THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BusLaw: PWlb1297522

27 April 2017

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear Mr Mason,

National Innovation and Science Agenda – Improving Corporate Insolvency Law

The Law Society appreciates the opportunity to comment on the Exposure Draft of the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 and the Explanatory Memorandum, released as part of the 'National Innovation and Science Agenda – Improving corporate insolvency law'.

The Law Society's Business Law Committee contributed to this submission.

Law Council submission

The Explanatory Memorandum notes that these reforms aim to drive a "cultural shift" from penalising and stigmatising failure, to "promoting a culture of entrepreneurship and innovation". The Law Society supports reform in this area. We are concerned to ensure, however, that any changes do not unduly burden business, particularly start-ups and small businesses, but also practitioners assisting those administering the process.

The Law Society supports the submission made by the Law Council of Australia ("LCA submission"), which is enclosed.

The Law Society's comments below complement the LCA submission.

Safe harbour for insolvent trading

The Law Society supports the introduction of a new safe harbour for company directors from personal liability for insolvent trading to facilitate more successful company restructures outside of a formal insolvency process, where to do so would achieve a better outcome for the company and its creditors as a whole. We agree with the comments made in the LCA submission that some aspects of the proposed drafting could be clarified to ensure that the proposed amendments achieve their

objectives. This will minimise the complexity and uncertainty of the proposed new regime.

Under the new provisions, directors will only be liable for an insolvent company's debts where it can be shown that they were not taking a course of action reasonably likely to lead to a better outcome for the company and its creditors as a whole. Whether a course of action is reasonable will vary on a case-by-case basis.

One key factor in determining whether a course of action is reasonable is ascertaining whether the director has obtained the appropriate advice from an "appropriately qualified entity". We reinforce the concerns expressed by the LCA and other stakeholders about the potentially detrimental role of pre-insolvency advisors on restructuring efforts. Unlike insolvency practitioners, who are regulated, pre-insolvency advisors are not members of a recognised profession, bound by a code of ethics or subject to requirements governing professional competence. We support the LCA submission recommendation that at a minimum, an "appropriately qualified entity" would need to maintain minimum levels of professional indemnity insurance.

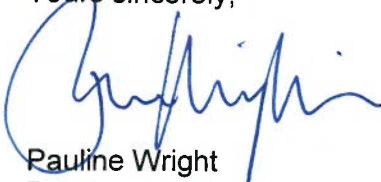
Ipso facto clauses

We support the introduction of a limited prohibition on the enforceability of ipso facto clauses during a formal restructure. We agree with the suggested amendments in the LCA submission which are designed to maximise the scope for a successful restructure, without unnecessarily constraining legitimate commercial arrangements.

Conclusion

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, by email at liza.booth@lawsociety.com.au or phone (02) 9266 0202.

Yours sincerely,



Pauline Wright
President

Law Council OF AUSTRALIA
Business Law Section

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
Parks ACT 2600
Via email: insolvency@treasury, gov.au

24 April 2017

Dear Mr Mason,

Submission in response to the Treasury 'National Innovation and Science Agenda – Improving corporate insolvency law' 2017

This is a joint submission by the Insolvency and Reconstruction Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia ('the Committees') in response to the release of the Treasury Exposure Draft 'National Innovation and Science Agenda – Improving corporate insolvency law' on 28 March 2017 (the 'Exposure Draft').

Summary

We support the introduction of a carve out for insolvent trading to facilitate and support reasonable and appropriate restructuring efforts by company directors. We believe however that there are some aspects of the proposed drafting that could be clarified to ensure that the proposed amendments meet their stated goal.

We support the introduction of a limited prohibition on the enforceability of ipso facto clauses during restructuring efforts using a creditors' scheme or voluntary administration. We support the need to target these reforms to contracts that unduly inhibit good faith restructuring efforts. We include below several matters that could be addressed in order to ensure that the proposed amendments will facilitate restructuring efforts without

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

Office Bearers: *Chair* T Dyson (QLD) | | *Deputy Chair* R Maslen-Stannage (NSW) | | *Treasurer* G Rodgers(QLD)
Director: Carol O'Sullivan | | email carol.osullivan@lawcouncil.asn.au

unnecessarily constraining a variety of legitimate commercial arrangements or the efficient and effective operation of financial markets.

