

Mr Daniel McAuliffe
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The Treasury
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Dear Mr McAuliffe

IMPROVING BANKRUPTCY AND INSOLVENCY LAWS

The Insurance Council of Australia¹ (the Insurance Council) appreciates the opportunity to provide its views in response to the Treasury's paper, *'Improving bankruptcy and insolvency laws'* (the paper), concerning proposed changes to Australia's bankruptcy and insolvency laws. We note that the paper forms part of the Government's National Innovation and Science Agenda (the Agenda).

The Insurance Council supports the policy goals behind the Agenda. We agree that innovation and entrepreneurship is key to Australia's long term economic growth. However, we submit that any planned change to Australia's bankruptcy and insolvency laws should be supported by a clear and sufficient rationale for change and strike an appropriate balance between encouraging entrepreneurship and protecting creditors.

This submission mainly focuses on the paper's proposal to constrain the operation of ipso facto clauses that have the purpose of allowing termination of contracts solely due to an insolvency event. We note that the paper also considers whether this approach should be extended to include other types of ipso facto clauses (e.g. clauses that vary contract terms).

Contracts of general insurance typically do not include clauses that stipulate an insolvency event as a termination right. However, general insurance contracts may include clauses that specify an insolvency event as an exclusion in the contract. We emphasise that there is a clear distinction between a termination right in a contract and an exclusion under a contract.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. March 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$43.8 billion per annum and has total assets of \$118.5 billion. The industry employs approximately 60,000 people and on average pays out about \$124.2 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

In this regard, any proposed changes should carefully take this distinction into account and not detrimentally affect an insurer's ability to exclude an insolvency event as a head of cover, particularly because the insolvency event itself may have caused the loss. Insurers should not be placed in the position of being forced to be the insurer of an insolvency event simply because they cannot exclude this head of liability.

We are pleased that the paper recognises that there are circumstances where constraining the operation of ipso facto clauses would be undesirable, impractical, or introduce unnecessary uncertainty into the market.

The Insurance Council strongly submits that a specific carve out for exclusion clauses in general insurance contracts is required, given the circumstances outlined above.

While we are supportive of the proposal for a safeguard provision that would provide any affected counterparties with an appeal right to vary contract terms, we consider that a specific carve out for exclusion clauses in insurance contracts would be more appropriate.

In addition, the Insurance Council is concerned with the paper's proposal to reduce the default bankruptcy period from 3 years to 1 year. Specifically, we are concerned that this may have a detrimental impact on the speed at which consumers can obtain new credit, which would have consequential effects on delinquency rates and recovery.

For instance, if an individual's default bankruptcy period was lifted after one year, they may not have regained an adequate capacity to meet new credit obligations; therefore, a potential lender would unlikely be able to accurately assess the credit worthiness of that individual.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO