Law Council
OF AUSTRALIA

Business Law Section

Insolvency Reforms to Support Small Business

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About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
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Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Restructuring Law Committee
- Intellectual Property Committee

- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committee meets quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Greg Rodgers, Chair
- Mr Mark Friezer, Deputy Chair
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- Dr Elizabeth Boros
- Mr Adrian Varrasso

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

For Further Information

This submission has been prepared by a working group drawn from members of the Insolvency & Restructuring Committee, the Corporations Committee and the SME Business Law Committee of the Business Law Section of the Law Council of Australia (collectively referred to in this submission as the **Committee**).

The Committee would be pleased to discuss any aspect of this submission.

Any queries can be directed to the chair of the Insolvency & Restructuring Committee, Scott Butler, at scott.butler@hallandwilcox.com.au or on (07) 3231 7722, or the chair of the Business Law Section, Greg Rodgers, at greg.rodgers@rbglawyers.com.au or on 0404 093 589

With compliments

Greg Rodgers
Chair, Business Law Section

Executive Summary

1. The submission responds to the call for submissions in respect of the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (the **Bill**) and its explanatory memorandum (**Explanatory Memorandum**), published by Treasury on 7 October 2020.

2. At the outset, the Committee welcomes the initiative of Treasury to deal with corporate law reform for small to medium enterprises (**SME**s) facing insolvency. We also agree, in general, with the approach that has been taken to provide an alternative regime for enabling SMEs to restructure where possible, and where a trade-on solution is not possible then to allow such enterprises to transition to liquidation in a manner that is intended to be more cost-effective than the one-size-fits-all approach currently available under the *Corporations Act 2001* (Cth) (**Corporations Act**).

3. The Committee wishes to expressly acknowledge the efforts of Treasury officers to assist in consultation and their preparedness to engage with independent legal professionals on the Committee. The current economic circumstances facing SMEs are just cause for these reforms to be fast-tracked, and we trust that the independent counsel of expert lawyers in this field will assist Treasury in finalising the detail of the reforms within the very limited timeframe available.

4. For ease of reference, in this submission we have used the expression "***draft regime***" to refer to the scheme set out in the Bill, and which will be supplemented by regulations to be passed subsequently. Also, for ease of reference, where terms are defined in the Bill, Explanatory Memorandum or the Corporations Act, we have adopted the same terms without necessarily reciting that they are defined.

5. Given the very brief timeframe within which consultation and submissions can be made in this instance, we have structured our submissions into four categories:

    (a) Part 1 - Changes that we believe should be made to the current draft regime, having regard to the intended outcome of the proposed reforms;

    (b) Part 2 - Issues that we believe will need to be dealt with in draft regulations that will provide more detail of the proposed new restructuring and liquidation processes;

    (c) Part 3 - Issues for further insolvency reform which we believe should be dealt with, if not at this juncture, then at least in the near future; and

    (d) Part 4 - Matters of drafting which we have identified in the exposure draft of the Bill.

Part 1 - Changes required to current draft regime

6. The comments in this part of our submission are made based on the understanding of the underlying policy of the draft regime as reflected in the summary of the new law set out in the Explanatory Memorandum and the Department of the Treasury's fact sheet (**Fact Sheet**)[1]. Where changes are suggested, the intention is to make the draft regime better suited to the underlying policy, or to correct or suggest aspects that we believe will be needed to make the draft regime work in practice.

Interests of creditors

7. The overriding consideration for the draft regime, whether for restructuring the debtor company or for an efficient, less expensive liquidation of the debtor company, is the assessment of the interests of creditors. So many of the decisions to be made by directors, restructuring practitioners and creditors require an appreciation of the interests of creditors.

8. There are several provisions in the Bill which contain references to the interests of creditors, but the references are expressed variously as, for example, "the interests of creditors" (s453J, s453L), "the *best* interests of the company's creditors *as a whole*" (s453N), "the interests of the company's creditors" (s453P), "the interests of the creditors of the company *as a whole*" (insertion of s157A(4A) and s(4B)), "the interests of creditors" (insertion of s75-1 of Schedule 2), "the interests of the creditors" (s75-21(2)(b) of Schedule 2). Unless it is intended to establish different standards for considering the interests of creditors, the same expression should be used throughout the Bill so as to avoid uncertainty and possibly imposing a higher standard than intended.

9. Further, as many of these tests relate to matters to be considered by the restructuring practitioner, yet that role is not intended to be unduly onerous and expensive, use of the term "*best*" may be unintended. Such language is reflective of the "Best Interests" test applicable under s1129(a)(7) of the U.S. Bankruptcy Code which provides, "*With respect to each impaired class of claims or interests* – (A) each holder of a claim or interest of such class … (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is *not less than the amount that such holder would so receive or retain if the debtor were liquidated* under chapter 7 of this title on such date."

10. It is submitted that all such references should be amended simply to "the *interests of the company's creditors as* a *group*". This adopts the same terminology used in s75-41 of the Insolvency Practice Schedule, which sets out the test for when a Court can set aside a deed of company arrangement passed upon the vote of related creditors.

