HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS

REVIEW OF THE FOUR MAJOR BANKS (SECOND REPORT)

Westpac

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Mr CRAIG KELLY: Could you then maybe reflect on Australian insolvency laws. The US has a chapter 11 provision, and we have different provisions. Do you have any thoughts on that?

Mr Hartzer: I would have to say, believe it or not, that is not something I have a lot of expertise in. I would be happy to come back on notice if it is an area of particular interest; or maybe if there is somewhere you would like to go, I might be able to help you.

Mr CRAIG KELLY: Do you find that the provisions in the US allow greater recoveries for the banks? Do you believe our provisions should be looked at and reviewed? Maybe they are a few questions you could take on notice.

Mr Hartzer: I would be happy to take them on notice. Do you have an opinion, David?

Answer: Westpac considers that Australia currently has a strong insolvency regime. This regime was further strengthened by the Insolvency Law Reform Act 2016 which made a significant number of changes to the Corporations Act, the Bankruptcy Act and consequential changes to other laws, including:

- Reforming how liquidators are registered and regulated, and amending the recovery process for creditors by streamlining the Bankruptcy Act and Corporations Act (corporate and personal insolvency regimes).
- Substantially changing the way the profession is regulated, increasing the rights of creditors, raising the authority of ARITA (Australian Restructuring Insolvency & Turnaround Association), and extending the education requirements of practitioners.
- Introducing new 'special resolutions' enabling creditors to remove a poorly performing liquidator without court approval.

The objectives of the Act are to:

- Remove unnecessary costs and increase efficiency in insolvency administrations;
- Enhance communication and transparency between stakeholders; and
- Boost confidence in the professionalism and competence of insolvency practitioners.

To seek to further improve preservation of value in insolvency situations, on 28 March 2017, the Government released draft legislation on the following matters:

- 'Safe harbour' protections for legitimate restructuring efforts by firms in financial difficulty - that is, where directors and advisers are making a genuine effort to improve the position for creditors; and
- 'Ipso facto clauses' being suspended for a short period (perhaps up to 90 days) during restructuring efforts aimed at preserving value in the underlying business.

Westpac is currently considering this draft legislation.

In our limited experience, the Chapter 11 insolvency regime that operates in the US has a number of issues including:

- It is a court driven process and typically slower and more expensive that the Australian regime. An administrator in Australia can make many decisions without the need for Court approval, whereas under Chapter 11 such decisions would need to be tabled in court (after being copied to every creditor who then has an opportunity to appear at the hearing and make representations) and approved by a bankruptcy court judge.
- Chapter 11 leaves existing management in control of the company and responsible for coming up with a restructuring plan. This is the team that is likely to have been responsible for leading the company into insolvency in the first place. Westpac can see why this policy could be considered limited in its approach and that there may be policy rationale for suitable alternatives.
- Chapter 11 does not expose the management and directors to external scrutiny. The Australian approach installs a "fresh set of eyes" to oversee the company, including preparing a report for ASIC on any contraventions of the Corporations Law by the previous management and directors.