Introduction

We welcome the opportunity to comment on the proposals set out in the Exposure Draft issued on 28 March 2017. The consideration of amendments to encourage and facilitate restructuring and to reduce the stigma attached to business financial distress and failure are measures that our Committees have been advocating for several years, most recently through our submission to the National Innovation and Science Agenda – Improving bankruptcy and insolvency laws' Discussion Paper in 2016. We remain resolute in our view that the need for these reforms is long overdue and we welcome the opportunity to contribute our views for consideration on the final form of the amendments through this submission.

Comments on the safe harbour for insolvent trading

Defence v carve out

The draft provision implements the 'Model B' proposal from the Discussion Paper by proposing a 'carve out' for directors who take reasonable and appropriate steps to attempt to restructure a company during times of financial distress. We re-iterate our view from the submission to the Discussion Paper that the current law imposes an inappropriate disincentive for directors to engage in good faith and reasonable restructuring efforts and support the Government's proposal to remedy this in the proposed amendment. However, in order for the amendment to provide the necessary certainty for directors to facilitate reasonable restructuring efforts, the amendments need to provide a true safe harbour rather than simply add to the defences that already exist in Corporations Act 2001 (Cth) s 588H (as we noted in our 2016 submission). We strongly support making the amendment a true safe harbour by making the new provision a carve out rather than a defence.

At present, the terms carve out and defence are used interchangeably in the Explanatory Memorandum, where [1.11] states that the safe harbour will 'carve directors out from the civil insolvent trading provisions' but other references in the document refer to the new provision as a 'safe harbour defence' (see [1.49], [1.51]- [1.54], [1.57], [1.58]). Furthermore, the notes to draft s 588GA, and the new proposed s588GB refer to a defence. There is also a proposal to change the heading to s 588H to 'other defences'.

In our view, it is important that these references be either changed or referred to a 'carve out'. Referring to the new provision as a defence is likely to support the view that directors bear the onus of proving that it applies, despite the wording of s 588GA(3). **We further recommend that the term 'carve out', which is not a legal term of art, be clarified in the Explanatory Memorandum.**

The term 'evidential burden' is one that is commonly used in legislation (see for example s13.3 of the Commonwealth Criminal Code, *Criminal Code Act 1995* (Cth)). It is important that the term as used in the proposed carve out be put into its broader legislative context so as not to cause uncertainty or confusion as to the extent of the burden this imposes on defendant directors. This could be done through the Explanatory Memorandum. The use of the term 'evidential burden' in s 588GA(3), as defined in s 588GA(5), is explained in the Explanatory Memorandum as a 'low evidential burden', which makes it clear that the director need only identify relevant action taken that could be said to be 'reasonably likely to lead to a better outcome for the company and the company's creditors' (s 588GA(1)(a)). Once this is established by pointing to the relevant steps, the onus shifts to the liquidator to disprove the course of action as satisfying s 588GA(1).

This represents a shift in policy from the current provision where the onus is on directors to establish a defence, which would come only after a contravention of the insolvent trading prohibition under s 588G(2) had been established by a liquidator, ASIC or a creditor.

We strongly support this change in policy to lighten the regulatory burden on company directors who seek to undertake reasonable restructuring efforts. However, the change in policy to a carve out, from a defence, needs to be clear and unambiguous in the wording of the amendments and in the Explanatory Memorandum to ensure that directors are given the certainty needed to facilitate good faith restructuring efforts. **We recommend that the word defence be replaced with 'carve out' in the proposed amendments and the Explanatory Memorandum, and that the title of s588H not be changed to 'Other defences'.**

'The person starts to suspect'

Proposed s 588GA(1)(a) directs attention to the specific time that the director 'starts to suspect that a company may become insolvent'. Director liability under s 588G(2) is triggered (absent a safe harbour) when a debt is incurred at a time when, relevantly, there are reasonable grounds for suspecting that the company is insolvent or would become

insolvent when the debt is incurred, and the director is aware that such grounds exist or a reasonable person would be so aware. Therefore, assuming the director is acting on reasonable grounds, the safe harbour protection only commences at the point when otherwise (absent defences) the director would become liable for debts so incurred. **We recommend that the period of safe harbour protection should commence at an earlier stage.**