Qualifying companies

11. The criteria for companies to qualify for the draft regime is to be set out in regulations yet to be promulgated. While the reasons for adopting that approach are understood (see Part 2 of this submission), the Committee believes such a fundamental issue should be addressed in the primary legislation.

[1] Accessed at https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Insolvency-Reforms-fact-sheet.pdf

12. The Explanatory Memorandum seems to assume that low levels of liabilities and/or assets lend themselves to a simple restructuring or liquidation process. Unfortunately, small asset insolvency administrations can be complex and expensive, especially when trading trusts are involved.

13. The understanding of the threshold as set out in the Fact Sheet appears to be too simplistic and perhaps also too low to be an effective solution for what is expected to be a multitude of SME insolvencies in the coming years. These reforms are meant to apply to small businesses. Various other legislation deals with small businesses or SMEs. For example, the small business definition in the Income Tax Assessment Act (s328-110) is based on a turnover test (annual turnover of less than $10 million). While that level may be considered too large for the draft regime, it does highlight that elsewhere, a simple assessment of the total debts owed by a business may not be the most useful criterion.

14. The Australian Taxation Office also defines a small business entity in the context of capital gains tax as a company that is carrying on a business and has less than $2 million in aggregated turnover. Aggregated turnover is the annual turnover from a current business and any annual turnover from other businesses that a taxpayer is connected or affiliated with.

15. Further, if the qualifying test is simply to have liabilities less than $1 million, then it would seem possible that a company could qualify after paying substantial preferential payments to selected creditors so as to bring the total liabilities below the cap.

16. While the finer details of the criteria for qualifying under the draft regime could be left to regulations, it is submitted that some headline categories for assessing qualification should be set out in the primary legislation.

Faster and simpler pathway to liquidation

17. The reforms do not make it clear that a company that fails to have a restructuring plan approved should enter liquidation or voluntary administration, particularly as it is deemed insolvent when a restructuring plan is proposed to creditors. It should be appreciated that when directors of an SME face up to insolvency, their personal, financial and psychological circumstances may make them unwilling or unable to go the next necessary step of placing their business into liquidation. Faced with a recalcitrant debtor company, creditors are left with the task of taking their own action to place the debtor company into liquidation, incurring more expense themselves. That is not in the interest of creditors as a group.

18. It would be more advantageous for all parties concerned in dealing with insolvent SMEs if the failure to adopt a restructuring plan would lead to an automatic transition to a creditors' voluntary liquidation unless creditors resolve otherwise.

19. It is understood that there may be lesser qualifications set for restructuring practitioners rather those of currently registered liquidators, as a means of meeting what is perceived to be an almost overwhelming demand for services under the draft regime. We address issues of such qualifications later in this submission. However, at this juncture, we submit that in a case where an SME company transitions to the simplified liquidation process (or indeed, the usual liquidation process under the current law) then there should be a process for transferring the administration to a registered liquidator who has the qualifications and experience currently required for conducting liquidations.

20. There is also a concern that the pathway to the simplified liquidation process may not be as straight forward as the currently drafted s498 suggests. In some, or perhaps many, instances, directors of SMEs may not have the necessary knowledge or skills to give the declaration required as to the eligibility criteria for the simplified liquidation process. Alternatively, they may not have any ongoing interests in the company if their restructuring plan fails (as they will be more interested in protecting their own personal positions). The restructuring practitioner may be in a better position to assess the circumstances of the company against the eligibility criteria.

21. The eligibility criteria for simplified liquidation includes a requirement that the company has given returns, notices, statements, applications or other documents as required by taxation laws (s500AA(1)(f)). We submit that the simplified process should be for the benefit of creditors, and so it seems harsh that they would be denied that benefit because of an omission by the directors of the debtor company.

Debts during a restructure and PPS security interest holders

22. While the draft regime has borrowed heavily from the voluntary administration provisions in Part 5.3A of the Corporations Act, there are fundamental differences relating to the risks that creditors will face between voluntary administration (**VA**) and restructuring under the draft regime. In a VA, creditors dealing with a company during the VA period would have greater comfort in so doing, because the company is actually under the control of the administrator rather than the directors, the administrator is personally liable for the debts incurred in the VA, and those debts are not only provable in a subsequent liquidation but also are afforded priority. None of those safeguards appear to apply under the draft regime.

23. Restructuring practitioners are not personally liable for debts incurred by the company during the restructuring process and yet suppliers of essential services may be prevented by ipso facto protections and by section 600F of the Act from cancelling or suspending those services. To provide protection to suppliers of essential services for the costs of ongoing supply, the Bill should either:

    (a) explicitly permit such suppliers to require cash on delivery or payment in advance for ongoing supply of services; or

    (b) contain a mechanism to ensure payment of all costs incurred to essential suppliers during the restructuring process.

24. Landlords and other property owners are in a similar position to essential service providers in respect of the draft regime in that they are prevented by the stay in proposed s453Q from retaking possession of their premises but they have no assurance that rent will be paid during the restructuring process. This is not the case in VA where the administrator incurs personal liability for such rent (s443B).

