



INSTITUTE OF
**PUBLIC
ACCOUNTANTS®**

**Submission to The
Treasury:
Exposure Draft:
Corporations
Amendment
(Corporate
Insolvency
Reforms) Bill 2020**

October 2020

12 October 2020

The Manager
Business Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: matthew.bowd@treasury.gov.au and MCDInsolvency@treasury.gov.au

Dear Sir/ Madam

Exposure draft: Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

The Institute of Public Accountants (IPA) commends the Government on introducing these overdue reforms to the insolvency laws of Australia and specially to support small business through the difficult economic conditions imposed by COVID-19. We welcome the opportunity to offer our views on the exposure draft for the insolvency reforms.

In preparing this submission, we have undertaken consultation with members who are Registered Liquidators, certified turnaround specialists and members who do not currently practice in these sectors. We have received a range of views on the proposed legislation. There is considerable concern that the detail has been left to the Regulations, which are not presently available for consultation.

The IPA is one of the three professional accounting bodies in Australia, representing over 40,000 accountants, business advisers, academics and students throughout Australia and internationally. Three-quarters of the IPA's members work in or are advisers to small business and SMEs.

We have had the benefit of consulting with the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and support their views and the recommendations made in the ASBFEO's Insolvency Inquiry report released in July 2020.

Our main points are:

1. A small business viability review should be introduced as the first stage in the process.
2. Small Business Restructuring Practitioners (SBRP) should be appropriately qualified and regulated.
3. Government should commit to an early review of the reforms to ensure they are working as intended.

Small business viability review

Adding to our support for the ASBFEO's proposal for a small business viability review, we have found widespread member support for this as a first stage in the process, prior to the commencement of any formal restructuring process. We also support the complementary proposal put forward by the ASBFEO and others that this viability review could be undertaken with Government funding through a targeted grant specifically tied to obtaining professional advice from a suitably qualified practitioner. It has been widely documented that all too often, small business owners will not seek help until it is too late or almost too late. In order to prevent small business insolvency (whether as a

result of COVID-19 or generally) we believe that it is critical to address some of the underlying issues. If small business owners can be encouraged to seek assistance before it becomes too late, then the policy objective of preventing small business insolvencies (or saving small businesses to grow into the future) can be further supported and in fact, strengthened.

We have also been advised that many small businesses will not want to be associated with the stigma of insolvency and may stay away from a formal pre-insolvency process. This is another reason to support a business viability review which takes a different, non-threatening and supportive perspective and may be more appealing to small business owners. Likewise, putting a restructuring plan to creditors may be off-putting for small business owners. On the other hand, a business viability review by a qualified accountant, may have a higher probability of achieving the desired policy outcome of preventing small business insolvency.

Small Business Restructuring Practitioners

To deal with the anticipated wave of small businesses facing solvency problems when pandemic recovery protections are removed, it may be necessary to broaden the category of professionals that could readily qualify as a SBRP. This would include experienced and appropriately qualified practitioners that can diligently and expeditiously undertake an initial viability assessment in the first instance, followed by the preparation of a reconstruction plan if required. To ensure continuity and to expedite the process this could be the same person (but not necessarily).

We note and support the recommendations of the ASBFEO, that the trusted existing adviser of the business could fit that role. Indeed, a range of experienced practitioners could also potentially qualify for undertaking the SBRP role, and where necessary undertake further professional development to achieve the required levels of skills and knowledge to attain competency (see below). We also support the recommendations of the ASBFEO in respect of the attributes required to qualify as an SBRP professional:

- Be a member of an appropriate professional association, with a code of ethics (which is enforceable against members)
- Hold a public practice certificate and hold appropriate professional indemnity (and any other required) insurance
- Be appropriately skilled and competent to perform the task
- Meet the 'fit and proper person' test on an ongoing basis.

To pre-empt the Regulations, we submit that the educational requirements needed to meet the level of knowledge and skills to undertake an SBRP role, eligible practitioners could complete, as a minimum, two intensive CPD programs such as those being considered by the IPA's education partner, Deakin University:

- Business Review and Viability Assessment: 2-Day Intensive Workshop: Online materials and webinar series, micro credential educational design. Case studies and solutions provided.
- Understanding and Preparing a Restructuring Plan: 4-Day Intensive Workshop: Online materials and webinar series, micro credential educational design. Case studies and solutions provided.

