



27 November 2020
OBPR ID: 25694

Mr Jason Lange
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Dear Mr Lange

Regulation Impact Statement – Insolvency reforms to support small business – Final Assessment

I write in relation to the attached Regulation Impact Statement (RIS) on the Government's insolvency reforms to support small business.

I am satisfied that the RIS broadly addresses the matters raised by you and your colleagues as part of the first pass assessment.

Evidence of the problem

We have included additional detail regarding the problems facing Australia's insolvency framework, which are backed by evidence from stakeholders and statistical analysis. For example, we have included references from industry stakeholders, government entities and international bodies that highlight the issues they see with Australia's insolvency framework. In addition, we have included statistical analysis where possible. For example, the RIS notes that:

From April to September 2020, there was a decrease in companies entering external administration of 51 per cent compared to the same period in 2019 (a decrease from 4,404 to 2,139). Extrapolating this rate to the end of the year results in approximately 3,000 companies that have not entered external administration compared to the corresponding period in the previous year.

This decrease in the number of external administrations can partially be explained by the Government's temporary insolvency relief¹. As such, the RIS more clearly captures legacy issues facing Australia's insolvency framework, and those that have arisen because of COVID-19. It is this evidence to support the case for Government intervention.

¹ On 25 March 2020 the Government introduced temporary insolvency relief. The relief increased the minimum threshold for creditors issuing a statutory demand from \$2,000 to \$20,000 and increased the time to respond to the statutory demand from 21 days to six months. Directors were also given temporary relief from personal liability if a company trades while insolvent. This temporary relief expires on 31 December 2020.

Options analysis

We have provided more detailed descriptions of the options under consideration, and further explained how they might operate.

As requested, we have provided a more comprehensive explanation of the anticipated impacts for each option, including greater details of the costs and benefits of the options (such as the overall impact on the Government's underlying cash balance). The options now more expansively explain how they have been developed through consultation with stakeholders.

We have enhanced our explanation on the impacts of option 2, providing further detail of the costs and benefits of a debtor-in-possession model, supplemented with evidence provided by stakeholders. For example, we have included evidence from the Australian Small Business and Family Enterprise Ombudsman's (ASBFEO's) Insolvency Inquiry Report, which described issues that the current external administration processes pose for small businesses, and why there are barriers to their use.

In regards to concerns that the Office of Best Practice Regulation (OBPR) raised around option 3, we have better articulated how the option aligns with stakeholder feedback and suggestions. I note that the changes to option 3 are to clarify the existing intent of the option, rather than to propose new parameters for this option.

Accordingly, we have outlined how this option links eligibility to an already existing legislative definition of small business, while highlighting that there are different legislative definitions currently in place depending on the policy objective. A list of some of the statutory definitions was included in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 2018, 'Background Paper 12: Financial services and Small and Medium-Sized Enterprises', p5-6.

The consideration of option 3 is further improved with a better explanation of the impacts of using an already existing legislative definition of small business to link to eligibility of the new insolvency processes. This includes more detail on the possible impacts on the creditors of a company that goes through an insolvency processes not suitable for the company.

Consultation

Throughout the RIS, we have sought to better explain how consultation was conducted and how it influenced the development of the options. The different stages of consultation, and how they have contributed to the development of the options, have been clearly laid out. Further, we have included relevant extract from stakeholders' submissions into the draft exposure legislation to support the analysis.

Treasury held regular consultation with stakeholders following the implementation of the temporary insolvency relief from March 2020. Consultation was held with various stakeholder groups including representatives of insolvency practitioners, turnaround professionals, accountants and other professionals, and small business representatives. While the purpose of this consultation was to gauge the impact of the insolvency relief and to better understand the state of the insolvency market, these meetings provided an opportunity to discuss broader policy issues with stakeholders. This included systemic issues with Australia's insolvency framework and the impact that these are having on business (including small businesses) in the context of COVID-19.

On 24 September 2020, the Treasurer announced the broad framework for the insolvency reforms to support small business. Following the Government's announcement of the reforms, Treasury held bilateral meetings with a variety of stakeholders including the Australian Restructuring Insolvency and Turnaround Association (ARITA), the Turnaround Management Association (TMA), ASBFEO, Law Council of Australia,

Chartered Accountants Australia & New Zealand (CA ANZ), KPMG, the Australian Banking Association (ABA) and representatives of small business. The purpose of the consultation was to allow stakeholders to communicate their high-level views on the reform process, and to ask questions of Treasury, as input into preparing draft legislation.

I note OBPR has raised concerns with the length of time the legislation was released for formal consultation. Due to the impacts of COVID-19, and the ending of the temporary insolvency relief, it is important the new insolvency processes can commence as soon as possible, hence the need for the 1 January 2021 start date. This would allow the reforms to benefit a larger number of businesses, particularly those that have been heavily impacted by the pandemic. As such, to meet the required timelines for a 1 January 2021 start date, a shorter public consultation period was required. I note that this shortened consultation period received approval from the Legislative and Governance Forum on Corporations (LGFC).

I further note OBPR has requested the RIS attribute individual stakeholders' to their respective comments. In bilateral meetings with stakeholders, stakeholders may not have been aware that their comments could be attributed to them publically. The bilateral meetings were used as a discussion to further develop policy and may not have reflected the final position of the stakeholders. As such, Treasury has avoided attributing individual views to stakeholders from these meetings.

In regards to the implementation plan and how the policy would be monitored the RIS now contains greater detail. The RIS now fully explains that the chosen option would be made through legislative changes to the *Corporations Act 2001* and related subordinate legislation. Subordinate legislation includes changes to the *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020*, *ASIC Supervisory Cost Recovery Levy Regulations 2017* and the *Corporations (Fees) Regulations 2001*, as well as rules made under the *Corporations Act 2001*.

As well as the changes raised in this letter, we have also made a large range of other minor changes to address comments made by OBPR.

In light of the changes made to the RIS, I am satisfied that the RIS is now consistent with the six principles for Australian Government policy makers as specified in the *Australian Government Guide to Regulatory Impact Analysis*.

I submit the RIS to the Office of Best Practice Regulation for formal final assessment.

Yours sincerely



Meghan Quinn
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Markets Group
Department of the Treasury
27 November 2020