



12 November 2010

File: ER2007/00800

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Dennett

CORPORATIONS AMENDMENT (SONS OF GWALIA) BILL 2010

I refer to our letter dated 4 November and to the current inquiry by the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) into the Corporations Amendment (Sons of Gwalia) Bill 2010 (the Bill). Following further analysis and discussion of the issues raised by the Law Council of Australia (LCA) in its supplementary submission to the Committee, Treasury provides further comments on the content of that submission.

In particular, this letter comments on the LCA's proposed amendments to the Bill and whether such amendments detract from the intended policy objectives contained in the Bill.

Section 563A

Item 6 of the LCA supplementary submission suggests that subsection 563A(1) should be amended to include the additional underlined text below:

"The payment of a subordinate claim made against a company is to be postponed until all other debts or claims made admissible to proof against the company under section 533 are satisfied."

Item 7 of the LCA supplementary submission also suggests that paragraph 563A(2)(b) may be read as referring to non-provable claims in relation to shareholders rights to a return of capital. The LCA suggests that, for clarity, reference to the admissibility of claims might be also added into paragraph 563A(b)(2).

Treasury notes that the suggested amendments provide that the claims referred to are only those that are admissible to proof and that such amendments would maintain the intended policy underlying clause 2 in the Bill. In view of this, Treasury does not oppose these LCA proposed amendments.

Debts owed by and claims made against a company

The LCA additionally suggests that the inclusion of "debts owed by" in addition to "claims" in subsection 563A(1)(at item 5 of the LCA supplementary submission). The LCA has submitted that doing so would ensure the consistent use of terminology in the Corporations Act.

Treasury notes that these amendments would address the LCA's concerns and that it would not undermine the intended policy underlying clause 2 in the Bill.

"A person"

As noted in item 8 of the LCA supplementary submission, there is a possible ambiguity due to the inclusion of the text "a person" in paragraph 563A(2)(b).

As noted in our letter dated 4 November, it is Treasury's view that any possible ambiguity could be addressed by the removal of the offending words "a person" from paragraph 563A(2)(b), as suggested by the LCA. Treasury does not oppose this LCA proposed amendment.

Priority of Interest

Items 10 to 14 of the LCA supplementary submission refer to the interaction of:

- the provisions that provide that post commencement interest on non-subordinated debts are paid after payment in full of those debts; and
- the proposed new section 563A.

The LCA supplementary submission does highlight a possible issue regarding whether the current cross referencing in section 563B will be read as referring to all subordinated claims (as intended) in subsection 563A(2) or only to paragraph 563A(2)(a) claims.

To address the LCA's concern, section 563B could be amended to clarify that interest on non-subordinated claims will rank above all subordinated claims under the proposed section 563A. Treasury does not oppose these LCA proposed amendments.

Schemes of Arrangement

The LCA raises concerns that an "external administration" will not include the process for establishing a Scheme. The LCA also raises concerns regarding the effect on subordinated creditors when participating in schemes of arrangement.

As noted in items 15 to 17, "external administration" is not currently defined, either for the purpose of section 600H specifically or the *Corporations Act 2001* generally.

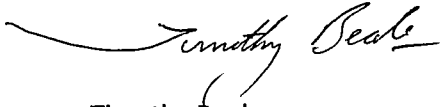
Treasury notes that a definition of external administration could be inserted into section 600H to address the LCA's concerns. If appropriate, the definition could be accompanied by explicit references to processes to which the provision is intended to apply. This would address the LCA's concerns and still give effect to the underlying policy behind the Bill.

Treasury has had discussions with the LCA regarding their concerns that the Bill as drafted would result in subordinated creditors with no entitlement to vote not being bound by a scheme of arrangement.

It is Treasury's understanding that the LCA's concerns may be addressed by amendments that would have the effect of providing that a Part 5.1 compromise or arrangement would be binding on creditors with subordinated claims who had not been given leave to vote, despite the fact that a meeting of that class of creditors had not been ordered by the Court under section 411(1). Treasury does not oppose these LCA proposed amendments.

Should you have any queries about Treasury's further comments, please do not hesitate to contact me on (02) 62632870 or via the following email address: tim.beale@treasury.gov.au.

Yours sincerely

A handwritten signature in black ink, reading "Timothy Beale". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Timothy Beale
Manager
Governance and Insolvency Unit
Corporations & Financial Services Division