However, we have received considerable feedback from members who are experienced Registered Liquidators and specialized and accredited turnaround and reconstruction practitioners who have

expressed concern that knowledge and expertise in insolvency is required if the SBRP function is to be performed adequately. For this reason, we believe it will be critical to the success of the reforms to closely align the role and functions of the SBRP to the requirements to qualify to be a SBRP.

If the optimal balance between a suitably qualified SBRP and having an effective and efficient process is not reached, then the reforms may be undermined.

For instance, the turnaround process is more than debt restructuring and cashflow reports, which appears to be the focus of the exposure draft. For SBRPs who do not have lengthy experience in insolvency, it may be that appropriate training is required though how much of the process can be 'templated' or reduced to a reliable checklist approach is arguable. Further, experienced insolvency practitioners have referred to requirements such as dealing with creditors, some of whom may be disgruntled.

More specifically, the draft legislation strongly leans on the Voluntary Administration process and Part X Debt Agreements – it may be fair to say that only Registered Liquidators and/or Registered Trustees have the necessary familiarisation and working knowledge of these to ensure the correct administration of the new simplified process. Further, the interactions of these new insolvency regimes with the existing laws concerning the *Personal Property Securities Act 2009* (PPSA) and Secured Creditor appointments (via a Receivership) also need to be considered.

Further, creditors are going to rely upon the skills of the SBRP in putting together the proposal against a backdrop of the potential outcomes generated via a Voluntary Administration or Liquidation under the existing framework. This is also likely to require specialist knowledge.

It is proposed that in the event that a transaction outside of the ordinary course of business is to occur, that the SBRP is required to give their consent. In such a circumstance where that consent is given then that transaction is not able to be set aside in the event the company goes into liquidation. Care and knowledge will be needed to ensure that the implications of this in a liquidation do not lead to inadvertently depriving creditors of potential assets.

Given all of the above, it will be critical to strike the balance between achieving a workable, simplified process and suitably qualified practitioners. The regulations will play an important part in the success of the reforms.

In the meantime, and in the longer term, we understand that even though there is a small pool of Registered Liquidators, there is sufficient capacity and willingness to undertake the SPRP role. In addition, there is already an existing pool of specialist and experienced turnaround and reconstruction practitioners. However, how the existing market responds will also depend on whether any restrictions are placed on the commercial viability of this work through prescribed fee structures.

With respect to fee structures, we consider it is important not to create an environment where it becomes a 'race to the bottom' where fees can be undercut. This has happened in the market for SMSF auditors where over a number of years the average fees have gradually and significantly reduced to the point where the ATO has imposed greater scrutiny on the quality of SMSF audits that are being undertaken.

Another issue is that regulator needs to be adequately funded to carry out this activity. We are concerned that ASIC is inadequately funded to perform its current functions (a point we have made

repeatedly over many years) and that it may be under-funded to adequately regulate this new class of practitioner.

Commitment to review

Given the importance of the reforms, the potential for unintended consequences and the fact that they have been rushed into legislation and regulation, we strongly believe that the Government should commit to a full review of the operation of the reforms shortly after 12 months from commencement. It is critical to the survival of many small businesses that these reforms operate as intended.

Members who have decades of experience in the insolvency sector have advised that within the first six months of the reforms operating, issues such as those mentioned above (eg impact on creditors and intersection with PPSA), may emerge and will need to be addressed. Another unintended consequence is that SBRPs become, in some cases, akin to a 'shadow director' as small business owners may become reliant on them to make key business decisions that are outside the scope of the engagement.

We also believe that the current environment needs to be considered in that the Government has recently announced changes to the Credit Act and a relaxation of the Responsible Lending Laws, which reverse the responsibility from 'lender beware' to 'borrower beware'. We understand that second and third tier lenders may occupy the market of lending to distressed small businesses on sub-optimal terms. The likely increase in lending and debt could lead vulnerable businesses into insolvency. This further supports the need to ensure that small business owners can access competent and trustworthy advice at an early enough juncture. It is also necessary to ensure that the pre-insolvency market operates as intended and that it does not attract unscrupulous practices. It needs to be and remain fit for purpose.

If you have any queries or require further information, please don't hesitate to contact Vicki Stylianou, Group Executive, Advocacy & Policy, either at vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733.

Yours sincerely



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