GPO Box 2985
Melbourne VIC 3001
Rialto South Tower
Level 31, 525 Collins Street
Melbourne VIC 3000
+61 3 8623 3333
info@kordamentha.com

KordaMentha

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

30 November 2022

Dear Committee Secretary

Inquiry into Corporate Insolvency in Australia

Thank you for the opportunity to provide a submission in relation to the Parliamentary Joint Committee inquiry into Corporate Insolvency in Australia. This submission supports the submission of the Australian Restructuring Insolvency and Turnaround Association ('ARITA'). We have not repeated ARITA's submission in its entirety but would like to highlight a number of matters which are of particular interest to us. KordaMentha's submission is made in the context of our experience, ranging from the SME market to large, complex corporate insolvencies.

As a general comment, we see this inquiry as an opportunity to push for quick, meaningful fixes of parts of our insolvency system that are broken. Insolvency practitioners have been calling for fixes to some of these issues for many years and have largely been ignored. These fixes will inevitably result in cost savings to the benefit of creditors of an insolvent company, as many of these changes will remove the necessity of costly court applications.

The industry has also been calling for a holistic review of Australia's corporate (and personal) insolvency regimes for some time. We are seeing international insolvency regimes being reviewed and amended to remain relevant to the economies they are operating in. Other regimes are also looking at and responding to the difficulties of having a single insolvency law framework that applies to all sizes and types of companies. A holistic review is not something that can or should occur in a compressed timeframe - the Harmer Review of the 1980s occurred over a five-year period with the Harmer Report being tabled in 1988.

Many of the principles and objectives of insolvency law outlined in the Harmer Report are still very relevant, however it is questionable whether the laws we have today are efficiently achieving these. Australia's businesses and the economy have changed markedly over the past 30 years. Australia needs an efficient and effective insolvency regime. Some parts of our regime, like voluntary administrations, are in a general sense, excellent, flexible tools for dealing with corporate failures. However, there are many provisions of our existing laws that are not efficient or effective. Over 30 years of case law has also changed the practical operation of our laws. We also find ourselves with inconsistent policy provisions by various parts of government (at a Federal level and as between Federal and State levels).

Some level of corporate failure is inevitable. However, Australia's insolvency laws must remain fit for purpose in the years to come. It is time for a comprehensive review of our existing regime which now includes piecemeal legislation that have been introduced, sometimes hastily, at various points in time over the past 30 years, as well as the outcome of case law on that legislation, to ensure it is consistent with societal expectations about how corporations should be managed when they are faced with financial difficulties.

Terms of Reference Point 1: Recent and emerging trends in the use of corporate insolvency and related practices in Australia

It is an undisputed fact that corporate insolvency appointments plummeted during the two-year period Australia experienced COVID-19 lockdowns. Initially, this reduction in formal appointments was considered to be a result of the temporary insolvency measures introduced around statutory demands and insolvent trading protections for directors. However, once these protections were removed, we did not see the increase in formal appointments that was expected. Ultimately, the temporary insolvency law amendments occurred alongside massive public capital stimulus, rent abatements and financier and ATO forbearance, so it is difficult to determine the extent to which each of these measures individually impacted director behaviour.

Time will tell whether these temporary amendments and other policy measures allowed companies to truly survive or whether it was an opportunity for directors to 'kick the can down the road' and ignore their directors' duties, with the ultimate outcome being a whole lot of insolvent companies with no realisable assets left for creditors.

By the time a holistic review is commissioned and undertaken, there may be more data to inform the question of whether there was a correlation between the removal of the 'stick' (being the insolvent trading prohibition), the anecdotal drop off in directors seeking advice and the reduction in formal appointment numbers.