25. The consequence of the above would be to require essential service providers, landlords and other property owners to effectively fund the costs of trading during the restructuring process without their consent. This is not a concept which is typically adopted in restructuring processes overseas. For example, even in Chapter 11 in the US, post-petition creditors are entitled to a priority ahead of the claims of the debtor's pre-petition creditors.

26. It is also not clear from the draft regime whether property owners (e.g. landlords) will be bound by a restructuring plan if they did not vote in favour of it. We suggest that the treatment of property owners ought to be consistent with VA.

27. It is submitted that creditors who supply any other goods or services to the company during the period of restructuring should be given a priority and fall within s556(1a) in any restructuring or liquidation within the subsequent 6 months – this is to encourage suppliers to continue to supply during this period and not put the company on cash on delivery terms. This would also make it consistent with what occurs under a VA.

28. It is also submitted that where creditors hold a PMSI and whose PPSA Retention of Title Property is sold, used or consumed by the company during the period of restructuring, the creditors should be entitled to be paid for those goods and be given a priority and fall within s556(1a) in any restructuring or liquidation within the following 6 months. In this regard, provisions consistent with s442C and s442CC should be incorporated into the Bill so as to protect the interests of such security holders.

29. Further, it would seem that the current drafting of amendments for s553 and s91 would result in debts incurred during the restructuring not being provable in a subsequent liquidation.

30. Further, the vesting of unperfected security interests under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) held by creditors which may themselves be SMEs will hurt those creditors if restructuring is included as a trigger for such vesting under the PPSA. It is submitted that vesting should be limited to the existing grounds of liquidation and voluntary administration under s267 of the PPSA, rather than extending it to a debtor under restructuring. If an unregistered security interest vests when a restructuring practitioner is appointed, then it will be easy for directors to appoint a restructuring practitioner with the sole purpose of having any unregistered security interests vest and then engineering for the company to come out of restructuring. The directors could know that the eligibility requirements are not met (e.g. too many liabilities) or decide not to put forward a plan. If, despite our contrary view, it is decided that security interests not registered prior to the appointment of a restructuring practitioner should vest under a restructuring, they should only vest where a plan is entered into. Similarly, any amendment to s267 of the PPSA should again provide that security interests which are not registered prior to the appointment of the RP should only vest where a plan is entered into.

31. Another area of concern for the likely success of the draft regime for SMEs is the potential for directors to continue to face action by the Commissioner of Taxation with respect to director penalty notices. Currently, s269-30 of the *Taxation Administration Act 1953* (Cth) (**Taxation Administration Act**) makes specific provision for alleviating the exposure of directors for such taxation liabilities if certain steps are taken with respect to VA or liquidation of the company. It is submitted that the success of the draft regime will require that commencing a restructuring would similarly assist the directors with respect to personal liability for taxation liability. Hence, amendments will need to be made to the Taxation Administration Act.

Limit on extent of safe harbour protection

32. While directors have the protection from insolvent trading during the restructuring, such protection should only be afforded in respect of debts incurred where there has been adequate disclosure to creditors of the fact that the company is under restructuring. Where directors have wilfully concealed the fact from a creditor, then offence provisions would apply. However, given the importance of the moratorium to the company and the directors, and the effect on creditors, negligent omission should come at a price.

Additional grounds for terminating a restructuring

33. The restructuring practitioner should have the right to terminate the restructuring if the directors fail to cooperate, and if the directors do not adequately disclose all relevant information including the extent of debts owed to creditors.

34. If recent payments made by the company which has conveniently reduced the total liabilities below the proposed cap for qualifying the company to use the restructure process, then this should be a ground for allowing the restructuring practitioner to determine that the company does not qualify, thereby bringing the restructuring to an end.

35. Further, where there have been other transactions conducted by the company which, in the event of a subsequent liquidation, would be voidable under Part 5.7B of the Corporations Act - this should be a further ground for allowing the restructuring practitioner to determine that the company does not qualify, thereby bringing the restructuring to an end.

36. Under the Bill, the power to halt the process seems to be conferred only on the restructuring practitioner (s453J). Section 455B provides for regulations to be made for when a plan will be terminated, but not for when the earlier period of restructuring can be terminated. Section 458A(2) suggests that the Court could step in and terminate a restructuring plan, but is silent on whether the Court could step in to terminate the earlier period of restructuring.

37. It is submitted that there should be an express power conferred on the Court allowing for how Part 5.3B is to apply in relation to any company (similar to s447A with respect to Part 5.3A) so that the Court is clearly given power to terminate a period of restructuring (not just a restructuring plan), and standing should be conferred not only on the restructuring practitioner but also any creditor and ASIC.

Other changes

38. Section 453N should be extended to prevent the company issuing new shares without the restructuring practitioner's written consent so as prevent a takeover without the restructuring practitioner’s knowledge. Currently, the drafting is limited to “transfer of shares” but an issue of more shares may be just as effective in transferring control and ownership of the business.

39. Section 453V should be extended to related entity guarantees. It would be just as destructive to the objective of allowing an SME to restructure if guarantees given by related entities, such as another company that carries on business or holds assets used in the SME’s business, are not also subject to the moratorium afforded by this section. This would also assist with restructuring of multiple entities within the same group.

