Given the very narrow window of time afforded to stakeholders to review the detail of the exposure draft subordinate legislation (and relevant bill now before Parliament), I am only able to make a brief submission that raises the most significant concerns I have been able to identify in the substance of the Regulations and the Rules.

Qualifications, experience and knowledge of the new "Small Business Restructuring Practitioner": The importance of knowledge and education in insolvency law and practice

I repeat the points made in my previous submission dated 12 October 2020 on the Exposure Draft of the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 ("the Bill").

I am opposed to the proposed creation of the new category of registered liquidator contemplated by s 20-2 of the Rules because applicants for registration to practise only as a restructuring practitioner will not be required to have undertaken and successfully completed the same postgraduate-level "insolvency-specific education" ordinarily required of applicants for registration under s 20-1(2)(b) of the Rules.

It is obvious from the complexity of the new Part 5.3B – and the minimum (not to mention open-ended) requirements and tasks of the "restructuring practitioner" – that the level of knowledge and expertise required of a restructuring practitioner under Part 5.3B is not substantially less than that presently required of a liquidator or Part 5.3A administrator.

It is difficult to reconcile these new, lower standards with the measures introduced by the *Insolvency Law Reform Act 2016* (Cth) to legislate rigorous, "insolvency-specific education" standards for registered liquidators. Indeed, I agree with ARITA's submission which states that "the proposed reforms undermine much of the progress made to increase the competence and capability of the profession through the *Insolvency Law Reform Act 2016* (ILRA)."

Exclusion of contingent liabilities from the definition of "admissible debt or claim"

It appears the proposed new Part 5.3B "small business" company restructuring procedure will not allow the compromise of an insolvent company's "contingent" debts or claims.

Regulation 5.3B.01 defines "*admissible debt or claim*", in relation to a company's restructuring plan, to "*not include a contingent debt or claim*". Given that contingent claims can pose a significant threat to an insolvent company's viability, this carve-out appears to limit the potential use of the new "restructuring plan". If the Pt 5.3B procedure is going to achieve the Government's stated goal of increasing small businesses' chances of regaining viability, the scope of liabilities that can be compromised (released) by the new "restructuring plan" needs to include the usual broad gamut of

"provable" debts and claims (as per s 553(1) of the Act). If the company is a guarantor for example, presumably that liability could not be compromised which would make a genuine debt restructure difficult to achieve.

It would appear that contingent creditors could sit outside the process and press their (uncompromised) claim during the period of a restructuring plan or after a plan were effectuated. As I read the exposure draft, contingent creditors would not be covered by Reg 5.3B.28 which prevents "a person bound by the plan" making a winding up application or bringing a proceeding to recover an "admissible debt or claim".

Further, the exclusion of contingent claims will cause great uncertainty (if not litigation) as to which claims are "contingent" and released by a "restructuring plan" under Reg 5.3B.30 and which claims are not released.

Restructuring practitioner's certification under Reg 5.3B.16

For what is supposed to be a "debtor in possession" procedure of less complexity than Part 5.3A voluntary administration, the potential liability and exposure of the restructuring practitioner under Reg 5.3B.16 appears unreasonable. What constitutes "reasonable" inquiries and steps on the part of the restructuring practitioner and what is to be expected (as a minimum) of the restructuring practitioner is too open to argument and interpretation, particularly when the procedure contemplates the company's board agreeing to fix the remuneration of the practitioner on or before his/her appointment.

Remuneration of the restructuring practitioner

In my view, there is a real tension between the "up front" fixed fee remuneration contemplated by ss 60-1B and 60-1C of the Rules and the potential variables of the restructuring period that may increase the unanticipated work required of the restructuring practitioner, including but not limited to:

- Receiving and dealing with creditors' notices of dispute of the company's assessment of their debts set out in the schedule of debts and claims included with the company's restructuring proposal statement (Reg 5.3B.20);
- Dealing with any necessary variation of the schedule of debts and claims (Reg 5.3B.20(5));
- Dealing with any changes of creditors' votes as a result of variations (Reg 5.3B.21);
- Receiving and assessing requests for consent to transactions or dealings outside the ordinary course of the company's business (s 453L).

In short, the complexity, intricacies and contingencies that are part and parcel of the new Part 5.3B restructuring procedure mean that a reputable, professional and ethical restructuring practitioner is likely to request a level of remuneration that could render the procedure equally expensive as a Part 5.3A voluntary administration. Conversely, there is a concern that a practitioner who agrees to a "low"

quantum of remuneration will not be prepared to spend the necessary time to fulfil the role in a manner that ensures the procedure's integrity and confidence of creditors.

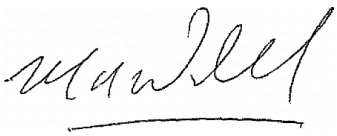
Simplified Liquidation Procedure: Unfair preferences

In my view, deeming preferential payments below a certain threshold amount to be irrecoverable is undesirable: it simply adds a further arbitrary complexion to the unfair preference laws which are already beset with undue complexity and the random availability of defences to creditors. I repeat my previous submission of 12 October 2020 advocating the *automatic avoidance* of all preferential payments within, say, 60 days prior to the commencement of a simplified liquidation. Automatic avoidance of preferences would entail the abolition of the existing s 588G(2) "no reasonable grounds for suspecting insolvency" defence.

At the very least, preferential payments to *related party creditors* – within a certain period prior to the liquidation – could be deemed void and/or automatically repayable instead of remaining subject to the present s 588FA and the s 588FG defences.

I am more than happy to speak to any of the above points (or my submission generally) and can be contacted by email or via UTS Law.

Yours faithfully,



Mark Wellard