

Private and Confidential

The Manager, Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: insolvency@treasury.gov.au

27 May 2016

Dear Sir / Madam,

**Viva Energy Australia Pty Ltd – Submission in response to National Innovation & Science
Agenda Proposals Paper *Improving bankruptcy and insolvency laws***

1. Introduction

- 1.1. Thank you for the opportunity to make a submission in response to the Australian Government's *Improving bankruptcy and insolvency laws* Proposals Paper (**Paper**).
- 1.2. Viva Energy makes a submission in response to one of the proposed reforms in the Paper, as follows:

Making 'ipso facto' clauses, which have the purpose of allowing contracts to be terminated solely due to an insolvency event, unenforceable if a company is undertaking a restructure.

2. Viva Energy

- 2.1. The Viva Energy Group of companies (**Viva Energy**) conducts downstream petroleum refining, distribution and marketing in Australia. Viva Energy manufactures and supplies a range of products including Shell branded fuels, oils, lubricants, greases, bitumen and chemicals.
- 2.2. Viva Energy's products are supplied to and used by a broad range of Australian businesses including companies in the transport, mining and resources sectors. Fuels manufactured by the Viva Energy Group are also sold to consumers via Viva Energy's Shell branded retail sites, which are, in the main, operated by Coles Express under a retail alliance.
- 2.3. Until 13 August 2014, Viva Energy was owned by Royal Dutch Shell plc and its operations comprised the Shell Australia Downstream business.

- 2.4. Viva Energy owns or leases approximately 729 retail sites in Australia. In addition to its retail network, Viva Energy owns and/or operates more than 20 fuel import and storage terminals in Australia.
- 2.5. Viva Energy conducts a petroleum refining business from premises in Geelong, Victoria, which produces a range of petroleum products. The refinery supplies about 55% of Victoria's fuel and uses crude oil and other feedstock to manufacture a range of products including gasoline, diesel fuel, jet fuel, bitumen, liquid petroleum gas, specialty solvents and aviation fuel.
- 2.6. Viva Energy supplies its fuel products to in excess of 3,000 small, medium and large commercial customers accounting for around 25% market share.

3. Use of *ipso facto* clauses

- 3.1. Viva Energy's supply contracts with customers typically include *ipso facto* clauses, which enable Viva Energy to terminate the contract on the basis of a defined 'insolvency event' such as appointment by the customer of an administrator.
- 3.2. Viva Energy conducts significant levels of trade credit with customers on an unsecured basis. Viva Energy's ability to do so is assisted by *ipso facto* clauses which enable Viva Energy to mitigate its risk by controlling the circumstances in which it can terminate supply when a customer becomes insolvent or faces a material change in circumstances.
- 3.3. Viva Energy understands the importance to businesses of reliable fuel supply and currently extends unsecured credit lines to work with customers to encourage and promote their business growth. However, in order to work with its customers in this way, it is important to Viva Energy that it retain control over its ability to terminate supply in insolvency situations.

4. Viva Energy's Submission

- 4.1. Viva Energy makes the following submissions in response to the Paper.
- 4.2. The rights of a company which is insolvent and considering or attempting a corporate restructure should not take precedence over the rights of counterparties, who have no control or influence over the company's solvency and financial decision-making.
- 4.3. Any moratorium on the enforceability of *ipso facto* clauses should therefore ensure that contracting parties that are compelled to continue to supply to insolvent companies are adequately protected.

Adverse impact on market

- 4.4. Viva Energy submits that there is a risk that the proposed moratorium on *ipso facto* clauses will have an adverse effect on the business landscape in the following ways:

- 4.4.1.1. With no ability to terminate contracts on a customer's insolvency, suppliers will likely move towards secured trade or suppliers will elect not to take the risk of entering into agreements with customers that are considered higher risk based on their financial position.
- 4.4.2. A change could occur in the market which would be potentially adverse to small businesses in particular, as they would be required to furnish security for supply such as cash or a bank guarantee. This would in turn tie up their working capital, and be detrimental to their growth and economic growth generally.
- 4.5. Suppliers may be reluctant to enter into contracts at all, and instead adopt general terms and conditions of trade. This may result in higher pricing for the customer, as volumes are not contracted, and once again, this would be particularly detrimental to smaller businesses.
- 4.6. Where there would be no right to terminate, and no security, suppliers may trade on shorter terms. This would once again impact the market, as smaller customers already suffer as a result of larger customers paying them on longer terms, whilst these smaller companies would at the same time be required to pay their suppliers on shorter terms.

Nature of the insolvency

- 4.7. Any changes would need to take into account the differing impacts depending on the form of insolvency.
- 4.8. Where a company is in administration, a moratorium on the enforceability of *ipso facto* clauses is less of a concern as opposed to where a company is subject to other insolvency arrangements. This is due to section 443A of the *Corporations Act*, which provides that an administrator is personally liable for debts incurred by a company under administration. Section 443A gives protection to parties who continue to supply goods and services to a company after appointment of an administrator.
- 4.9. If the moratorium on *ipso facto* clauses is to also apply in insolvency arrangements other than administration, protections should be put in place which are comparable with section 443A to ensure that contracting parties are not disadvantaged by their inability to rely on the clauses.
- 4.10. For example, receiverships are generally not directed at a corporate restructure to ensure the company's solvency at some future date and ability to keep trading. Rather, they allow a secured creditor to realise assets that satisfies its debt and the receiver then hands the company back to its directors.
- 4.11. If a supplier has no ability to terminate contracts on insolvency, it will be locked into the same contract with the same directors who have already led the company into insolvency once already.
- 4.12. The moratorium on *ipso facto* clauses should therefore not apply to receiverships. Alternatively, protections similar to section 443A should be put in place to ensure that the counterparty is protected in respect of future supplies.
- 4.13. In a deed of company arrangement situation, the prohibition will have the effect that the supplier will be prohibited from terminating a contract and may also compromise a debt as part of the arrangement. Following the deed of company arrangement, although the company will technically be solvent, it may continue to be a credit risk. In these circumstances, as is the case

with receiverships, the supplier would have to continue supplying the restructured company on an unsecured basis despite the same directors continuing to operate the company.

- 4.14. Also, the company may be considered a credit risk which, had that risk existed at the time of contracting, may have resulted in the supplier deciding not to enter into the contract at all. This impacts on the supplier's freedom to choose its customers based on an assessment of the customer's financial position and credit risk at any stage of the relationship.
- 4.15. Consideration should also be given to protections for suppliers during the 'safe harbour' periods proposed in the Paper to ensure that the rights of continuing suppliers are not superseded by the rights of insolvent companies attempting a restructure.

Post-insolvency practice

- 4.16. Viva Energy submits that the proposal is not necessary as in practice, even after terminating a contract on the grounds of an insolvency event, Viva Energy will continue to work with a company's administrator or receiver to ensure security of fuel supplies. This is due to the section 443A of the *Corporations Act* providing comfort that the administrator will be liable for payment following their appointment.
- 4.17. At the point of termination for insolvency, suppliers will likely be in the position of an unsecured creditor in respect of unpaid supplies which could be substantial amounts. Continuation of supply enables the supplier to continue to generate sales and margins to partially offset what has been potentially lost through the insolvency. This also gives the administrator or receiver the opportunity to explore a restructuring of the business while ensuring security of fuel supply.

If you require any further information, please do not hesitate to contact me.

Yours faithfully



César Piotti
Senior Legal Counsel
Viva Energy Australia Pty Ltd