40. As mentioned above, we submit that the power conferred on the Court with respect to the draft regime should be the same broad power which the Court has in relation to VA (s447A). It is not considered that the current draft s458A goes far enough, as there may be other aspects of Part 5.3B that could arise. Providing for an equivalent to s447A to give the Court the ability to change the provisions of the Part where unusual circumstances apply will allow the draft regime to achieve its objectives.

Part 2 - Issues for draft regulations

Concern as to reliance on regulations

41. The Committee expresses some concern at the manner in which so much detail of the proposed SME insolvency restructuring regime is not in the primary legislation but rather is being left to regulations that are still to be issued. We are also concerned with the statement made at paragraph 1.110 of the Explanatory Memorandum:

> *In the event that regulations made in relation to debt restructuring plans contain provisions which are inconsistent with the Corporations Act or any other Acts, the regulations will prevail to the extent of any inconsistency. This power is necessary to deal with potential situations where the operation of the Act may produce unintended or unforeseen results that are not consistent with the policy intention for the new regime. Issues may arise that were not contemplated at the time of drafting because the debt restructuring process is a new regime. Further, because this new regime has been developed in response to the significant and continuing economic consequences of the Coronavirus, there is greater than usual need for the Government to be empowered to deal with unintended or unforeseen consequences, particularly those that risk undesirable outcomes for companies and creditors. In this context, it is appropriate for the Government to be able to address these potential consequences where the issues are too specific to be dealt with adequately, and in a timely manner, in the primary law.*

42. While the reasons for this approach, as outlined in the above extract, are understandable, we note that the approach appears to be inconsistent with the guidelines adopted by the Senate Standing Committee for Scrutiny of Delegated Legislation[2] and in particular Principle (j) in that:

- Significant elements of a regulatory scheme should ordinarily be included in primary legislation, rather than delegated legislation;

- Significant elements include:
  - key definitions central to the operation of the regulatory scheme;
  - significant elements of how the scheme is to operate;

- The Senate Standing Committee does not generally consider operational flexibility, on its own, to constitute a sufficient justification for including significant elements of a regulatory scheme in delegated legislation.

Qualifying companies

43. We reiterate our comments above to the effect that while the finer details of the criteria for qualifying under the draft regime could be left to regulations, it is submitted that some headline categories for assessing qualification should be set out in the primary legislation.

44. That being said, issues to be considered when assessing qualification of companies for accessing the draft regime should include:

[2] Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines

(a) Total liabilities owed by the company;

(b) What cap should be set for total liabilities – it is submitted that the foreshadowed cap of $1million may be too low to be an effective tool for resolving many SME insolvencies;

(c) Whether there have been any recent payments made by the company which has conveniently reduced the total liabilities below the cap – this could perhaps be resolved by allowing the restructuring practitioner to determine that the company does not qualify in such an event, thereby bringing the restructuring to an end;

(d) Whether there have been other transactions conducted by the company which, in the event of a subsequent liquidation, would be voidable under Part 5.7B of the Corporations Act - this could perhaps be a further ground allowing the restructuring practitioner to determine that the company does not qualify in such an event, thereby bringing the restructuring to an end;

(e) Whether the amount(s) owed to secured creditors should be included in the cap (and if so, should that also include PMSI holders);

(f) Should future liabilities, such as arising under acceleration clauses in chattel leases or other long-term contracts be included in the calculation;

(g) Should the criteria also take account of the assets owned by the company and also the structure in which such assets are held (such as trading trusts);

(h) Should there be a grouping of related companies which, together, operate the SME, and if so, should there be any alternative cap for such grouped entities;

(i) Should small companies that are part of a large international corporate group qualify for this regime.

Role and qualifications of restructuring practitioner

45. The role of the restructuring practitioner under the draft regime is quite unusual in that it appears, at first glance, to be one of “all care, no responsibility”. However, there are a number of tasks and decisions reserved for the restructuring practitioner under the draft regime which carry with it quite a heavy responsibility (s456G). While the regulations will set out the scope of the rights, obligations and liabilities, the only aspect certain from the Bill in terms of absolving the restructuring practitioner is that s/he will not be liable in respect of the decision whether or not to terminate a restructuring or whether or not to consent to be appointed (s456H).

46. As currently drafted, even though the restructuring practitioner has a limited role which expressly excludes running the business, the role and the tasks reserved for the practitioner would still appear to fall within the description of *shadow director*. We submit that an express exclusion should be stated in the regulations so that restructuring practitioners are not so exposed. Otherwise, given the risk profile, such persons may find it extremely difficult to obtain adequate insurance cover.

