

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into corporate insolvency in Australia

2022 - 2023

Division: Market Conduct Division
Topic: Ovato matter oversight
Reference: Spoken (p. 50-51)
Senator: Paul Scarr

Question:

Senator SCARR: Do you have any views in that regard, especially given taxpayer dollars within the FEG scheme and the way in which the court considered recalls to that scheme as part of its consideration with respect to whether or not to approve the scheme of arrangement? Is it an area which you are in the process of considering and coming to a view from a public policy perspective?

Mr Dickson: If I understood the question correctly, I would venture to say it's a very complex area in terms of how you weigh the different competing interests in a scenario like Ovato. What we hear is that there are trade-offs from different policy approaches. For instance, you could take one view around the need to preserve the interests of taxpayers, which is to limit the scope of calls on the FEG unnecessarily. There are other views as well, in terms of what sorts of impacts should take precedence. Another perspective on that is that in weighing up all of the different competing factors, sometimes a case-by-case approach is required and that judgement needs to be brought to bear on what would deliver the greatest net benefit to society in terms of outcomes. In that world, we've heard the view that the court system is one mechanism that would enable people to do that. That's the system that currently exists. There's a view that perhaps the court system enables the prospects of greater job preservation, for instance, where it can take into account all of the factors—including whether or not the FEG has been unfairly exploited, or inappropriately exploited, for that kind of use. So there's a mix of views and there are pros and cons on each side of the various different policy options.

Senator SCARR: I think that's a very reasonable analysis that you've put forward. I'll just give a bit more context to the discussion. The concern I have is that we heard evidence from the AMWU, that they received advice that they didn't have standing to make representations to the court with respect to the position of employees. We also had evidence from the department with responsibility for managing the FEG, that they considered whether or not they should appear and decided not to appear. My concern is from a public policy point of view—whether or not the court had the benefit of all of the information, evidence and perspectives it needed to have as it went through the balancing process which you've outlined. Is Treasury looking at the Ovato situation from a helicopter point of view, from a policy point of view? And are there any views with respect to how the federal government should respond to that situation in terms of appearing in court, or making submissions or not making submissions, and whether or not there are other factors which are explicitly referred to in the Corporations Act and which should be added? I'm very happy for you to take that on notice because, as you said, it's a very complicated matter. Is that something you could perhaps come back to the committee on with some more information, given that particular case has been raised by a number of stakeholders?

Mr Dickson: Happy to do that, Senator.

Answer:

As a policy agency, Treasury does not participate in regulatory activity and is not directly involved in particular schemes of arrangement. As part of its general responsibility for the *Corporations Act 2001*, including the provisions governing schemes of arrangement, Treasury regularly receives and considers feedback from stakeholders regarding the operation of those provisions. Treasury is aware of the concerns of some stakeholders regarding the schemes approved by the court in Ovato.

There are two broad types of schemes of arrangements. Creditors' schemes, which are used to restructure the debts of a financially distressed company, and members' schemes, which are typically used to effect the takeover of a company. Treasury understands that Ovato involved both members' and creditors' schemes.

There is a high level of court involvement in the scheme approval process. At the first court hearing, the court decides whether to convene a meeting (or meetings if there is more than one class) of members or creditors affected by the scheme. At the final court hearing, the court considers whether to approve the scheme. In deciding whether to convene the meetings or approve the scheme of arrangement, the court has a broad discretionary power to take into account any matter that it considers appropriate. It is the role of the scheme proponents to draw all relevant matters to the court's attention. The hearings allow any person whose interests are affected, or for ASIC, to appear to object to any aspects of the scheme and to raise any concerns.¹

¹ Damian T and Rich A (2021) *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement*, 4th edn, Herbert Smith Freehills, Sydney.