Terms of Reference Point 2: The operation of the existing legislation, common law and regulatory arrangements

Complexity

Australia's corporate insolvency processes are contained in and must be navigated by the profession in:

- Chapter 5 of the Corporations Act
- Schedule 2 – Insolvency Practice Schedule (Corporations) ('IPS')
- the Corporations Regulations; and
- Insolvency Practice Rules (Corporations) 2016 ('IPR')

The introduction of the IPS and the IPR in the Insolvency Law Reform Act added complexity and in many instances inefficiencies to our regime. It is hard to argue that simplification of the law is not necessary.

Inconsistent policy positions

The Review of the Insolvent Trading Safe Harbour Report ('Safe Harbour Report') published in November 2021 and tabled in Parliament in March 2022 identified a number of inconsistencies and conflicts within our current laws. For transparency, we note that Leanne Chesser of KordaMentha was one of the three panel members who undertook that review.

Rather than directly quoting from the Safe Harbour Report, we direct the Inquiry to Pages 79 and 80 which lists inconsistent policy positions in relation to:

- Section 588FA – unfair preferences
- Section 588FGA – directors to indemnify Commission of Taxation if certain payments set aside

- Director Penalty Notices and resulting personal liability
- Section 596AC – relevant agreements or transactions that avoid employee entitlements.

Displacement of Priorities

Section 556 of the Corporations Act's order of priority of payment of debts or claims is a well-entrenched provision which details the Commonwealth's expectation as to who gets paid in what order.

It is of concern to us that over the past few years, we have seen various State Governments using state-based legislation to displace Chapter 5 of the Corporations Act. The most recent example of this is the *Victorian Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022*. We refer you to Clauses 56 and 57 of that Act which blatantly refer to the *Environment Protection Act 2017* cost recovery powers operating despite anything to the contrary in Chapter 5 of the Corporations Act and declaring that the provisions of Section 297 of the *Environment Protection Act 2017* are Corporations legislation displacement provisions for the purposes of Section 5G of the Corporations Act in relation to the provisions of Chapter 5 of that Act.

As another example, the priority of the Australian Taxation Office ('ATO') was removed almost 30 years ago. However, over the past few decades we have witnessed the ATO attempting to reassert that priority in different ways, particularly in respect of potential Capital Gains Tax liabilities.

These are two further examples of inconsistent policy positions within the Commonwealth and between the Commonwealth and State governments.

Personal Property Securities Act ('PPSA') and Personal Property Securities Register ('PPSR')

This legislation is over 10 years' old, and creditors are either still not aware of it, or still getting registrations wrong. The terminology used in the PPSA is particularly bespoke and not used in the general business world, so it is no wonder creditors have had difficulty in engaging with its provisions.

The purpose of the PPSR was for it to act as a 'noticeboard' of security interests in a particular company so all creditors could understand what assets may have been 'pledged' by a company. Through our formal appointment processes, it is necessary for us to correspond with all PPSR registrants to determine the validity of their security interests in assets of the particular company we have been appointed to. The number of registrations we find to be no longer valid (in many cases because the registrant has just forgotten to remove them) suggests the 'noticeboard' concept is not working to give a 'true picture' of a company's pledged assets.

Considerable time and expense is incurred by external administrators attempting to engage with PPSR registrants, often to no avail. We agree with ARITAs recommendation that the law be changed to allow external administrators to give notice to registrants to verify their claims within a set period, failing which their claims will be treated as unsecured or not at all.

Insolvency Law Reform Act 2016 ('ILRA') problems

The profession has been calling for fixes to errors and anomalies created by provisions enacted by the ILRA in 2016 since 2016. Without listing all of the problems, we highlight the following, all of which are contributing to inefficiencies within the current regime:

- The ability to use 'Proposals without meetings' should be extended to any provision of the Corporations Act, not just the IPS and IPR.
- The Creditors' rights provisions and the need to send Initial Reports, Initial Remuneration Notices and Statutory Reports to creditors in a Members' Voluntary Liquidation, where all creditors will be paid in full, should be removed.

