

Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into Corporate Insolvency in Australia

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

January 2023

Agency: Australian Taxation Office
Question No:
Topic: General Questions
Reference: Written (22 December 2022)
Senator/MP: Senator Deborah O'Neill

Questions:

Additional general questions

(You are invited to respond to any or all of these 'general questions' as you think appropriate.)

1. Root and Branch review: Several submitters have suggested a root and branch review of Australia's insolvency laws in the style of the 1988 Australian Law Reform Commission (ALRC) Harmer Review.

a. What is your view on whether there should be a root and branch review?

If supportive:

b. Why would a root and branch review be required?

c. What organisation would be most appropriate to conduct the review?

d. Are there any other structural features you think a review should have – for example, its timing and consultation processes?

e. In considering the structure, scope and approach of such a review, might Australia draw any insights from relatively recent reviews internationally (such as those undertaken in Singapore and the United States in the 2010s, for example)?

f. The ALRC is currently undertaking a review of the legislative framework for corporations and financial services regulation. Will that review address the complexity of insolvency law, or should the root and branch review take a similar approach?

g. Should the root and branch review address both the policy and legislative framework for insolvency?

2. Purpose of Australia's insolvency laws

a. What are the goals and purposes of Australia's corporate insolvency laws?

b. Do you think those goals and purposes are clearly articulated at present? To the extent they are, are they in turn adequately realised in practice?

c. The Australian economy has changed considerably since the Harmer report was released in 1988. Have the goals and purposes of Australia's insolvency law changed with it?

d. Is there an appropriate balance between the interests of stakeholders with the mixture of creditor and debtor in-possession regimes that are currently in place?

e. Are the goals and purposes themselves adequate and appropriate, or may they need reform?

3. Major reforms

- a. What are the main gaps, discrepancies, or failings of Australia's current corporate insolvency laws?
- b. Are there major reforms that are required?
- c. Are any adjustments needed to preference claims and the use of litigation funding?

4. Public interest aspects of Australia's corporate insolvency laws

- a. What aspects of the role of corporate insolvency practitioners are largely serving public purposes and are unfunded?
- b. To what extent is any unfunded work distorting the market where insolvency practitioners recover costs from unfunded work by charging higher rates on other matters?
- c. Professor Jason Harris and Mr Michael Murray (submission 18) suggested 'a threshold financial and systems analysis of the regime, personal and corporate, be conducted, with a view to determining available funds and resources for necessary tasks. Depending on those findings, to then conduct a legal review to ascertain the private law and public law responsibilities in an insolvency.' Should such analysis be part of a root and branch review?
- d. What options are there to address unfunded public purposes of corporate insolvency work and what are the advantages and disadvantages of those options?

5. International best practice

- a. To what extent do Australia's corporate insolvency laws align with the United Nations Commission On International Trade Law (UNCITRAL) [Legislative Guide on Insolvency Law](#)?
- b. Are there aspects of the UNCITRAL legislative guide that Australia should follow?

6. Data and research: Submitters to this inquiry and many previous inquiries and reviews have recommended that better data, statistics, and research is needed on corporate insolvency.

- a. Are those recommendations difficult to progress, and if so, why?
- b. To assist insolvency reform in a root and branch review, what are the research questions for which better data is needed?
- c. Are there sources of data that exist, but are not publicly available?
- d. Have the COVID-19 emergency measures had a distortionary effect on available data from the past three years and broader trends over the past decade?
 - i. *[If yes]* Are there any steps required to mitigate this other than just waiting?

7. Harmonisation of corporate, personal, trust, & partnership insolvency law

- a. Why does Australia have separate Acts for personal and corporate insolvency?
- b. What are the differences in insolvency law for trusts?
- c. What are the differences in insolvency law for partnerships?
- d. What might harmonisation of all forms of insolvency law look like?
- e. What barriers are there to creating a single insolvency act?
- f. What would the advantages and disadvantages be of a single insolvency act?

8. COVID-19 emergency reforms

- a. Were there any temporary measures or reforms introduced as a result of COVID-19 that went too far or not far enough?
- b. Are there areas requiring normalization or reform that have been identified from the COVID-19 emergency measures?

9. Recent reviews: The following reviews are complete, but the recommendations are yet to be implemented by government:

- [Whittaker Statutory](#) review of the *Personal Property Securities Act 2009*;
- The [ABSFEQ Insolvency Practices inquiry](#); and
- The [Insolvent Trading Safe Harbour statutory review](#).

- a. Are there any barriers to implementing those recommendations?
- b. Are there any of those recommendations that should not be implemented?

10. Small business restructuring and simplified liquidation reforms. In January 2021, the following reforms commenced:

- a new small business restructuring regime to enable simpler restructuring of small businesses; and
- a simplified liquidation process to streamline creditors' voluntary winding up for companies that have liabilities less than \$1 million.

- a. How well are the reforms working and, in particular, the debtor in-possession aspects of the small business restructuring regime?
- b. Are any adjustments required?

Table 2.1 in Treasury's submission (submission 34, page 11) demonstrates an increase in the number of companies entering small business restructuring over the past three quarters, from 9 in first quarter to 83 in the September quarter.

- a. What, if anything, does this trend say about take-up of the regime?
- b. Is there enough data yet to properly evaluate the efficacy of the regime?
- c. What factors may have influenced this increase?

11. Regulation of pre-insolvency advisors

- a. What data and research are available on the impacts of the unregulated environment for pre-insolvency advisors?
- b. What would be the benefits and disadvantages of regulating pre-insolvency advisors?
- c. What approaches are taken overseas or in the UNCITRAL principles to the regulation of pre-insolvency advisors?

12. Recommendations in submissions and timing of reforms:

- a. The committee has received many recommendations for reforms in written submissions. For example, the Business Law Section of the Law Council of Australia (submission 30)

made 33 recommendations. Do you wish to comment on recommendations made thus far by any other inquiry participant, either in a written submission or in a hearing?

b. Noting the suggestions for a root and branch review of Australia's insolvency laws, the committee would welcome your views on whether there are areas of reform that should progress now, and which areas of reform are more appropriately dealt with in a root and branch review.

Answer:

Questions 1 – 12

The ATO has no comment on these questions.