

City Insolvency Discussion Group



Chartered Accountant



CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

Wednesday, 6 September 2017

Insolvency Law Reform Act
Technical and Practical Implications

Presented by

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Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare



Insolvency Law Reform Act

Technical and practical implications

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Summary of today's discussion

Insolvency Law Reform Act

- March 2017 reforms
- September 2017 reforms
 - Creditor rights
 - Communication with creditors
 - Remuneration of Insolvency Practitioners
 - Funds handling and record keeping

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill

- Stay on Ipso facto clauses
- Safe harbour for directors

Insolvency Law Reform Act – March Changes

- Qualification
 - Formal tertiary studies in insolvency administration
 - Continuing professional education
- Registration
 - Application process
 - Registration is no longer indefinite
 - Registration can be conditional
 - Registered Liquidator to notify ASIC of certain events
- Discipline of IPs
 - Show cause notices
 - Disciplinary committee

Insolvency Law Reform Act – March Changes cont.

- Insurance requirement
 - Adequate and appropriate professional indemnity and fidelity insurance
 - Significant increases in maximum penalties for reckless or intentional failures to maintain insurance
- Assignment of the right to sue:
 - IP may assign any right to sue
 - Written notice issued to creditors
 - Approval of the Court necessary where action already commenced
 - May see increase in recovery actions in previously personal claims, such as voidable transactions and insolvent trading claims
 - Could allow Liquidators to finalise winding up more quickly

Creditor communication

- Declaration of Independence, Relevant Relationships and Indemnities (**DIRRI**)
- Committee of Inspection (COI) to advise, assist and monitor external administrator
- Creditors can direct that a meeting be held
- Proposals can be put to creditors in writing and are not required to be passed at a meeting
 - Proposal passed by majority of responding creditors in number and value
 - Meeting required if 25% of creditors in value object
- Report to creditors within 3 months of commencement:
 - Assets and liabilities
 - Past current and future enquiries
 - Likelihood of a dividend
 - Possible recovery action

Creditor rights

- Give directions to external administrators & request information
- Creditors request for information must be complied with unless:
 - it is irrelevant;
 - compliance would result in breach of duties; or
 - it is “unreasonable”, being substantial prejudice to creditors, insufficient property available to comply, request is vexatious or information is privileged
 - Must make written record of any non-compliance with directions
- Power to remove and replace external administrator
- Power to appoint a reviewing Liquidator

Remuneration of insolvency practitioners

- Remuneration for ‘necessary work properly performed’ in relation to external administration
- Remuneration determination
 - Made by members, creditors, COI or Court
 - May be reviewed
 - In making or reviewing, court must have regard to whether remuneration is reasonable
- Cannot exercise casting vote to approve remuneration
- Statutory maximum default remuneration of \$5,000
- Remuneration approval without meeting
- Internal disbursements

Funds handling and record keeping

- Duties as to funds keeping
 - Administration account
 - Consequences for non-compliance
- Record keeping
 - Annual reports
 - Must keep proper books
 - Allow access to books by creditors
 - ASIC may audit books
 - Books must be transferred to new external administrator

Beyond the ILRA - Safe Harbour & Ipso Facto Reform

- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill
- Ipso facto clause allows a party to terminate due to an insolvency event
- Stay on enforcement of ipso facto clauses during:
 - schemes of arrangement;
 - Receiverships / managing controllerships; and
 - voluntary administration
- Exceptions to the stay
 - Secured creditor over whole or substantially whole of company's property
 - Court order
 - Where there are other grounds to terminate
 - Where waived by external administrator
 - Agreements made after the stay
 - No requirement to provide additional credit
 - Will only apply to contracts entered into after legislation

Beyond the ILRA - Safe Harbour & Ipso Facto Reform

- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill
- Directors have a duty to avoid insolvent trading
- Successful insolvent trading claims are very rare
- The risk of an insolvent trading conviction is a disincentive for directors to take what would otherwise be appropriate risks
- Safe harbour reform
 - Carve out vs defence
 - Applies where:
 - directors start developing one or more courses of action
 - that are reasonably likely to lead to a better outcome for the company than an immediate appointment
 - What is a “better outcome”?



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Next CIDG session:

Wednesday, 4 October 2017