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

Dear Committee Secretary

Inquiry into the effectiveness of Australia's corporate insolvency laws: Answer to Question on Notice (Appearance at public hearing on 1 March 2023)

Thank you for the opportunity to appear at the public hearings of the Committee's inquiry into the operation of Australia's corporate insolvency regime. This 'answer to question on notice', like my original submission of 30 November 2022, is my own as an independent academic.

Question on Notice:

At my appearance on 1 March 2023, the following question was taken on notice:

Senator SCARR: On this point, before I move on to my next area of questions: when we talk about two failures, as you well know there can be a situation where you've got a group of companies. There might be four or five companies in a group and they will go down at once. Would that be counted as one failure?

Prof. Wellard: That issue, as I understand it—I can take it on notice or refer you to the provision—is already crafted into the sections I just mentioned, as a carve-out effectively. The short answer would be no. You would count, effectively, a group scenario as one failure. There's legislation currently that achieves that balance. It's a good point.

Senator SCARR: Okay. Thank you. If you could just take that on notice and give us a guide. I'm sure I could find it, but I'm sure I could find it far quicker with your assistance!

Answer/Response:

In designing, framing and drafting an 'automatic disqualification' provision that would count a failure of a group of companies as only one failure, guidance can be obtained from two current provisions (or sets of provisions) of the *Corporations Act 2001* (Cth) ('the Act').

- Firstly, s 206GAA of the Act provides for an ASIC power of disqualification in the event of two or more company failures and the Commonwealth has received a minimal return on an advance for the purposes of paying employee entitlements under the *Fair Entitlements Guarantee Act 2012* (Cth). Subsection 206GAA(4) provides that, in determining whether disqualification is justified, ASIC must have regard to whether the two corporations were related to one another.

- Secondly, s 453C of the Act and reg 5.3B.03 of the *Corporations Regulations 2001* (Cth) limit access to the use of the Pt 5.3B 'small business' restructuring procedure by denying eligibility for (ie, denying use of) the procedure to a company whose director has been a director of another company that used the Pt 5.3B procedure (or a simplified liquidation procedure) in the previous seven years. However, the 'group failure' scenario is addressed ('carved out') by reg 5.3B.03(4) which provides for an exception to the usual denial of eligibility in circumstances where the two companies are related and the other company had commenced the restructuring/simplified liquidation procedure no more than 20 business days prior.

Yours sincerely,

Mark Wellard

Academic