- There should be an automatic 'ordinary course' of trading exemption for Committee of Inspection members. As currently drafted, if an external administrator continues to trade a company and creditors who have been elected to that company's committee of inspection choose to continue trading with the external administrator in the ordinary course of business, then the terms of Section 80-55 of the IPS are breached and the committee of inspection member commits a strict liability offence. We have experience with these provisions disincentivising creditors to participate in external administrations through committee of inspection membership. Presently, to deal with this matter, we have had to resort to asking creditors at creditors' meetings to pass resolutions to protect committee of inspection members from the risk of breaches of the Corporations Act.
- In respect of the Funds Handling provisions in Division 65 of the IPS, we have been involved in numerous costly court applications due to the strict liability attaching to breaches of these provisions. The provisions work in the context of a single company appointment and we agree with the concept that non-related external administration funds should not be intermingled. However, we have experience in large, complex group appointments where the pre-appointment operation of those companies and pre-appointment account arrangements (many of which operate on a 'treasury-style' basis) make it impossible to be able to comply with the provisions on appointment. In many instances, it is impractical or prejudicial to creditors to attempt to amend the companies' pre-appointment conduct just to avoid the strict liability imposed on external administrators for breaches of Division 65. As a result, creditors' money is spent on going to Court to obtain relief. Consideration should be given to an amendment to target (or focus on) both group appointment scenarios and pre appointment account arrangements which are either impractical or prejudicial to a company's creditors to terminate.
- The drafting of Section 75-90 of the IPR causes confusion as to what is required to comply with that section. It states: 'An external administrator must ensure that each creditor's claim or proof of debt in relation to an administration bears evidence of:
  - (a) its admission or rejection; and
  - (b) the reason for its admission or rejection; and
  - (c) the amount for which the claim or proof of debt has been admitted.'

  This wording seems to imply that a physical copy of a proof of debt is needed and that that physical copy must include the above information. It has become less common over the years, and this was only exacerbated during COVID impacted years, that we receive physical copies of proofs of debt. The vast majority of them are sent to us by electronic means. The wording of this section should be amended so that it is made clear that a record must be kept of the necessary information, not that the actual proof of debt must bear the evidence.
- In respect of the 'Duties of external administrators relating to remuneration and benefits (etc)', IPS 60-20(4)(c)(ii) requires the approval of creditors for a related entity to derive a profit or advantage. We routinely require approval for internal disbursements that may have a profit element in them, such as estimates for the storage and destruction of books and records after the end of an external administration. This should be amended to allow for a committee of inspection to approve these as an alternative to creditors in line with other powers granted to committees of inspection to make decisions on behalf of creditors.
- The requirement of IPR 70-40 to provide a report to creditors in certain external administrations within 3 months of appointment is of little value to creditors when a company has transitioned from a voluntary administration or deed of company arrangement to a liquidation as the creditors have recently been provided with extensive reports covering this information in preparation for a meeting to wind up the company either pursuant to section 439A or section 445E. An exemption to complying with this requirement in these circumstances should be added to IPR 70-40.

Reports on Company Activities and Property

In formal appointments, directors of companies are required to complete a Form 507 Report on Company Activities and Property and provide them to the external administrator. This information is meant to help external administrators understand the asset and liability position of a company. Even though a new version of this form was released this year, we are still frustrated by the fact the example tables do not suggest 'totals' of asset categories or amounts owing by the company are required. It is also our experience that directors still do not understand the nature of and how to complete the form, despite the extensive instructions available, with a number of the responses dependant on the interpretation of directors.

We are also frustrated by the fact that all amounts owing by the company (other than employee entitlements) are lumped together. There is no split out of 'secured' creditors such as banks, PPSR creditors such as equipment lease creditors or related party creditors. Even though the example tables provided ask directors to identify security, PPSR applicability and whether or not a creditor is a related party, unless directors provide that information in an excel format that our staff can manipulate, our staff spend considerable time having to manually calculate those totals as we are required to report to ASIC and creditors on secured, unsecured and related party creditors.