47. The role of the restructuring practitioner, even though not taking control and trading the business of the company, is still quite involved and responsible. It will involve tasks such as:

(a) reviewing the books and records of the company – and in this regard, we recommend that there be an obligation on the directors to deliver the books and records to the restructuring practitioner before the appointment is accepted so that the restructuring practitioner can make an informed decision whether or not to take the appointment (several foreign regimes also require a cash flow forecast when presenting the plan);

(b) carry out some degree of investigation of the affairs of the company so as to be able to express an opinion as to the merits of any restructuring plan proposed by the directors;

(c) reviewing the proposed restructure plan to work out what it means and whether it is likely to be carried out;

(d) preparing the report to creditors advising on the plan;

(e) in assessing the merits of the plan, being able to form a reasonable opinion, in the interest of creditors as a group, as to whether the plan is better or worse than liquidation – this will require familiarity and experience with voidable transaction and other insolvency laws;

(f) reviewing proposed transactions that may not be in the ordinary course of business and deciding whether to consent to them, in the interests of creditors;

(g) having the capability of taking an appointment as liquidator if a plan is not proposed or accepted – if this is not contemplated, but rather it is proposed to transfer any such administration to some other, higher qualified liquidator, then this could result in duplication of expense.

48. We note from the Explanatory Memorandum and from the Fact Sheet that it is proposed to create a different class of liquidator – a small business restructuring practitioner – yet the brief list of tasks outline above clearly show that the knowledge, skills and experience of such practitioners still needs to be quite extensive.

49. We recommend that before any decision is made to permit some lesser qualified category of practitioner to undertake such a role, some time is taken to see if the current insolvency market is able to provide adequate numbers of suitably qualified registered liquidators to cope with immediate demand that is anticipated after the proposed commencement date of 1 January 2021. Any additional time that current practitioners may need to cope with the immediate demand could be provided by granting, in the regulations, a temporary extension to the proposed restructure periods (say, for the first three months of 2021).

Creditors entitled to vote

50. In voluntary administrations, related party creditors can influence the outcome of the vote upon a deed of company arrangement to the disadvantage of independent creditors. To address this, s75-41 of the Insolvency Practice Schedule allows for the Court to make certain orders including setting aside the resolution of creditors. Such a process requires an application to be made to the Court by a creditor, the administrator or ASIC.

51. Given the quite different circumstances of a restructuring under the draft regime, such as the lower amounts potentially owed to creditors, the limited role of the restructuring practitioner, the control of the company remaining in the hands of the directors who

would be expected to favour related party creditors, and the intention that the draft regime be a low cost and quick process, it would be inconsistent with the policy behind the draft regime to require creditors, restructuring practitioners or ASIC to have to apply to the Court where a restructuring plan has been accepted based on the vote of related party creditors.

52. It is submitted that in the calculation of votes for a restructuring plan, the votes of related party creditors should be excluded.

When deemed insolvent

53. In s455A, it is stated that the company is taken to be insolvent if the company proposes a restructuring plan. The regulations can then prescribe the time at which the company *is taken to have done so* (i.e. taken to have proposed a restructuring plan). This does not address the situation where, for example, the company does not propose a plan but simply goes into restructuring without then proceeding to a plan, regardless of the reasons for not doing so. However, if under s453B, the resolution to appoint a restructuring practitioner was based on the ground that the company was not actually insolvent but considered likely to become insolvent, then it may be pre-emptory to deem insolvency simply upon signing the appointment.[3] To preserve the interests of creditors in relation to when the company may have been deemed to be insolvent, the regulations should say that once a plan is presented, the company is taken to have been insolvent since the start of the restructuring, not at the later time of proposing the restructuring plan.

Terminating a restructuring plan

54. Section 455B(2) provides that the regulations can make provision for various issues relating to a restructuring plan, including when a plan can be terminated. We submit that the regulations should include the same tests relating to termination of a deed of company arrangement, vis. if it does not provide as much as it would in a liquidation for a creditor, apply to the restructuring plan. This will also be necessary so that an applicant in a winding up application commenced before the appointment of a restructuring practitioner can recover their costs under a restructuring plan with the appropriate s556 priority.

[3] It is noted that under Part X of the *Bankruptcy Act 1966 (Cth)*, the mere signing of an authority under s188 of that Act is an act of bankruptcy upon which a creditor can base a petition to bankrupt.

Part 3 - Issues for further insolvency reform

55. Following the passing of the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) and the temporary measures enacted by instrument, the Committee made substantial submissions to Treasury in respect of a number of consequential issues which were identified and which need addressing (**March Submission**).[4] That included changes required to 'safe harbour' provisions.

56. It is appreciated that with the introduction of the proposed SME insolvency law reforms from 1 January 2021, and the likely conclusion to more general emergency measures which currently are planned to end on 31 December 2020, it probably now past the point at which many of the unintended consequences that we identified in the emergency measures can be alleviated. However, we believe the changes to the safe harbour provisions that were discussed in the March Submission should be considered as soon as possible so that other enterprises that will not qualify under the proposed SME restructuring regime can have a reasonable opportunity to seek assistance for restructuring.

57. In the Committee's submission made to Treasury dated 11 September 2020 (**September Submission**)[5], we recommended further consultation on a number of issues including:

    (a) Financial assistance measures to allow directors and managers of insolvent businesses to seek proper advice from appropriately experienced and regulated advisors. The ASBFEO recommended ta voucher system to allow a business viability review to be undertaken by a suitably qualified professional. Such a review would be useful for the restructuring practitioner and help reduce the need for them to undertake detailed financial reviews to support a plan recommendation; and

    (b) Financial assistance to allow for the orderly external administration of abandoned insolvent entities.

