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News with Clout

Restructuring Insolvency and Turnarounds

ARITA ENDEAVOURING TO LIVE UP TO NEW NAME

With the Senate Economic Committee and the Murray enquiry flagging certain issues in need of attention in the insolvency regime in this country, the **Australian Restructuring Insolvency and Turnaround Association** ("ARITA") are wading into the debate via a draft discussion paper whose deadline has just passed.

It seems each major downturn generates enough introspection in credit providers, the insolvency profession and the corporate watchdog as to what is and is not working. Why should the GFC be any different? Professionals old enough will recall the introduction in 1993 of Voluntary Administration and Deeds of Company Arrangements. This was seen as a creditor driven process designed to facilitate the ongoing existence of the company or if not the company then the business. We feel generally it has not lived up to the hype.

It would appear that this new discussion paper is a well thought out foray into suggested solutions for either what did not work in the last changes, and what is no longer working because of the changes in the business and economic environment.

Generally it is felt that the failure is in respect of keeping the businesses and entities alive and retaining value for, creditors specifically, and all stake holders generally.

Two impediments are seen to survival under the existing legislation. That is the Insolvent Trading Rules and the exemption of a moratorium on not all ipso facto clauses.

It is argued that the big end of town are too ready to appoint an administrator on the whiff of insolvency. On balance it has been found overall that voluntary administration has not worked. Curiously it has been found that the small end of town is generally reluctant to use the process in any event.

For ipso facto clauses it involves contractual provisions where on the event of insolvency the particular contract becomes immediately void often killing off the business which may possibly otherwise have been viable.

The two remedies proposed are the adoption of a Business Judgment Rule which is referred to as Safer Harbour and the extension of the moratorium to cover all Ipso Facto clauses for the period of the voluntary administration which really does not go far enough.

The aim of the business judgment rule seems to us that if the directors get the right advice and the information that the advice is obtained on is correct and the advice is to continue on in the interests of all, then their personal assets should not have the same exposure.

The reason the ipso facto extension does not really go far enough is because once the decision is made as to a Deed of Company Arrangement the contract can still be terminated.

There are a variety of other provisions that have been considered and look refreshing. Whether or not the legislature listens, remains to be seen.

As ever we appreciate your support and welcome all your enquiries.

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NEWS WITH CLOUT

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