Corporate insolvency laws under the microscope

Australia's corporate insolvency laws are set to be scrutinised in a comprehensive inquiry to determine how temporary COVID-19 pandemic insolvency measures, as well as other policy measures introduced in response to the pandemic, may have influenced trends and practices.

The inquiry is being undertaken by Parliament's Joint Committee on Corporations and Financial Services. It will look at the effectiveness of the corporate insolvency laws in protecting and maximising value for the benefit of all interested parties and the economy and will consider potential areas of reform. It's being led by Chairwoman, Senator Deborah O'Neill, who said turbulent economic conditions meant a review was necessary. "There has been no substantive review in 34 years of Australia's insolvency structures," she said. "The historical moment is now, especially as Australia sees an uptick of insolvencies as pandemic-era protections wane, and businesses battle inflation and supply-chain issues."

The sector's peak industry body, the Australian Restructuring Insolvency & Turnaround Association (ARITA), which has been seeking a "root and branch review" for more than half a decade, has welcomed the inquiry. "Our laws are ridiculously complex. They are so difficult for directors to understand that five times as many businesses are wound up by ASIC than are properly closed down. They make the process unnecessarily expensive, with registered liquidators forced to do work which is not needed and they often have to do this work without getting paid. No one wins from this – not investors, not creditors, not workers and not the community.

"We want to see our laws redrafted under what we call the SEE principles: simple, effective and efficient. Using this framework, we will have more usable laws, reduced costs and better outcomes for all."

Trent Devine, Jirsch Sutherland Partner

Jirsch Sutherland Partner Trent Devine agrees any review that could lead to improvement of the industry "should be welcomed". "I'm particularly in favour of any reforms to reduce unlawful phoenixing," he says.

"Regardless of the review, it's always important for directors and their advisers to remember that insolvency shouldn't be considered the last resort. It's crucial to get professional help from a qualified professional to discuss options – and that could include restructuring and reinvigorating a company to allow it to move forward. The sooner you seek help the more options there could be. At Jirsch Sutherland, we offer an obligation-free consultation where we can discuss options."

The deadline for written submissions is November 30, 2022. "Should any advisers or directors have any feedback or thoughts about the insolvency process as it currently stands or around the terms of reference [see below] for the inquiry, we would welcome your comments. Please don't hesitate to contact me or one of my colleagues."

The terms of reference of the insolvency laws inquiry are:

1. recent and emerging trends in the use of corporate insolvency and related practices in Australia, including in regard to temporary COVID-19 pandemic insolvency measures, recent changes in economic conditions, etc and other contributory factors or events that have impacted insolvency patterns

2. the operation of the existing law including the small corporate business restructuring and liquidation reforms, the 2019 unlawful phoenixing reforms and the operation of the PPS Act

3. other potential areas for reform, such as preference claims, corporate trustees, insolvent trading and safe harbour, and international approaches and developments

4. support for business access to corporate turnaround capabilities to manage financial distress

5. the 'role, remuneration, financial viability, and conduct of corporate insolvency practitioners'

6. the role of government agencies, including ASIC and its effectiveness as a co-regulator, the ATO's role, and other bodies including the Small Business Ombudsman

7. any related corporate insolvency matters.