58. We believe the current economic circumstances and the likely consequences that will be experienced in the coming year make it imperative that such additional measures and issues be considered.

59. Reform of insolvency laws with respect to trading trusts is long overdue. So far, issues of priorities of creditors' claims and access to assets held on trust have been left to be resolved by the Courts. Provisions could be included in legislation (including in the draft regime) to make it easier for liquidators to deal with sales of trust property, rather than (as if often required) having to go off to Court to seek directions. It would also assist if a provision similar to s302B of *Bankruptcy Act 1966* (Cth) that declares any removal of trustee due a company proposing to or entering into a restructuring or restructuring plan or other insolvency administration is void.

[4] Submission from the Committee to Treasury dated 31 March 2020 which can be accessed at https://lawcouncil.asn.au/resources/submissions/consequential-corporate-insolvency-emergency-measures

[5] Submission from the Committee to Treasury dated 11 September 2020 which can be accessed at https://lawcouncil.asn.au/resources/submissions/extension-to-temporary-insolvency-emergency-measures

60. If increasing creditor returns by reducing the expense of insolvency administrations is an objective, then a significant saving can be achieved by eliminating ASIC search and lodgement fees for liquidators.

61. While Treasury is to be commended for tackling the issue of SME insolvencies, with the overall objective of providing greater flexibility because *one size does not fit all*, it should not be assumed that the existing forms of external administrations are always suitable for all larger companies. There are a number of aspects of the draft regime which may also have some relevance for larger businesses. Consultation should ensue in respect of broadening the categories of companies that may be better suited to more flexible solutions.

62. It should not be forgotten that many SMEs are not run within a corporate structure. Personal insolvency reform has often concentrated on "personal" as opposed to "business" debt, yet many SMEs, especially those that may owe debts totalling less than $1 million, are run by sole traders or partnerships. Also, in recent years there have been numerous instances of insolvent incorporated associations (such as sporting clubs). While some States have addressed reform in presenting insolvency options, a more uniform approach would be a better outcome.

Part 4 - Matters of drafting in the Bill

63. Following is a table setting out suggested amendments to the exposure draft of the Bill. We believe for the most part, the suggested changes will be self-explanatory. However, where we considered some explanation is necessary, then we have made our comments within the table.

64. Please note that in raising suggested amendments as set out in the table, we have in some instances drafted suggested amendments consistent with some of the issues outlined in Part 1 (Changes required to current draft regime) above. However, given the very short time frame within which to make this submission, we have not drafted suggested amendments to take account of every issue we raise above. The Committee would welcome the opportunity to consult with officers of Treasury in relation to such drafting.

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020	***Comments***
452A Object of this Part The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for a restructuring process for eligible companies that allows the companies: (a) to retain control of the business, property and affairs while developing a plan to restructure with the assistance of a small business restructuring practitioner; and (b) to enter into a restructuring plan with creditors.	"Small business restructuring practitioner" is not defined. Elsewhere in Bill, the expression (which is defined) is simply "restructuring practitioner". Sub-paragraph (a) should be amended: "to retain control of the business, property and affairs while developing a plan to restructure with the assistance of a ~~small business~~ restructuring practitioner". Note: we also suggest amendments to definition of "restructuring practitioner".
453B Appointing a restructuring practitioner (1) A company may, by writing, appoint a small business restructuring practitioner for the company if:…"	For reasons expressed above, paragraph (1) should be amended: "A company may, by writing, appoint a ~~small business~~ restructuring practitioner for the company if …"
453P Winding up company	A similar provision to s440A(1) should be added to s453P so as to prevent the company being wound up voluntarily during the restructuring process. This would prevent disgruntled shareholders who are out of the money and have no economic interest sidelining the process.

453J Restructuring practitioner may terminate restructuring (1) The restructuring practitioner for a company under restructuring may, at any time, terminate the restructuring of the company: (a) if the restructuring practitioner believes on reasonable grounds that: (i) the company does not meet the eligibility criteria for restructuring; or (ii) it would not be in the interests of the creditors to make a restructuring plan; or (iii) it would be in the interests of the creditors for the restructuring to end; or (iv) it would be in the interests of the creditors for the company to be wound up; or (b) on any other grounds prescribed by the regulations. (2)The restructuring practitioner for a company under restructuring terminates the restructuring of the company by giving notice in accordance with this section. (3) The notice must: (a) be in writing; and (b) include all information prescribed by the regulations; and (c) be given to: (i) the company; and (ii) as many of the company's creditors as reasonably practicable. (4) The termination takes effect on the day on which notice under this section is given to the company.	It should be a further ground for termination if directors do not comply with any reasonable direction given by the restructuring practitioner. There are very tight time frames required for restructures. Creditors should not be delayed from taking other action if directors of the debtor are not complying with their obligations. An additional ground could be added here: "(v) directors have failed to comply with any reasonable direction given by the restructuring practitioner for the purpose of section 453F." Alternatively, this ground could be added by way of regulation under sub-paragraph (b). The expression "interests of the creditors" should be changed to use a universal expression of the test as discussed in our submission. Amend (ii), (iii) and (iv) to read "interests of the company's creditors as a group." When bringing a restructuring period to an end, certainty is required in terms of notice to the public. Creditor should not be prejudiced by not having received notice soon enough (i.e. if there is a delay between notifying the company and notifying the creditor directly. Sub-paragraph (3)(c) should include: "(ii) lodging any notice in the prescribed form with ASIC." Then renumber the old (ii) to (iii). Paragraph (4) amend: "The termination takes effect on the day on which notice under this section is given to ~~the company~~ ASIC."