It is possible that the company may have undertaken a course of action before there were reasonable grounds to suspect insolvency. As concerns may arise as to the potential solvency of the company the directors will need to determine whether to continue with the course of action or take alternative action. **We recommend that the carve out should apply to the decision to continue with an existing course of action that would be reasonably likely to lead to a better outcome for the company and the company's creditors.**

In our view, the focus should be on the conduct of the directors in trying to restructure the business rather than on identifying the precise moment from when the director actually suspected insolvency. Including this phrase in the carve out creates a potential gap in the protection afforded to directors because it may mean that conduct that implements a reasonable restructuring that would be reasonably likely to lead to a better outcome for the company and its creditors would still not satisfy the carve out where the director did not actually suspect insolvency at the time. This would leave them exposed to potential insolvent trading liability where a reasonable person would have been aware of the grounds to suspect insolvency (as per the current s588G(2)). The goal of these amendments is to give directors certainty so that they can have confidence to focus on reasonable restructuring efforts rather than on potential personal liability (see [1.12] of the Explanatory Memorandum). **We recommend removing the phrase 'the person starts to suspect the company may become or be insolvent,'** so that s 588GA(1)(a) would read:

> 'at a particular time, the person takes or continues a course of action that a reasonable person, in a like position in the company's circumstances, would believe would be reasonably likely to lead to a better outcome for the company and the company's creditors'

This gives directors the confidence that beginning or continuing with a reasonable restructuring effort will be protected, whether they subjectively suspect insolvency or not.

It should be noted that a successful restructure of a company in financial distress may involve one or more classes of creditors whose interests are valueless on a liquidation scenario. A common tool in successful restructurings is a debt for equity swap where one or more classes of debt and equity may be replaced by those proposing the restructuring. It is therefore important that the Explanatory Memorandum clarify that the phrase 'a better outcome for the company and the company's creditors' could be satisfied even where particular creditors or classes of creditors are not better off because their debts or claims have no economic value. It may be preferable to remove the 'interests of the creditors' as the phrase the interests of the company will include creditors. The law on directors' duties to consider creditor interests (as discussed by cases such as *Westpac Banking Corp v Bell Group Ltd (in liq)* [2012] WASCA 157) is not entirely clear and we should be mindful not to add to director's liabilities by endorsing a duty to creditors.

We also recommend that the Explanatory Memorandum clarify that the wording of s 588GA(1) is not intended to change the law of directors' duties to impose any positive duty to act in the interests of creditors.

'Debts incurred in connection with'

Proposed s588GA(1)(b) requires that the debts subject to the safe harbour carve out be 'incurred in connection with that course of conduct', being the course of conduct undertaken by the director(s) that would satisfy s 588GA(1)(a). It is important that the carve out give sufficient flexibility for the company to continue trading during the restructuring effort as this will usually maximize enterprise value and improve outcomes for the company and its creditors. We note that it may be arguable that this phrase is restricted only to debts specifically incurred for the purpose of the restructure, and it is unclear whether directors would need to establish (in satisfying their evidential burden) that the specific debt was connected with the restructuring.

For the amendments to facilitate restructuring it is important that directors focus on the efforts to save the business rather than focusing on their own potential liability by scrutinizing each and every potential debt to see whether it would fit within the carve out or not. Of course, we are not suggesting that a cavalier attitude to incurring debts be sanctioned, and note that the directors would remain under their duties to consider creditor interests as part of the duty to act in good faith in the best interests of the company, as well as their duty to act with due care and diligence both at general law and under statute. **We suggest that the phrase 'debts incurred in connection with that**

course of action' could be further clarified to ensure that directors do not need to review every potential debt to be incurred as demonstrating the necessary connection with the proposed restructuring by changing it to 'directly or indirectly in connection with that course of action'. This will allow directors to continue trading on the business while engaging in restructuring activity. Of course, they will remain subject to their directors' duties, which includes a duty to consider creditors under s 181. This will provide a disincentive to incur debts that are unlikely to support the restructuring effort.

Termination of the carve out

The proposed s588GA(1)(b)(ii) provides for termination of the protection given by the carve out when the course of action 'ceases to be reasonably likely to lead to a better outcome'. We are concerned that, with the benefit of hindsight, a court or regulator might decide that the protection had ceased to be available when, looking at the circumstances prospectively rather than retrospectively, there continued to be grounds for optimism that an effective restructuring that would meet the purpose stated in s588GA(1)(a) would be achieved. The value of the safe harbour protection is substantially diminished if there is a risk that, unbeknown to the directors, the protection will be found to have evaporated at any time.

