GPO Box 2985
Melbourne VIC 3001

Level 24
333 Collins Street
Melbourne VIC 3000

+61 3 8623 3333
info@kordamentha.com

KordaMentha
Restructuring

Committee Secretary
Senate Economics Legislation Committee
PO box 6100
Parliament House
Canberra ACT 2600

12 July 2017

By email: economics.sen@aph.gov.au

Dear Sir

Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017

We commend the drafters of the legislation for making sensible changes to many of the issues identified in the Exposure Draft and Explanatory Memorandum issued in March 2017.

This submission is made by KordaMentha. This submission supports the position outlined in the submission of the Australian Restructuring Insolvency and Turnaround Association ('ARITA') dated 12 July 2017.

We make the following specific comments in the context of KordaMentha's experience in large corporate insolvencies and restructurings:

PART 1 - SAFE HARBOUR FOR INSOLVENT TRADING

Appropriately Qualified Entity

Our submission to Treasury dated 24 April 2017 in response to the Exposure Draft and Explanatory Memorandum identified concerns we had with there being no guidance as to what or who qualifies as an 'appropriately qualified entity' to provide safe harbour restructuring advice. Whilst the Explanatory Memorandum to the draft Bill has expanded commentary on this issue, we are concerned there is still the possibility of abuse of the new provisions by those that facilitate phoenix activity.

To mitigate this abuse, we believe safe harbour restructuring advice should only be provided by a registered liquidator.

In the absence of such a requirement, there should be a minimum base line for the notion of 'appropriately qualified' and the legislation should specify that the adviser entity must hold professional indemnity insurance that covers that entity for the provision of the relevant advice.

Uninsured advisers should not be considered 'appropriately qualified' for the purposes of the legislation.

PART 2 – STAY ON ENFORCING RIGHTS MERELY BECAUSE OF ARRANGEMENTS OR RESTRUCTURES

Limitation of proposed changes

The explanatory memorandum includes discussion on the fact that the operation of ipso facto provisions can reduce the scope for a successful restructure, destroy the enterprise value of a business entering formal administration, or prevent the sale of the business as a going concern.

Our submission to Treasury dated 24 April 2017 identified the fact that loss of value through the operation of ipso facto provisions also occurs in Managing Controller appointments and use of these provisions can severely curtail a Managing Controller's ability to continue to operate a business on a 'business as usual' basis to then sell the business as a going concern. Generally, the sale of a business as a going concern maximises outcomes for creditors.

We commend the inclusion of Managing Controller appointments in the draft Bill as we see real benefit to all stakeholders from this. We would however like to see the operation of the stay extended to Liquidation appointments (including Provisional Liquidation appointments) to maximise the chances of the sale of businesses as a going concern, which in turn maximises the returns available to creditors.

Only applies to contracts entered into after enactment date

Whilst we have long advocated for a stay on the operation of ipso facto clauses and welcome the stay generally, we again note that there will not be an immediate benefit in respect of the new legislation if the bulk of a company's contracts were entered into before the enactment date. It is likely to be a number of years before companies in financial distress will see the benefit of these changes. Consideration should be given to the stay extending to existing contracts in relation to new insolvency administrations which commence after the enactment date.

Yours faithfully

[redacted]

Mark Korda
Partner