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Financial Systems Division
The Treasury
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PARKES ACT 2600 AUSTRALIA

By email only: insolvency@treasury.gov.au

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Dear Sir or Madam

Insolvency law consultation – *ipso facto* clauses

I am writing in response to the Treasury's consultation paper 'Improving Bankruptcy and Insolvency Laws', part of the National Innovation and Science Agenda. I offer the following brief observations in response to part 3 of the consultation, and suggest that legislation in this area should expressly preserve any existing common law protections.

Background

While they are plainly not the subject of any general prohibition, the position of *ipso facto* clauses at common law is not entirely settled. English law recognises a number of judge-made restrictions upon such clauses, including what has been called the anti-deprivation principle (**ADP**).

The ADP was most recently considered by the UK Supreme Court in *Belmont Park Investments v BNY Corporate Trustee Services Ltd* [2012] 2 AC 383, [2011] UKSC 38. It invalidates certain attempts to vary vested entitlements upon an insolvency event, and this has been held to include the entry of a company into administration: *Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch). The ADP, in one form or another, is of long standing, and traces its roots to bankruptcy decisions from at least as early as the eighteenth century.

The ADP in England is subject to exceptions and qualifications. It does not, for example, invalidate a provision for the forfeiture of a lease: *Roe d Hunter v Galliers* (1787) 2 TR 132, 100 ER 72. It has more recently been suggested that it does not prevent the termination of an open interest-rate swap upon one party's insolvency: *Lomas v JFB Firth Rixson Inc* [2011] 2 BCLC 120, [2010] EWHC 3372 (Briggs J); affirmed [2012] EWCA 419. Clearly it is no substitute for a robust ban on *ipso facto* clauses such as is being proposed.

The precise scope of the ADP in English law is a matter of dispute. The extent of its duplication in Australian law is equally unclear. This is not the proper place to propose some solution or other in these debates.

Recommendation

Any legislation in this area should expressly preserve any underlying common law rules that would invalidate an arrangement of the kind under consideration. This would foreclose the argument that these underlying common law rules had been abolished or supplanted by statutory intervention. This would be desirable because there may well be cases that would engage the common law rules, but escape the precise language of any proposed statutory rule, even if that rule were supplemented by an appropriate anti-avoidance provision such as is suggested in the proposals paper. This would avoid the unfortunate situation where legislation intended to favour and facilitate rescue and restructuring could have the unintended effect of repealing or supplanting long standing common law protections in this area, protections that persist for the benefit of a distressed debtor's creditors and, in this way, serve the public interest.

Yours faithfully



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