We recommend that s 588GA(1)(b)(ii) be reworded as follows:

> when the person should have been aware that the course of action ceased to be reasonably likely to lead to a better outcome for the company and the company's creditors;

Relevant considerations

We support the range of considerations listed in s 588GA(2) as being a helpful non-exclusive list of matters that directors should be doing to fit their conduct within the carve out in s 588GA(1). We note and agree that the evidential burden requires no more than adducing or pointing to evidence that suggests a reasonable possibility that the relevant conduct fit within s 588GA(1), which once satisfied would then shift the onus onto the applicant (liquidator, ASIC or a creditor) to disprove the application of the carve out.

We also suggest that the five matters listed should apply within a stated time period, namely the period of protection identified in s 588GA(1). Thus, it should not be necessary to prove that any appropriate steps or appropriate advice etc, were taken or obtained before the protection period commenced.

We also echo community and business concerns about the potentially detrimental role of pre-insolvency advisors on restructuring efforts. Unlike insolvency practitioners (who are regulated under the Insolvency Practice Schedule), pre-insolvency advisors are largely unregulated in that they need not be members of a recognized profession, bound by a code of ethics or need to demonstrate acceptable standards of honesty, integrity and professional competency. We recommend that the phrase 'appropriately qualified entity' be further explained in regulatory guidance either through regulations or by ASIC/AFSA making a regulatory guide which sets criteria to assist directors and the court in assessing whether a person is an appropriately qualified entity. We support ARITA's recommendation that, at a minimum, an 'appropriately qualified entity' would need to maintain minimum levels of professional indemnity insurance.

Limitations on the carve out

We support the proposed limitations on the applicability of the carve out in circumstances where tax lodgments and employee entitlements are not up to date as these are important measures of company's viability. In our view, there is no need to ensure that tax payments are up to date given that the Commissioner of Taxation is an unsecured creditor and not entitled to priority payment compared with other unsecured creditors. Employee entitlements are already given priority status under Corporations Act 2001 (Cth) ss 433, 556 and 561.

We recommend that the term 'generally compliant' in [1.45] of the Explanatory Memorandum be revised to accord with the wording of s 588GA(4)(b). We recommend further that the assessment of compliance for these matters be undertaken at the time that the protection commences, noting that a failure to comply during the protection period may support the view that s 588GA(2)(b)(ii) is engaged.

We also recognize the importance of maintaining proper books and records and providing restructuring advisors and external administrators with this material. **We support removing the carve out protection where directors fail to comply with these requirements.**

We also support ARITA's submission regarding the importance of directors providing a report as to the affairs as a condition of the safe harbour.

Application of the carve out in corporate groups

It is common for business activity to be conducted using corporate groups, from large commercial enterprises down to SMEs. The Exposure Draft uses the term 'the company' (see, for example, s 588GA(2)(a), (b), (d) and (e), and s 588GA(4)). We recommend that consideration be given to the application of such provisions to corporate groups. For example, there may be separate group entities that employ staff, hold assets and conduct trading activities. In this context, it is common for the group to rise or fall as a whole due to the inter-dependence of the individual group companies, while debts may still be incurred separately by individual group members. **We recommend that 'the company' be clarified to ensure that conduct by directors as part of a corporate group can come within the carve out.**

Extension of the carve out to holding companies

Section 588V of the Corporations Act 2001 (Cth) imposes insolvent trading liability on a holding company in similar terms to individual liability under s 588G. The proposed amendments contained in the Exposure Draft do not currently extend to holding companies and s 588V. A failure to extend protection to holding companies is likely to make directors reluctant to proceed to a workout for a subsidiary even though they personally would be protected by the safe harbour, if doing so would expose the holding company to liability for a subsidiary's debts. **We strongly recommend that protection be available to a holding company in circumstances where directors are protected by s 588GA.**

Improper phoenix activity

We note that these proposed amendments do not deal specifically with improper phoenix activity. While it could be argued that making it harder to establish insolvent trading, by providing a safe harbour carve out, will not discourage improper phoenix activity and the largely unregulated pre-insolvency advisory industry, we support the relevant considerations in s 588GA(2). We believe these measures should be, at worst, neutral to the improper phoenix industry and, at best, will encourage directors to eschew such advice in favour of 'obtaining appropriate advice from an appropriately qualified entity who was given sufficient information to give appropriate advice' (s 588GA(2)(c)).

