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Insolvency reforms to support small business

Some preliminary considerations on the proposed insolvency reforms are set out below.

Considerations	Area
Will the flow of trade credit be interrupted and/or lead to an increase of creditors demanding personal guarantees?	Practical application
What will the registration criteria be for a SBRP i.e. will the Wild West return where cowboys proliferate the insolvency industry and anything goes?	System integrity
Will the definition of "small business" include a turnover threshold, to limit access to only true small businesses?	
Will limitations apply for the types of incorporated entities that can access the new processes—surely it is not contemplated they are suitable for public companies?	
Who will calculate/verify the $1m creditor threshold, and what about uncertain or contingent claims? What happens when creditors come out of the woodwork post-commencement/acceptance (as invariably happens) and push the value of creditors above the $1m threshold?	System integrity/Practical appllication
Given the SBRP will not be personally liable for debts incurred during the restructuring process (unlike a voluntary administrator), common sense tells me any trading will be cash on delivery—which will impact the directors' ability to operate. Assuming for a moment (at a stretch) that creditors will be prepared to extend credit during the restructuring process: • will directors, like voluntary administrators, be personally liable for debts incurred during the restructuring process (it would be perverse for the position to be different to a voluntary administration)? If not, can voluntary administrators look forward to being relieved of their personal liability? • will debts incurred during the restructuring process be given priority over pre-appointment debts?	Trading
If the director is personally liable, will they have the same regard (as a voluntary administrator does) for debts they incur during the restructuring process, particularly if they have nothing to lose?	Practical application

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Will a SBRP appointment trigger the vesting provisions under section 267 of the Personal Property Securities Act 2009 (PPSA) (it would be perverse for the position to be different to a voluntary administration)? Despite the complexity of PPSA law, presumably it is the director who will make a determination as to the validity of security interests (notwithstanding their lack of expertise and holding a clear conflict of interest)? Who will be liable for losses if their determination is wrong?

Will directors account to secured creditors if a security interest traces into proceeds, or they choose to continue trading and sell retention of title goods (it would be perverse for the position to be different to a voluntary administration)? If so, presumably it is the director who makes the assessment and is charged with protecting secured creditors' rights (notwithstanding their lack of expertise and holding a clear conflict of interest)? Who will be liable for losses if their determination is wrong?

Rights of secured creditors

Will the SBRP role involve comparing a return to creditors under the restructuring proposal to a return in a theoretical liquidation, which necessitates obtaining business/asset valuations and investigating theoretical recoveries available in a liquidation (such as voidable transactions, presumably limited to related-party transactions under the streamlined liquidation pathway) etc.?

Practical application

The SBRP is to be remunerated on a fixed-fee basis (negotiated upfront) plus a percentage of disbursements under the restructuring plan (if accepted by creditors). It is difficult to see how this type of fee arrangement will be in the best interest of creditors:

- like all professionals, a fixed-fee arrangement will be based on a scope—the SBRP will limit the time they commit to the process to broadly align to the scope and therefore fixed fee. This limits time spent on issues arising beyond the scope of the fixed fee (including potentially overseeing the directors conduct or misconduct as the case may be) and scrutiny of the restructuring plan;
- this problem will likely compound as directors search for the lowest fixed fee, encouraging a race to the bottom. This may translate to the SBRP providing a very narrow scope of service;
- the general position is the more professional advice the better for an entity that is in financial difficulty. A fixed-fee arrangement will limit the scope of advice during the restructuring process;
- a fixed fee/percentage of disbursements fee arrangement may not allow for a proper assessment of creditors' claims for voting and dividend purposes. Such a fee arrangement cannot realistically anticipate:
    - difficulties associated with adjudicating on disputed or contentious/uncertain claims; and/or
    - the cost of any legal advice required to finalise adjudication on such claims.

While aimed at minimising and providing certainty on cost, a fixed fee/percentage of disbursements fee arrangement may ultimately be to creditors detriment given the numerous unknowns inherent with insolvency appointments.

System integrity / Remuneration and its value

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Will there be a mechanism allowing the SBRP to resign or re-negotiate the fixed fee once appointed, particularly if it becomes uncommercial to fulfil the fixed fee/percentage of disbursements fee arrangement due to scope creep or requirement to deal with complex issues unforeseen at the outset?	Remuneration and its value
How is it proposed to approve expenses associated with engaging third parties such as solicitors, valuers etc., particularly if the director does not agree with the need for expert opinions/advice. Or is it contemplated the fixed fee/percentage of disbursements fee arrangement, negotiated upfront, be inclusive of third-party costs?	Practical application
Both ASIC and the courts hold insolvency practitioners to incredibly high standards, and rightly so. How will ASIC and the courts balance the paradigm shift to a low cost/return to creditor focus vis-à-vis statutory obligations imposed on insolvency practitioners? Will the same level of accountability be tenable in anew low cost, fixed-fee environment, or will the standard be assessed against the service offering in the limited scope, fixed-fee retainer?	Duties and regulation
If creditors reject the restructuring proposal and the business ultimately ends up in liquidation, will the relation-back day be the SBRP appointment date or the later date of a liquidation?	System integrity/ Practical application
Will the streamlined liquidation process for small business mean director misconduct effectively goes unchecked, and thereby encourages more and more misconduct? While claims pursued by liquidators may not always result in a return to creditors, they certainly serve to encourage proper conduct by directors of failing companies, concerned about their actions being reviewed by a liquidator in due course.	Duties and regulation
Will court liquidations with creditors less than $1m (many of which are assetless) fall under the new streamlined liquidation process, or continue to follow the existing liquidation process (which imposes onerous obligations and therefore cost on liquidators to conduct investigations, whether funded or not)?	
It is proposed the streamlined liquidation process will protect unrelated creditors from being pursued by a liquidator for unfair preference claims. The unrelated creditor most commonly targeted for preference payments is the Australian Taxation Office (ATO), who exert pressure in the lead up to liquidation, receiving payment and preference over other creditors. Is this proposed reform really aimed at protecting government revenue, further enhancing the ATOs position of priority and power over other creditors?	System integrity

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