453L Conducting the business of the company during restructuring *Transactions and dealings affecting property* (1) A person contravenes this section if: (a) a company is under restructuring; and (b) the person is a director of the company; and …	This should be amended to mirror s437D(5). It should be an offence for officers or employees who are involved in causing the company to enter into the transactions. As currently drafted, there are two issues with the section. Firstly, it could be the case that where there is more than one director that one of the directors, or some of the directors, cause the company to purport to enter into a transaction or dealing affecting the property of the company. Unless subsection (2) applies, this would be an offence for the other directors who had nothing to do with causing the company to enter into the transaction under s453L(1)(c)(i). Consequent on the above amendment, the heading of section 453LA should be amended to refer to 'person' rather than 'officer'. Also it could be that a receiver is appointed over the assets during the restructuring and they could cause the company to enter into a transaction and the directors would then commit an offence. To fix this there needs to be an equivalent of s441B(3) inserted into s 454D.
(5)The restructuring practitioner for a company under restructuring may only give consent under paragraph (2)(b) if the restructuring practitioner believes on reasonable grounds that it would be in the interests of the creditors for the company to enter into the transaction or dealing	For reasons expressed above, the test in (5) should be amended to "interests of the company's creditors as a group."

453LA Order for compensation where officer involved in void transaction (1) Where: (a) a court finds a person guilty of an offence constituted by a contravention of subsection 453(1); and	The cross reference here should be to section 453L(1).
453N Effect of restructuring on company's members *Transfer of shares* (1) A transfer of shares in a company that is made while the company is under restructuring is void except if: … (2), (4), (6), (9), (12) and (14) each use the test "best interests of the company's creditors as a whole."	The prohibition in this section should be extended to prevent the company issuing new shares without the restructuring practitioner's written consent so as prevent a takeover without the restructuring practitioner's knowledge. Several amendments are required through the paragraphs of section 453N. It is suggested that wherever the expressions "transfer" or |transfer of shares" are used, then they should be replaced with "transfer or issue of shares" and "transfer or issue". Amend (2), (4), (6), (9), (12) and (14) to use the expression, "interests of the company's creditors as a group."

453P Winding up company (1) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under restructuring and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under restructuring rather than be wound up. (2) The Court is not to appoint a provisional liquidator of a company if the company is under restructuring and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under restructuring rather than have a provisional liquidator appointed.	For reasons expressed above, the test in both (1) and (2) should be amended to "interests of the company's creditors as a group."
453V Restructuring not to trigger liability of director or relative under guarantee of company's liability (1) During the restructuring of a company: (a) a guarantee of a liability of the company cannot be enforced, as against: (i) a director of the company who is a natural person; or (ii) a spouse or relative of such a director; and (b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse or relative; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.	It would be just as destructive to the objective of allowing an SME to restructure if guarantees given by related entities, such as another company that carries on business or holds assets used in the SMEs business, are not also subject to the moratorium afforded by this section. Insert: "(a)(iii) a related entity of the company".

456J Appointment of 2 or more restructuring practitioners of company (1) Where a provision of this Act provides for a small business restructuring practitioner for a company to be appointed, 2 or more persons may be appointed as small business restructuring practitioners of the company.	For reasons expressed above, paragraph (1) should be amended: "Where a provision of this Act provides for a ~~small business~~ restructuring practitioner for a company to be appointed, 2 or more persons may be appointed as ~~small business~~ restructuring practitioners of the company"
456K Appointment of 2 or more restructuring practitioners of restructuring plan (1) Where a provision of this Act provides for a small business restructuring practitioner for a restructuring plan to be appointed, 2 or more persons may be appointed as small business restructuring practitioners of the plan. (2) Where, because of subsection (1), there are 2 or more small business restructuring practitioners for a restructuring plan: …	For reasons expressed above: - paragraph (1) should be amended: "Where a provision of this Act provides for a ~~small business~~ restructuring practitioner for a restructuring plan to be appointed, 2 or more persons may be appointed as ~~small business~~ restructuring practitioners of the plan". - paragraph (2) should be amended: "Where, because of subsection (1), there are 2 or more ~~small business~~ restructuring practitioners for a restructuring plan…"