Terms of Reference Point 3: Other potential areas for reform

Trusts

The profession has for over 30 years been calling for legislative reform to address the issue of insolvent corporate trustees and insolvent trusts. There is no register of trusts and there is no way for a Registered Liquidator to easily confirm if they are potentially dealing with trust assets, particularly if unhelpful directors or directors who are ignorant to the distinction between corporate trustee assets and trust assets are involved. It is not uncommon for Registered Liquidators to only find out they have been dealing with trust assets many months after being appointed to a corporate trustee. Automatic ejection clauses of corporate trustees on the appointment of an external administrator are also extremely common meaning external administrators are bare trustees of the trust assets and costly court applications are needed to seek relief from actions unintentionally taken or to be appointed as Receivers to trust assets to realise them.

The previous Government consulted on this issue in 2021 and many excellent submissions were made including the submission of ARITA. We refer the inquiry to these submissions and implore the inquiry to recommend legislative reform to address the issues identified. Any amendments to deal with trusts should provide clarity on the reporting requirements of external administrators. For example, are separate reports/lodgements required for the trust, particularly if the corporate trustee is the trustee of more than one insolvent trust or has liabilities of its own?

Safe Harbour

As mentioned above, the Safe Harbour Report was tabled in March 2022 by the previous Government together with its response to the recommendations. The previous Government agreed to implement nine of the fourteen recommendations and noted the other five. Of the five that were noted, the Government stated they would consider three of those recommendations further.

We strongly encourage the inquiry recommend that all fourteen of the Safe Harbour Report recommendations be implemented, including the recommendation that a holistic in-depth review of Australia's insolvency laws be commissioned.

Technology Issues and definition of Essential Services

Consideration of the digital world we now operate in is necessary. The Corporations Act was written at a time when practitioners were dealing with physical books and records and warehouses full of stock and plant and equipment which are easy to take possession of and investigate and realise. This is no longer routinely the case. We now operate with electronic company books and records that are stored in the Cloud and crypto assets that can be incredibly difficult to identify, take possession of and then realise.

Practitioners are frustrated by Cloud providers holding them to ransom for pre appointment amounts owing before they will allow access to a company's books and records. Whilst this is imperative if a practitioner is attempting to trade on a company with the intent of selling it as a going concern and thereby saving jobs and maximising returns to creditors, it is equally important in a non-trading context as books and records are required for investigation and identification of potential assets and pre appointment misconduct of directors.

Section 600F of the Corporations Act places limitations on the right of suppliers of essential services to insist on payment of pre appointment amounts as a condition of supply to companies in external administration. An essential service is defined as electricity, gas, water or a carriage service within the meaning of the *Telecommunications Act 1997*. We believe the right to access electronic company books and records should be included in this section.

We also believe Australia Post, as a Corporate Commonwealth Entity, should not be entitled to insist on the payment of pre-appointment amounts outstanding before agreeing to supply services to companies in external administration. We have a number of examples where Australia Post's position on this matter has frustrated an external administrator's ability to trade a company post appointment with the aim of job preservation and maximisation of returns to creditors. Also of concern to us is Australia Post insisting on immunity from potential preference actions as a condition of post appointment supply. We consider this is akin to Australia Post asking us to breach our duties as external administrators.

Section 556 definition of an excluded employee

Recent case law has exposed the requirement of a director to also be an employee of the company for their spouse or other relatives to be considered an excluded employee for the purposes of section 556. It is our position that the intent of the definition of 'excluded employee' is to limit the payments to employees who are spouses or relatives of directors, whether the director themselves is an employee or not.

Terms of Reference Point 4: Supporting business access to corporate turnaround capabilities to manage financial distress

In our experience, the Voluntary Administration regime is a very powerful and useful tool. It is flexible and versatile and has been used in very large corporate failures in Australia. It is better suited to medium to large companies from a cost perspective, but an improved Small Business Restructuring regime as outlined in ARITA's submission will assist in this regard.

