



Australian Government
Productivity Commission

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Dr Sean Turner
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services

Dear Dr Turner

Thank you for the opportunity to participate in the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvency in Australia.

The core function of the Commission is to conduct public inquiries at the request of the Australian Government on key policy or regulatory issues that affect Australia's economic performance and community wellbeing. In addition, we undertake research at the request of the Government and to support its annual reporting, performance monitoring and other responsibilities.

The Productivity Commission last examined the issue of corporate insolvency in its 2015 inquiry into Business Set-up, Transfer and Closure. The report was tabled in Parliament and the then Government released a response in May 2017.

The Commission noted in 2015 that an effective corporate insolvency system can perform an important economic role. We considered that the objective for the insolvency regime should be to provide a genuine opportunity for restructure of economically viable companies, and where that is not possible, to provide an expedient, effective and orderly process for winding up a company.

The Commission's view in 2015 was that Australia's insolvency system was performing relatively well and did not require wholesale change (finding 13.2). It also considered that wholesale adoption of the United States' chapter 11 debtor in possession model would be unwarranted and potentially undesirable. Nonetheless, we noted the scope for reform to specific aspects of the insolvency system, particularly in relation to the timing and effectiveness of restructuring and ensuring that the liquidation process is as inexpensive and expedient as possible.

The Commission has not monitored the extent to which the 2015 recommendations have been implemented. As you would be aware, in its response to the Commission's 2015 inquiry, the Government of the time supported many of our recommendations relating to corporate insolvency, but it did not support several aspects of the Commission's recommendations on business restructuring. Since the Government's response, we note that there have been a number of changes to the policy landscape. There may also be new policy challenges related to the corporate insolvency

system have emerged in the intervening years. Fully assessing and evaluating these matters would require further consideration by the Commission or some other organisation.

That said, we can assist with a response to the following question from Senator O'Neil:

More than a few submissions to this inquiry have recommended the need for a 'root and branch' review of Australia's corporate insolvency regime, akin to the ALRC's General Insolvency Inquiry in the 1980s ('the Harmer review'). Did the Productivity Commission receive similar evidence in its inquiry?

As noted above, the Commission observed in its 2015 inquiry that the corporate insolvency system was generally regarded as sound. This position was supported by a number of inquiry participants, including the Australian Restructuring Insolvency and Turnaround Association (sub. DR53) and the Business Law Section of the Law Council of Australia (sub. DR55).

However, we also acknowledged that there had been 'recent calls for review of Australia's insolvency laws' (p. 362), particularly the Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission, which, in 2014 recommended that:

... the government commission a review of Australia's corporate insolvency laws to consider amendments intended to encourage and facilitate corporate turnarounds. The review should consider features of the chapter 11 regime in place in the United States of America that could be adopted in Australia. (Senate Economics References Committee 2014, p. xxxiv)

The Commission received 75 submissions to its 2015 inquiry (38 received following the release of an issues paper and a further 37 received following the release of the inquiry draft report). Of these, only the Centre for Commercial and Property Law at the Queensland University of Technology (the Centre) noted the need for a comprehensive review. In its initial submission, the Centre noted that (sub. 26, p. 3):

The last comprehensive review of the insolvency system was by the Australian Law Reform Commission (the Harmer Report) and was handed down in 1988. Whilst there have been aspects of our insolvency laws that have been reviewed since that time, none has been able to provide the clear and comprehensive analysis that is able to come from a more considered review. Such a review ought to be conducted by the Australian Law Reform Commission or similar independent panel set up for the task.

The Centre reiterated its views in its post-draft submission (sub. DR64, p. 1), commenting that:

... we continue to make the submission to national policy inquiries and discussions that a comprehensive review should be undertaken of the regulation of insolvency and restructuring in Australia.

All submissions to the 2015 inquiry are available on our website at www.pc.gov.au/inquiries/completed/business/submissions. If you require additional information, please contact Catie Bradbear

Your sincerely

Michael Brennan
Chair