458A Powers of the Court (1) The regulations may: (a) confer powers on the Court in relation to the restructure of companies or restructuring plans; and (b) prescribe whether those powers are to be exercised on the initiative of the Court or on the application of one or more persons; and (c) prescribe persons who may apply to the Court for the exercise of those powers. (2) Without limiting subsection (1), the powers that may be conferred on the Court include the power: (a) to vary or terminate a restructuring plan; and (b) to declare a restructuring plan void. (3) The powers conferred on the Court under regulations made for the purposes of this section are in addition to any other powers conferred on the Court.	The power conferred on the Court should be the same broad power which the Court has in relation to voluntary administrations (s447A). It is not considered that the current draft s458A goes far enough, as there may be other aspects of Pat 5.3B that could arise. The preferred course would be to insert a new (1) similar to s447A: "The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company." Then renumber the remaining paragraphs, and insert at the start of the new (2): "Without limiting subsection (1),""
Part 2: **19 After paragraph 12.1 of the small business guide in Part 1.5** Insert: *12.1A Restructuring* If a company experiences financial problems, the directors may appoint a small business restructuring practitioner to help the company develop a plan to restructure.	For reasons expressed above: this provision should be amended: "If a company experiences financial problems, the directors may appoint a ~~small business~~ restructuring practitioner to help the company develop a plan to restructure."

11 Section 9 **restructuring practitioner:** (a) in relation to a company but not in relation to a restructuring plan: (i) means a small business restructuring practitioner for the company appointed under Part 5.3B; and (ii) if 2 or more persons are appointed under that Part as small business restructuring practitioners for the company—has a meaning affected by paragraph 456J(2)(b); or (b) in relation to a restructuring plan: (i) means a small business restructuring practitioner for the agreement appointed under Part 5.3B; and (ii) if 2 or more persons are appointed under that Part as small business restructuring practitioners for the agreement—has a meaning affected by paragraph 456K(2)(b).	The definition itself (section 11 of part 2) is a bit circular or perhaps a bit confusing by defining a restructuring practitioner as a small business restructuring practitioner for the company appointed under Part 5.3B etc. It would be better to simply say "practitioner". Suggested draft below: ***restructuring practitioner***: (a) in relation to a company but not in relation to a restructuring plan: (i) means a ~~small business restructuring~~ practitioner ~~for the company~~ appointed <u>for the company</u> under Part 5.3B; and (ii) if 2 or more persons are appointed under that Part as ~~small business~~ restructuring practitioners for the company—has a meaning affected by paragraph 456J(2)(b); or (b) in relation to a restructuring plan: (i) means a ~~small business restructuring~~ practitioner <u>appointed</u> for the agreement ~~appointed~~ under Part 5.3B; and (ii) if 2 or more persons are appointed under that Part as ~~small business~~ restructuring practitioners for the agreement—has a meaning affected by paragraph 456K(2)(b).
15 After subsection 60(1) (1A)	Remove italics that appear in subparagraph (vi)

21 At the end of subsection 109X(1) Add: ; or (e) if a restructuring practitioner for the company has been appointed—leaving it at, or posting it to, the address of the restructuring practitioner in the most recent notice of that address lodged with ASIC.	For the purpose of serving documents on the company, simply serving the restructuring practitioner, when s/he is not in control of the company's affairs, is possibly pointless, and of no utility. In such a circumstance, service should be on BOTH the company by some other permitted means AS WELL AS the restructuring practitioner. Therefore, amend: "if a restructuring practitioner for the company has been appointed—then (in addition to serving the company by other permitted means), leaving it at, or posting it to, the address of the restructuring practitioner in the most recent notice of that address lodged with ASIC."
22 After subsection 157A(4) Insert: *Application by restructuring practitioner* (4A) The restructuring practitioner for a company under restructuring may lodge an application with ASIC to change the name of the company if the restructuring practitioner is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole. *Application by restructuring practitioner for a restructuring plan* (4B) The restructuring practitioner for a restructuring plan for a company may lodge an application with ASIC to change the name of the company if the restructuring practitioner is satisfied that the proposed change of name is in the interests of the creditors of the company as a whole.	For the reasons discussed in our submission, we recommend using the same expression throughout the Bill "interests of creditors as a group." Therefore, amend both (4A) and (4B).

32 Paragraph 420(2)(r) Omit "or a scheme of arrangement", substitute ", a scheme of arrangement or a restructuring plan".	Omit "or a scheme of arrangement", substitute ", a scheme of arrangement, deed of company arrangement or a restructuring plan".
35 After paragraph 425(5)(c) Insert: (ca) the restructuring practitioner for the corporation has consented to the application; or	Delete the words "has consented to the application"
57 After subparagraph 588FE(6B)(c)(iii) Insert: (iiia) by a restructuring practitioner for the company; or	(iiia) should read, "by, or with the consent of, a restructuring practitioner for the company;"
98 Section 75-1 of Schedule 2 The restructuring practitioner for a company or for a restructuring plan may convene a meeting of creditors in exceptional circumstances if it is in the interests of creditors to do so.	For the reasons discussed in our submission, we recommend using the same expression throughout the Bill "interests of creditors as a group."
75-21 Restructuring and restructuring plans (2)However, the restructuring practitioner for a company, or for a restructuring plan, may convene a meeting of the creditors if the restructuring practitioner is satisfied that: (a) there are exceptional circumstances; and (b) it is in the interests of the creditors to do so.	For the reasons discussed in our submission, we recommend using the same expression throughout the Bill "interests of creditors as a group."

104 Section 90-1 of Schedule 2 After "to review the external administration of the company", insert "in most cases".7	Delete the "7" that appears at the end.