



12 July 2017

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra
ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Fitt

Inquiry into the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017

Thank you for the opportunity to contribute to the Senate Economics Legislation Committee inquiry into the above Bill.

We support the objectives of the proposals in the Bill and believe that the package of proposals provide appropriate balance between supporting businesses to work through temporary difficulties and protection of rights for those transacting with them.

Safe Harbour

In broad summary, the Bill provides company directors with a defence against insolvent trading if they can demonstrate that they took courses of action reasonably likely to lead to a better outcome for the company.

We believe this is a suitable approach to supporting underlying viability while maintaining appropriate protection for current creditors and employees. Placing the burden of proof on the directors seeking the defence (clause 588GA(3)) also provides some mitigation against misuse and ensures directors are not able to simply avoid their obligations.

In response to previous consultations, we have supported the introduction of a Director Identification Number. This may provide an additional safeguard against misuse of legislation.

Undertake appropriate courses of action

We understand a concern that any defence to insolvent trading may encourage directors to prolong failed businesses to the detriment of current creditors. In the Bill, the mitigation for this concern is the need for action to be properly informed and not involve misconduct (clause 588GA(1)), and importantly, one of the factors for determining the reasonableness of actions is the use of appropriately qualified advisors (clause 588GA(2)(d)).

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We are aware that concerns have been expressed about individuals who purport to offer such advice but do not act in the best interests of the company. The emphasis in the Bill on “appropriately qualified” is therefore important. A member of a professional body such as Chartered Accountants ANZ for example, is:

- required to have met initial educational requirements
- subject to professional ethical codes, which include obligations to act with integrity, objectivity, professional competence and due care, and a responsibility to act in the public interest
- required to assess their competency and skills for the work proposed prior to accepting an engagement
- required to undertake ongoing education to maintain the currency of their knowledge and skills
- required to hold appropriate PI Insurance
- subject to ongoing monitoring of their work
- subject to disciplinary action in the case of any complaint

Advice sought from a chartered accountant with relevant skills, or a professional with similar obligations and requirements, will mitigate concern that the overriding objective of a better outcome for the company is met. If a company is failing and there are not viable options to save the underlying business, an appropriately qualified advisor will identify this. For a member of a professional body this is a clear obligation and there are defined consequences for not complying.

In our submission to the consultation, we recommended development of regulatory material covering what would constitute “appropriate” in this regard. We noted that pertinent factors would be membership of a professional body which requires the member to follow professional codes of ethics and hold PI insurance, and which has an active monitoring and disciplinary process.

Protection of current employees

We are aware that there was a view put forward in a submission to the consultation on the Bill that it was possible that employees and taxpayers may be in a worse position with the proposals. The Bill provides mitigation by not permitting the defence to be utilised unless employee entitlements are paid as they fall due, and taxation laws are complied with (clause 588GA(4)). We believe this addresses any such concern.

Stay on enforcing rights

We support the Bill provisions in relation to staying enforcement rights.

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