Comments on the stay on enforcing rights merely because of arrangements or restructures

We strongly support the introduction of amendments to address what has been described by insolvency practitioners as the biggest issue holding back restructuring in Australia - *ipso facto* clauses in contracts that allow unilateral variation or termination purely on the basis of an insolvency event (such as the appointment of an administrator or deed administrator). We support the application of the amendments to creditors' schemes aimed at avoiding liquidation and to voluntary administration, although we recognize that there are arguments that support its extension to receivership and to liquidation (on the basis of the anti-deprivation principle in insolvency law and by parity of reasoning to s 301 of the Bankruptcy Act 1966 (Cth)) and for consistency with similar provisions in other jurisdictions such as s 365(e) of the US Bankruptcy Code.

We make several recommendations aimed at ensuring that the amendments will facilitate restructuring efforts without unnecessarily constraining a variety of legitimate commercial arrangements or the efficient and effective operation of financial markets.

We recommend that the Government reconsider not including receivership, at least where the receivers are also managers over the whole or substantially the whole of the company's business (as contemplated by s 90 of the Corporations Act), in the protection offered by the new provisions. A failure to include receivership may mean that secured creditors are required to appoint both receivers and voluntary administrators which may unnecessarily increase costs of the restructuring. We accept that single asset receiverships involve different policy considerations and protection should not be extended to those. We support ARITA's submission on extending the protection to managing controllers.

We also note that there are strong policy arguments favoring the extension of protection against ipso facto clauses to all forms of external administration, including liquidation. We note ARITA's submission advocating the extension of ipso facto protection to liquidations, and acknowledge their reasons for that submission but note that it is already possible to seek court orders to extend the stay into liquidation. If the stay were to be extended to liquidations we note that liquidations may last far longer than administrations or schemes, and contracting parties may be bound by a far longer stay, but note that they have the ability to seek orders under proposed s 451G and would assume that any extension to liquidation would come with a similar protection.

Exclusion 4(c)

The proposed provisions in 415D and 451E both contain an exclusion to the operation of the stay in subsection 3 paragraph (c):

> 3(c) a right that:
>
> > (i) manages financial risk (within the meaning of Chapter7) associated with a financial product (within the meaning of that Chapter); and
> >
> > (ii) is commercially necessary for the provision of financial products of that kind;

We question the need for this exclusion given that agreements that would come within its scope (such as swap agreements: see [2.26] of the Explanatory Memorandum) are likely to be excluded in the regulations (see the list in the Explanatory Document). Furthermore, including this as an exclusion may create uncertainty as to what fits within its scope which may need to be resolved by costly and time consuming litigation at a time when the company is trying to restructure. **We recommend deleting paragraph (c) from both ss415D and 451E.**

Effect on secured creditors: s 451E(1)

The proposed amendment would seem to affect the right of a creditor with an enforceable security over the whole, or substantially the whole, of the company's assets to enforce their security on the basis that the company is under administration. We are concerned that this is inconsistent with the power of the secured creditor to enforce during the 'decision period' under Corporations Act 2001 (Cth) s 441A, which is a fundamental aspect of voluntary administration. The scope of proposed s 451E(1) would be limited to action by reason 'merely because the debtor company is in administration', and would therefore leave open other grounds to take enforcement action such as non-payment or a breach of a loan covenant. However, **we recommend that any inconsistency between proposed s 451E and existing s 441A be removed by clarifying that s 451E(1) is subject to s 441A.** This could be done by adding s 451E to existing s 441A(3) which carves out other stay provisions in Pt 5.3A.

