

JONES DAY

AURORA PLACE • LEVEL 41, 88 PHILLIP STREET • SYDNEY NSW 2000
TELEPHONE: +61.2.8272.0500 • FACSIMILE: +61.2.8272.0599

27 June 2017

BY EMAIL

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Sir

Inquiry into the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 – Submission

Thank you for your invitation to make a submission in relation to the Inquiry of the Senate Economics Legislation Committee (**Committee**) into the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (Cth) (Bill)*.

Background

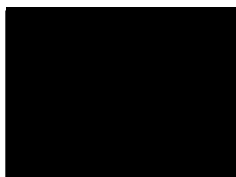
1. We previously made a submission to the Treasury in relation to the Exposure Draft of the Bill on 26 April 2017, which we **attach** for the Committee's reference.
2. We are pleased that the current version of the Bill has revised the Exposure Draft to:
 - a. change the definition of 'better outcome' in section 588GA(7) to mean an outcome better for 'the company' rather than one which is better for both the company *and* its creditors. As noted at paragraph 12 of our previous submission, we believe a definition restricted to the company better accords with the corporate governance principles recognised by Australian courts in considering the interests of corporate stakeholders, and the respective priority of those interests, while a company is experiencing financial difficulty;

- b. pursuant to sections 415D(1)(d)(i), 434J(1)(b)(i) and 451E(1)(b)(i), extend the ipso facto moratorium to circumstances in which the exercise of a right under a contract, agreement or arrangement is conditioned on the financial condition of a company, rather than solely on an application or order concerning a scheme of arrangement or the appointment of a voluntary administrator as under the Exposure Draft. As we outlined at paragraphs 19 to 25 of our previous submission, the extension of the moratorium in that manner (which is broadly consistent with the United States approach) is likely to enhance Australia's corporate and business rescue culture; and
 - c. provide for an additional ipso facto moratorium following the appointment of a managing controller of the whole or substantially the whole of a company's property under section 434J. As noted at paragraph 29 of our previous submission, the operation of the moratorium following the appointment of a managing controller was originally contemplated by the Government in foreshadowing the current insolvency reforms in its 2016 *Improving Bankruptcy and Insolvency Laws Proposals Paper*.
3. Nevertheless, we submit that the Committee should include within the scope of its investigation in the current Inquiry the following two additional matters we raised in our previous submission:
- a. amending section 588GA of the Bill so that it applies when *the company* rather than 'the person' (being the relevant director seeking to take advantage of the safe harbour) begins taking a course of action reasonably likely to lead to a better outcome for the company. Further to paragraphs 6 to 7 of our previous submission, it cannot have been the intention of the Government to relax robust corporate governance procedures, yet the current drafting of section 588GA with reference to 'the person' may potentially enable a director to undertake a unilateral course of action without ratification by the entire board of directors; and
 - b. exploring alternative wording in section 588GA(2) of the Bill so that the five prescribed factors to be taken into account in assessing whether a course of action is reasonably likely to lead to a better outcome for a company than immediate liquidation or voluntary administration are prima facie evidence of that fact. As noted at paragraph 15 of our previous submission, directors need to be provided with sufficient certainty in the application of the safe harbour to have incentives to pursue an informal restructuring and facilitate a stronger corporate and business rescue culture in Australia.

JONES DAY

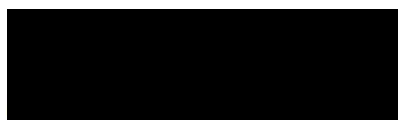
We would be pleased to discuss the contents of this submission with you further if that would assist in the conduct of the Committee's inquiry.

Yours faithfully



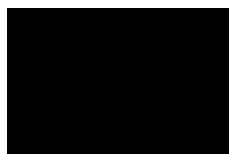
Roger Dobson

Partner



Katie Higgins

Partner



Dr Kai Luck

Associate

