

NEW INSOLVENCY INQUIRY MISSES THE MARK

On 10 October 2019, the Small Business and Family Enterprise Ombudsman (**Ombudsman**) launched an inquiry into the insolvency industry with the purpose of determining whether the current system will "*achieve the best possible outcome for small and family businesses in financial trouble*" (**Insolvency Inquiry**).

The Insolvency Inquiry

The Insolvency Inquiry follows the Small Business Loans Inquiry, the outcome of which the Ombudsman indicates showed concerns on the part of small business owners in debt recovery and insolvency processes. As a way of allowing small and family businesses that have faced financial difficulty or had their business restructured or wound up to "share their stories", a survey has been uploaded on the Ombudsman's Insolvency Inquiry website.

Based on the Terms of Reference released by the Ombudsman, the Insolvency Inquiry will examine:

- the existing insolvency system through the experience of small businesses, in particular, where they may be able to contribute to the process;
- the degree of transparency of the governance, processes and costs of practitioners including legal experts, valuers, investigating accountants, administrators, receivers and liquidators;
- how the insolvency of a small or family business may lead to bankruptcy for the owners; and
- how the established framework impacts the practices and fees of insolvency practitioners.

A Reference Group has been established as a forum for input with such group being chaired by former Senator John Williams.

The Ombudsman has advised that an interim report will be handed down by 11 December 2019 with the final report to be completed by 18 February 2020.

Missing the Mark

Since The Insolvency Inquiry has already been widely criticised by the restructuring and insolvency industry for a variety of reasons. Firstly, it is said that the Insolvency Inquiry fails to target key issues, such as the work of unregulated pre-insolvency advisors who can contribute to the practice of Phoenixing.

Further, the Insolvency Inquiry and its focus do not seem to show an understanding that by the time a small or family business experiencing financial difficulty seeks advice, it is often "too far gone" to successfully restructure the business and a liquidation process is inevitable.

There is also some concern that the Reference Group is narrow and does not include representatives from key stakeholders.

ARITA's Financial Recovery Law Reform Commission

There is a strong view that the Insolvency Inquiry seems unnecessary in light of the Financial Recovery Law Reform Commission (**Commission**), launched by Australia's leading restructuring and turnaround association, the Australian Restructuring Insolvency and Turnaround Association (**ARITA**).

The Commission forms part of ARITA's 8 Point Plan to review and reform insolvency laws in Australia. There is no doubt that reform is required and a complete review seems appropriate. We have seen much more nimble jurisdictions like Singapore putting in place meaningful reforms in this space.

It is thought that the Commission will provide a more thorough review of the restructuring and insolvency regime as a whole, which will include the impact on small and family businesses. The Commission will be led by a range of key stakeholders which we consider will give a highly relevant and insightful understanding of where the current restructuring and insolvency regime can be improved as a whole.

At a very minimum, Australia has missed an opportunity to test whether pre-positioned sales could work by first ascertaining if such sales could work for SMEs.

Conclusion

It will be interesting to see what recommendations come out of the Insolvency Inquiry, whether they will be adopted and whether they will have the effect of reducing the number of small and family businesses going into liquidation.

It is our view that for small and family businesses, seeking proper assistance earlier as well as staying well away from pre-insolvency advisors would potentially provide a better outcome than changes to the restructuring and insolvency regime that focus only on small and family businesses.



Ian Dorey

Partner

+61.7.3233.1236

ian.dorey@klgates.com



James Thompson

Lawyer

+61.7.3233.1212

james.thompson@klgates.com