The Safe Harbour Report refers to examples of restructures that have utilised the formal voluntary administration processes to provide better outcomes for stakeholders. It also refers to ways in which the safe harbour regime is being used to restructure companies outside of formal appointments. We again reiterate our recommendation that the Safe Harbour Report recommendations be implemented in their entirety to maximise the chances of directors being comfortable with exploring restructure options rather than moving straight to a formal appointment when they are concerned about insolvency.

Terms of Reference Point 5: The role, remuneration, financial viability, and conduct of corporate insolvency practitioners

Role of insolvency practitioners

Insolvency practitioners undertake a highly specialised role with enormous personal risk. A large percentage of critics of our profession are unaware that when appointed in a formal capacity, Registered Liquidators can become personally liable for a company's actions. There are also specific provisions of the Corporations Act that make, for example, a voluntary administrator or receiver and manager personally liable for goods purchased, services rendered, or property hired, leased, used or occupied. The corporate veil operates to remove this direct personal liability for directors, however, specifically places this liability on insolvency practitioners. Legislative amendments and the outcome of court cases over the past years seem to be resulting in an ever-increasing personal risk to insolvency practitioners where they have no true economic interest in the company.

Critics of our profession also do not understand the extent of unfunded work insolvency practitioners undertake. Despite having obligations under the Corporations Act to perform certain tasks, if there are no assets to realise to pay for that work, insolvency practitioners do not get paid.

Remuneration – maximum default amount under Section 60-5 of the IPS

The maximum default amount (currently set at $5,725 for appointments accepted during the period 1 July 2022 to 30 June 2023) recognises that it can be difficult for an external administrator to get sufficient creditor engagement to approve remuneration and that there is a commercial reality about how much it costs to get creditor approval. We submit that the maximum default amount should be raised because the cost of preparing remuneration reports as required by Section 70-45 of the IPR often far exceeds the amount of remuneration you are asking creditors to approve. We see very little creditor interest or engagement in reading the remuneration reports we are required to provide to them. We agree with ARITA's submission that remuneration reports need to be simplified. The work required to prepare remuneration reports does not add value to creditors. In corporate group appointments, remuneration report information is required for each company. We have had instances of remuneration reports being almost 700 pages long.

Raising the maximum default amount would also assist in the circumstances we find ourselves in with corporate group appointments where there are no third-party creditors to approve our remuneration in some entities – the only creditors being other companies in the corporate group. Our only alternative to taking the maximum default amount (which in most cases will not cover the cost of the external administration) is to make an application to court, which is commercially unviable.

Section 556 and Section 561 of the Corporations Act and a Liquidator's general costs

The legislation governing the priority of employee entitlements in a liquidation is incredibly complicated and subject to interpretation, particularly in the context of a Liquidator's general costs when Section 561 of the Corporations Act applies. We submit, as does ARITA's submission, that the purpose of Section 561 is to protect employees from a secured creditor with security over circulating assets, not to give employees a super priority over the costs of the liquidation and the normal Section 556 priorities. It does not make sense that if there is no secured creditor, a Liquidator's costs (including remuneration) are paid in priority to employees, but the mere existence of a secured creditor on appointment, even with a de minimis claim, somehow displaces that priority such that a Liquidator's general costs are subordinated to employee claims.

Similar provisions to Section 556 and 561 existed in the UK. Legislative amendment occurred there to ensure there is now no uncertainty as to a Liquidator's right to recover costs (including general costs and remuneration) in priority to other preferential debts where general assets are insufficient to cover those amounts.

Terms of Reference Point 6: The role of government agencies in the corporate insolvency system

ASIC and Financial Reporting Relief

We have been frustrated by ASIC's decision-making processes in relation to financial reporting relief deferrals and exemptions. The costly outcome of these decisions has been borne by creditors. We have a number of examples where ASIC's decisions are non-sensical. This may be because ASIC does not have sufficient discretion in its decision making. There is also no mechanism for review by a third party such as the Administrative Appeals Tribunal.

