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James Mason

Manager

Corporations and Schemes Unit

Financial Systems Division

The Treasury

Langton Crescent

Parkes ACT 2600

Email to: insolvency@treasury.gov.au

Dear Mr Mason,

### **National Innovation and Science Agenda – improving corporate insolvency law – submission on exposure draft**

I am a Chartered Accountant and former registered liquidator, with more than 20 years’ experience in financial and professional services at Nab, ANZ Bank, and Ernst & Young.

In my current role I lead complex loan workouts across the Institutional and Corporate platforms at Nab, and I am an ARITA Vic./Tas. board member.

I very much appreciate the opportunity to provide feedback on the *National Innovation and Science Agenda – improving corporate insolvency laws* Exposure Draft, which for clarity represent my personal views and are not made on behalf of either Nab or ARITA.

*Safe Harbour - Insolvent Trading*

I strongly support the proposed framework as a practical and sensible framework.

*The Ipso facto model*

I believe that there are a number of issues with the proposed framework. If left unaddressed the ipso facto proposals will have minimal impact and will represent a significant missed opportunity.

Detailed comments are attached as attachment 1.

Please feel free to call me on 0404 885 062 if that would be of assistance.

Yours sincerely,

Geoff Green

| ***Issue*** | ***Problem arising*** | ***Suggested solution*** |
| --- | --- | --- |
| **Limited operation**The ipso facto stay will only apply to clauses triggered by the appointment of a voluntary administrator or the initiation of a scheme of arrangement. | Clauses triggered by a state of insolvency will be unaffected, and so the proposed regime will be largely ineffective | The stay should apply to any ipso facto clause whether triggered by a form of insolvency administration, or insolvency or potential insolvency, or court-ordered receivership (which may occur even where there is no insolvency). |
| **Effect only temporary**The stay will end when the administration or scheme of arrangement ends | The past event will provide the other party to the contract with a free option to terminate the contract at will. That will make it harder to raise finance, secure equity or sell a business. | Either;1. the stay should be permanent
2. introduce a provision that the clause can no longer be relied upon if the trigger event has been cured by a restructuring
 |
| **No ipso facto stay for other forms of insolvency** The proposals do not extend the ipso facto stay to receiverships or liquidation | An ipso facto stay has the potential to increase the chances of a business continuing to operate as a whole – thereby improving the opportunity of ongoing employment, and improving the return for all creditors. Outcomes that varied on circumstances outside an employee’s control (for example) would be unfortunate and appear arbitrary. | The focus should be on ensuring a business continues to trade wherever possible to maximise the prospects of ongoing employment, and maximise the return to all creditors. The stay should extend to all forms of insolvency appointment, and to Court ordered receiverships  |
| **Will apply to appointments *of* receiver**It appears that it is intended that the stay will also limit a lender’s ability to appoint a receiver  | Secured creditors will be at risk of their security being diminished because of the combination of:1. the consequences of the [Bluenergy](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/977.html) decision; and
2. the current requirement that they can only make an appointment in the “decision period”

It is possible that secured lenders will seek to avoid that impact by:* declining to waive events of default – to ensure that that they have the option to appoint a receiver in the event that the directors appoint a VA – which will be de-stabilising, and may in fact trigger insolvency on the borrower’s’ part; and/or
* appointing receivers at an *earlier* stage - to avoid the risk that directors might “beat them to” an appointment.
 | In any event the section 441A decision period should commence from the time that a secured lender has *capacity* to make an appointment.The ipso facto stay should restrict a secured lender’s capacity to appoint a receiver.  |
| **Ipso facto commencement**It is proposed that the stay will apply only to contracts entered into after 1 January 2018 | The ipso facto stay will therefore operate fully for businesses that start up after 1 January 2018, but for existing businesses there may be a very gradual transition.Counterparties will seek to vary rather than replace contracts, slowing the transition further. | Retrospectivity is only an issue where there are negative consequences – there is no suggestion that safe harbour should only apply to directors appointed after 1 January 2018!If the stay is adjusted to exclude a secured lender’s right to appoint, then there is no loss of rights and no reason to avoid retrospectivity.  |