'When the company is wound up'

Subsection 451E(2)(c) states that the stay will terminate 'if the administration ends because of a resolution or order for the company to be wound up—when the company is wound up'. We note that s451E(2)(a) already covers when the administration ends, and entering a winding up will end the administration pursuant to s435C. **We support ARITA's view that s451E(2)(c) is superfluous and can be deleted.**

Subsection 451E(3)

This provision allows for an extension of the stay where it would otherwise end due to s 451E(2), but only where an order under s 444F is in force and the applicant is the same as the applicant for the order under s 444F. There are many restructuring efforts where secured parties, owners and lessors (who could be subject to s 444F orders) are supportive of the restructuring and orders under s 444F are unnecessary. The capacity to extend the stay beyond the default termination period should not depend on s 444F orders being obtained as this will only increase costs and delays and potentially have an adverse effect on the relationship with the secured party, owner or lessor and their willingness to support the restructuring. **We recommend removing the s 444F requirement.**

In addition, the proposed s 451E(3)(b) uses 'the interests of justice' as the standard for justifying the extension. We suggest that further clarification be given as to what might be relevant to this standard. For example, s 444F uses the standard of the interests of the secured creditor, owner or lessor, which is assessed at the time immediately prior to the appointment of the administrator (see *Re Strazdins; DNPW Pty Ltd v Birch Carroll & Coyle Ltd* [2009] FCA 731). While the 'interests of justice' is a concept well known to the law, it may be useful to clarify the extent to which the contractual counter-parties stayed by the extension will have their interests protected. In the *Strazdins* case it was held that the interests did not include rights arising merely upon the appointment of the administrator, which accords with the purpose of these amendments. It is noted that the interests of affected parties are also protected by s 451E(6) and the potential to seek a lifting of the stay under s 451F.

Personal liability of the administrator

Administrators generally act as the agent of the company (s 437B) and only incur personal liability for debts (under s 443A) and rent and other amounts in respect of property used or occupied by or in the possession of the company (under s 443B). It is possible that liabilities may be incurred under a contract whose enforcement is stayed under s 451E,

which do not involve the provision of further credit (see s 451E(6)) which would not fall within the administrator's personal liabilities under either ss 443A or 443B. While it is possible that contracts could provide events of default around such potential liabilities, we recommend that consideration be given to addressing this potential gap.

Commencement of the stay

The application of the stay provisions is stated under Schedule 1 Part 2 Item 7 to be only to 'rights arising under contracts agreements or arrangement entered into at or after the commencement of this Part.' It is very common for contracts to include multiple documents created at various times. For example, in supply agreements it is possible that a contract will be made up of a master supply agreement, credit application, standard terms and conditions (which change from time to time), purchase orders, order confirmations, invoices, delivery notices and regular statements of account. The current wording of Item 7 could mean that rights established under documents created after the commencement of the stay (such as purchase orders or invoices issued after commencement) but provided for under pre-commencement contractual frameworks (such as master supply agreements) would never come within the scope of the stay provisions as each new order may be found to form part of the same contract (see for example *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2015] VSCA 92). We recognize the need for a transition period so that commercial contracts can be amended to accommodate the new law. **We recommend that the commencement of the stay be subject to a limited transitional period (such as 12 months) so that the stay would affect all contracts, agreements and arrangements existing after the transitional period (other than those expressly excluded by regulation).**

Reliance on former event of default

There are concerns that a party to a contract who is bound by the stay may seek to enforce an event of default following the implementation of a DOCA or scheme and that this may undermine the restructuring. We note that the scheme administrator or the voluntary administrator may seek a court order extending the stay on limited grounds. It would be possible for the scheme or DOCA itself to deem that any right to terminate on the basis of the appointment of the administrator or the application for a scheme meeting to be held (both events which are covered by the proposed stay) would be irrevocably waived upon execution of the DOCA or scheme.

Proposed list of excluded contracts

The list of proposed excluded contracts contained in the Explanatory Document lists 'flexible priority arrangements'. If this is aimed at covering subordination agreements we recommend that that term (which is widely used and recognized in financial contracts) be used so as to reduce potential confusion around what a flexible priority arrangement is.

The list also includes replacement of trustees. We recommend that this should be amended to include situations where the trustee is removed but not yet replaced (and therefore continues to hold the trust assets as a bare trustee). It is common for so called 'ejection clauses' in trust documents to provide for the automatic removal of the trustee on the trustee entering external administration but for the mechanism to replace the trustee to not be exercised for a variety of reasons (including perhaps because there are insufficient trust assets to cover trust liabilities).

If you have any questions in relation to this submission, in the first instance please contact the Chair of the Insolvency and Reconstruction Law Committee, Ms Victoria Butler, on 08-9426 6694 or via email: vbutler@jacmac.com.au

Yours sincerely,

Teresa Dyson, Chair
Business Law Section