Example 1

- Business was not able to be sold as a going concern and the business was wound down
- The directors proposed a contribution DOCA where a pool of funds was made available for distribution to creditors - all employees and the secured creditor were paid in full and unsecured creditors were ultimately paid a dividend of 13.6 cents in the dollar.
- The company was a wholly owned subsidiary of another entity, which was privately owned. There was no surplus available to the member. The subsidiary and parent entity shared common directors. The company and ultimate parent company were related entities.
- The company was a 'grandfathered' large proprietary company, such that it was required to comply with the financial reporting obligations but did not need to lodge the reports with ASIC
- Financial reports as at 30 June 2018 were outstanding when the external administrators were appointed as voluntary administrators. No financial reports were required for subsequent years as the entity no longer met the definition of a large proprietary company.
- The directors of the company had confirmed in writing it was their intention to deregister the company as soon as the DOCA had been effectuated and had provided the external administrators with a signed Form 6010 deregistration request with an irrevocable consent stating the deregistration request was to be lodged immediately after the DOCA was effectuated. This was outlined to ASIC in the exemption application and copies of the documents signed by the directors were provided.
- As the exemption was not granted, the external administrators did not lodge the Form 6010 on behalf of the directors.
- However, the directors did exactly what they said they would do and lodged a deregistration request with ASIC within 2 business days of the DOCA effectuation.
- Over $50,000 of creditor funds were expended on preparing 2 year old accounts on a company that by that stage had no assets, no employees and no business – and it was in deregistration mode within a week of the DOCA being effectuated.
- The financial reports did not provide any benefit to the sole member who was already fully aware of the financial situation of the company

Example 2

- Unlisted public company required to lodge repeated requests for individual deferral, instead of an exemption, when it was a holding company with no assets.

Example 3

- A group of companies had historically lodged one set of accounts. However, when making the application for financial reporting relief, ASIC required two separate applications as there were two deeds of cross guarantee in place, causing the external administrations to incur additional unnecessary costs, which were borne by the creditors.

Example 4

- When making an application for financial relief, an application needs to be made for each company, even when only one set of accounts incorporates a number of companies. One application involved 22 companies, so at the fee level at the time of $3,487, that was an amount of $76,714 for relief from lodging one set of accounts. This is an excessive amount borne by the creditors.

ASIC as a Regulator and the Industry Funding Model ('IFM')

Registered Liquidators are frustrated by the fact ASIC is quick to fine them for lodging a document one day late, yet when it comes to ASIC providing information such as the draft or final Cost Recovery Implementation Statements, they have routinely been provided months after the original proposed delivery dates.

It is also frustrating that so much misconduct reported by Registered Liquidators to ASIC is not actioned. Particularly as it is the case that often this misconduct is identified where the cost of the investigations to report to ASIC is borne by Registered Liquidators as there are insufficient funds available in the external administrations for the Registered Liquidators' remuneration to be paid.

ARITA has made numerous submissions on the unworkability of the IFM as it applies to Registered Liquidators, most recently to The Treasury in October 2022. We do not intend to repeat all of those issues in our submission but refer the inquiry to ARITA for a fulsome briefing on the matter. We also note that the levies applied to Registered Liquidators are significantly more than those applied to Auditors, who are levied a flat levy significantly less than that of Registered Liquidators and do not have a graduated levy.

It is our view that once companies are placed in External Administration, they should not be charged levies under the IFM. The external administrators are already being charged levies on those appointments; individually charging the companies is a double levy and takes money away from creditors. ASIC has also been unable to provide guidance on which appointee is liable for a company's levy if there are concurrent appointees, such as a Receiver and a Liquidator.

