CLAYTON UTZ

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 - Further submission to the Senate Economics Legislation Committee from Clayton Utz

12 July 2017

Level 15
1 Bligh Street
Sydney NSW 2000
DX 370 Sydney

T +61 2 9353 4000 F +61 2 8220 6700
www.claytonutz.com

CLAYTON UTZ

Submission from Clayton Utz

Introduction

This submission is prepared by Clayton Utz in response to the referral on 15 June 2017, of the provisions of the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (**Bill**), to the Senate Economics Legislation Committee for inquiry and report.

On 24 April 2017, Clayton Utz made submissions to Treasury on the Bill (**Previous Submissions**) in support of the proposed amendments generally subject to our comments, recommendations and suggested adjustments.

Safe Harbour

We remain supportive of the Government's initiative to improve the current insolvent trading provisions contained in the Corporations Act 2001 (Cth) (**Act**), which often results in the premature and unnecessary liquidation of companies (with the resultant value destruction), which might have otherwise been successfully restructured.

We endorse the proposed amendments operating as a carve out to protect directors from the civil insolvent trading provisions of section 588G(2) of the Act, instead of operating as a defence so that the protection of safe harbour does not extend beyond the civil liability set out in section 588G(2) of the Act. This will allow directors to have available to them the safe harbour protection with a flexible mandate to remain in control of the business in financial difficulty and to take reasonable steps to restructure and allow the company to trade out of its financial difficulties.

As recommended by us in our Previous Submission, we support the removal of the word "defence" now removed from the notes to section 588GA and the Explanatory Memorandum as currently drafted, which will remove any confusion.

Course of action as the "better outcome" for the company

We welcome the move away from a focus on the interests of <u>both</u> the company and its creditors. These interests may be quite different at any particular time during a restructure and may otherwise cause some confusion for directors who might be in the process of developing and implementing a "course of action" reasonably likely to lead to an outcome better than the immediate appointment of an administrator, or liquidator, of the company.

As currently drafted, it is clear that directors must continue to act in accordance with all their legal obligations including, their general director's duties under Part 2D.1 of the Act despite seeking the protection of safe harbour and therefore, must continue to have regard to both the interests of shareholders and creditors with the focus on creditors' interests where a company is in financial distress.

We support and endorse the guidance now provided in the Explanatory Memorandum as to the meaning of the phrase "*better outcome*", recognising that any course of action that would reasonably likely lead to a better outcome for the company would depend upon circumstances in each and every case. Whether such a course of action might reasonably likely lead to a better outcome is to be assessed by the directors at the time a decision is made by them recognising that not all restructuring attempts will ultimately be successful and that administration and liquidation may occur, despite the attempts.

Appropriately qualified entity

We welcome the further discussion and guidance provided by the amended Explanatory Memorandum as to the context of the words "*appropriately qualified*", a matter which we raised in our Previous Submissions.

CLAYTON UTZ

Submission from Clayton Utz

We continue to support the flexibility that the test in section 588GA(2) allows as currently drafted, bearing in mind that a turnaround for different corporate entities will depend very much on their different needs having regard to the nature, size, complexity and financial position of the business to be restructured and will vary on a case by case basis.

We do not, however, support limiting the definition of the "*appropriately qualified entity*" to require the advisor to be a member of, or accredited by, any particular special interest group, for example, a registered liquidator. As we submitted in our Previous Submissions, the advisor should have such appropriate experience, training and a track record of having successfully restructured and turned around a company and should not, be limited merely to the possession of a particular qualification.

This will ensure that the flexibility intended by section 588GA(2), remains, so as to allow a variety and diverse range of experienced and appropriate advisers with different skillsets to address what needs to be done and how to do it. For example, a broker may be required to raise capital; a lawyer to address a structural risk; an engineer or logistics planner to fix a supply or systems issue; a credit restructuring officer or experienced director to deal with market or customer or supply or other operational and business problems. This will likely involve a myriad of expertise depending on the nature and size of the business the subject of the turnaround.

We do maintain our submission that a provision be included for the disqualification of an insolvency practitioner, who may have been engaged as the "*appropriately qualified entity*" to advise directors to develop and implement one or more courses of action, from subsequently taking an appointment as an administrator or liquidator to the company in the event that the courses of action cease to be reasonably likely to lead to a better outcome for the company.