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BY EMAIL

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Submission to the parliamentary inquiry into corporate insolvency in Australia

1. We refer to the inquiry into the effectiveness of Australia's corporate insolvency laws commenced by the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) on 28 September 2022 (**Inquiry**).

2. MinterEllison thanks the Committee for the opportunity to make these submissions to the Inquiry on the matters set out in the Terms of Reference as agreed on 28 September 2022 (**Terms of Reference**). We note that we have recently made submissions to other public inquiries concerning matters falling within the Terms of Reference, specifically the recent Treasury consultations in 2021 in relation to clarifying the treatment of trusts under insolvency law[1] and helping companies restructure by improving schemes of arrangement.[2]

3. At the outset, we wish to make clear that we do not consider that the underlying principles of Australia's insolvency laws are fundamentally unsound and therefore in need of drastic alteration. In our view, Australia's insolvency laws are largely robust and fit for purpose. However, with harmonisation and simplification, the various insolvency laws relating to companies, individuals, trusts and partnerships could be significantly improved.

4. Our primary submission is that, for reasons outlined below, the Inquiry ought to recommend the conduct of a further, more comprehensive and holistic review of Australia's corporate and personal insolvency laws, with a view to making meaningful recommendations to harmonise and simplify those laws.

5. Nearly 40 years have passed since the Australian Law Reform Commission (**ALRC**) undertook its five-year inquiry into insolvency law in Australia which resulted in ALRC Report No 45, the General Insolvency Inquiry, more commonly known as the "Harmer Report". Certain recommendations in the Harmer Report were not enacted, for example recommendations in relation to law reform regarding insolvent corporate trustees.[3] Since 1988, there has been significant economic, technological and social change in Australia. In the intervening decades, Australia's insolvency laws have also become considerably more complex.

[1] A copy of MinterEllison's submission to Treasury's 2021 consultation in relation to clarifying the treatment of trusts under insolvency law is available at https://treasury.gov.au/sites/default/files/2022-04/c2021-212341-minterellison.pdf.
[2] A copy of MinterEllison's submission to Treasury's 2021 consultation in relation to helping companies restructure by improving schemes of arrangement is available at https://treasury.gov.au/sites/default/files/2022-02/c2021-190907-minter-ellison.pdf.
[3] See footnote 1 above.

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6. Law reform in relation to corporate and individual insolvency has been piecemeal,[4] and we have seen various sub-areas of insolvency law reviewed separately, and layers of legislative reform being enacted incrementally. This piecemeal approach has contributed to Australia's insolvency legislation becoming increasingly complex and difficult to navigate, save for sophisticated users. For example, in the case of corporate insolvency, the legislative regime is spread throughout various enactments, including primary acts such as the *Corporations Act 2001* (Cth) (**Corporations Act**) (across both Chapter 5 and Schedule 2) and the *Cross-Border Insolvency Act 2008* (Cth) (**CBI Act**) and associated regulations and instruments including the *Insolvency Practice Rules (Corporations) 2016* (Cth). An example of complexity arising from recent corporate insolvency legislative reforms is the 'ipso facto' stay reforms introduced in 2017 under which the principal provisions are contained in four different sections within the Corporations Act[5] that are subject to a plethora of exceptions and exemptions separately contained in regulations[6] and an instrument.[7]

7. Further, unnecessary differences now exist between the insolvency laws and regimes applicable to corporations, individuals, trading trusts and partnerships. These differences create complexity, and are in many respects difficult to justify in principle. An example being the dissimilar legislative restrictions on enforcement of ipso facto clauses under the Corporations Act[8] and the Bankruptcy Act.[9] In addition, where consumers and others lack a proper understanding of the capacity in which a commercial counterparty is trading, these differences also render it difficult for them to understand and mitigate the consequences of potential counterparty insolvency.

8. Since the Harmer Report, the Commonwealth has been referred the power to legislate with respect to corporations so as to enact the Corporations Act. It is therefore not necessary to maintain any legislative schism with respect to personal insolvency (under the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**)) and corporate insolvency (under the Corporations Act). If Australian insolvency legislation is to be rewritten, consideration should be given to whether such legislation should be contained within a single enactment encompassing all of the current matters legislated for in the Corporations Act, CBI Act and Bankruptcy Act in an appropriately structured and streamlined manner.

9. For the above reasons, we consider that the Inquiry should recommend that a further more comprehensive review of Australia's insolvency laws relating to companies, individuals, trusts and partnerships be undertaken, either in the form of a further general inquiry conducted by an independent and dedicated law reform body (such as the ALRC) or by an advisory body similar to the Corporations and Markets Advisory Committee (CAMAC) which was abolished in 2018.

10. A review of the scope required to inform reform of Australia's insolvency laws cannot be achieved within the present Inquiry, given that:

    (a) the present Terms of Reference, focused solely on corporate insolvency, are too limited;

    (b) the further review could not be completed within the timeframe in which the Committee is to undertake this Inquiry, having regard to the following matters;

    (c) the body conducting the review would need to:

        (i) conduct its own research and analysis of Australia's insolvency laws, including using data-driven techniques to conduct such analysis;

        (ii) undertake a comparative review of Australia's insolvency laws compared to the insolvency laws of other jurisdictions in relevant respects;

        (iii) publish an appropriately detailed consultation paper identifying specific issues relevant to the broader terms of reference in respect of which interested parties might wish to make submissions. Meaningful consultation cannot be achieved in

[4] For example in recent history, see the *Insolvency Law Reform Act 2016* (Cth), *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth) and *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth).
[5] Corporations Act, ss 415D(1), 434J(1), 451E(1), 454N(1).
[6] *Corporations Regulations 2001* (Cth), reg 5.3A.50.
[7] *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth).
[8] See footnote 5 above.
[9] Bankruptcy Act, s 301.

the absence of such a paper, which must include sufficient explanatory detail to enable a layperson to understand the issues identified;

(iv) publish proposed law reform papers identifying and/or draft legislation in respect of which interested members of the public may make further submissions; and

(v) otherwise undertake an extensive consultation process where stakeholders may provide oral and written feedback on Australia's insolvency laws and specifically proposed law reform, including in forums such as public webinars, and with participation from relevant industry and professional associations.

Please do not hesitate to contact us if you have any questions regarding this submission or would like to further discuss any of the above matters.

Yours faithfully
MinterEllison