ATO

Many processes that are undertaken by external administrators, in particular the payment process for unsecured dividends under the Corporations Act, require information to be provided by the ATO in a timely manner. If the information is not provided in the strict timeframe required, dividends are unable to be paid and the dividend process has to start all over again. Resourcing of the Insolvency area of the ATO should be reviewed to ensure the ATO can meet its own standard timeframes and to avoid downstream inefficiencies and unnecessary costs being borne by creditors of insolvent companies.

Delays within the ATO have been particularly extreme this year. On a number of matters, we have been waiting in excess of two months for acknowledgement of our appointment as an external administrator. The delay in acknowledgement of appointments means the external administrator is not able to make lodgements and report activity on time. It prevents external administrators from efficiently providing information, such as having to complete hard-copy separation certificates, instead of being able to report the information through Single Touch Payroll. It also means that queries with regard to pre-appointment lodgements, including income tax returns where substantive refunds may be due, are further delayed. This adds to the cost of the administration to the detriment of creditors.

Terms of Reference Point 7: Any related corporate insolvency matters

Necessity of costly Court applications

The need to take matters to Court invariably results in cost that is borne by the creditors of companies or in some instances external administrators personally. The necessity to go to Court should be restricted to highly contentious issues only.

We have already mentioned the cost of going to court in respect of:

- the Funds Handling provisions in Division 65 of the IPS
- remuneration approvals in group appointment scenarios where there are no third-party creditors to approve remuneration; and
- anything to do with trusts where external administrators are appointed to a Corporate trustee.

In addition, in large, complex group appointments, it is almost always a necessity in voluntary administrations to seek an extension to the convening period for the second meetings of creditors as the voluntary administrators are not in a position to provide a meaningful report to creditors in the standard 20 business day timeframe. To reduce the cost of having to go to court in these circumstances, consideration should be given as to whether the convening period should be extended for large, complex groups such that second meetings of creditors can be held at any time during or within 5 business days after the end of a 3-month convening period. A 3-month convening period for the second meetings of creditors could be automatically applicable for listed companies and large proprietary companies as already defined in the Corporations Act.

Consideration should also be given as to how the necessity for court applications to limit the personal liability of voluntary administrators for any money borrowed during the administration can be removed. It is our experience that lenders do not expect us to bear that personal liability and readily accept clauses in agreements that limit it, however, we are still required to get court approval at a cost to the administration.

Access to Government on-line services

As the Government has moved more services to on-line portals, we do not think enough consideration has been given to how external administrators can access those services post appointment. External administrators are officers of a company, however, access is often limited to the principal authority. The principal authority does not include external administrators, despite the definition of 'officer' in the Corporations Act including receivers, administrators, deed administrators and liquidators, along with other roles. This limitation prevents external administrators from performing their roles efficiently and complying with the reporting requirements of government agencies. Examples where we have not been able to access online portals include the R&D Tax Incentive customer portal, the Unique Student Identifier Organisation portal and the Apprenticeships Data Management System.

Directors' duties, education and knowledge

There is a distinct lack of knowledge amongst directors of small companies as to the duties imposed on them by the Corporations Act. Even though they may operate their business through a corporate entity, the fact their personal wealth is so heavily entwined with the financial position of their company through personal guarantees etc they do not recognise the distinction between the two and do not understand they have directors' duties (particularly in the twilight zone of insolvency). Small company directors, in particular, lack an understanding of what can be called 'director fundamentals' including what good governance looks like and financial literacy. With the introduction of the Director Identification Number, we see an opportunity for basic information to be provided to newly appointed directors so they are aware of their obligations.

A holistic review of our insolvency regime should also consider whether there are alternatives to the underlying insolvent trading prohibition for example extending the business judgement rule (or something like it) to our insolvent trading regime or looking at wrongful trading regimes that are used in other jurisdictions.

We also point out that whilst this inquiry is focused on Corporate Insolvency in Australia, the interplay between small/micro corporate insolvencies and director personal liability through personal guarantees means that any holistic review that may be commissioned should also look at Personal Insolvency given the two are inextricably linked.

Yours sincerely

Leanne Chesser
Partner