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Standing to Challenge: Will the Australian Courts Continue to Assist Aggrieved Stakeholders as the Economic Uncertainty Remains?

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Insolvency practitioners (**IPs**) often occupy quasi-judicial offices which, among other things, require them to, assess and adjudicate on competing claims, take coercive and enforcement actions and complete potentially contentious transactions. They must discharge their legal and equitable duties whilst maintaining objectivity and, whilst recognising and appropriately balancing the interests of a diverse range of stakeholders.

If current financial uncertainty forecasts prove to be true,[1] the challenges faced by IPs in terms of discharging their legal obligations will likely intensify in complexity, timing and scope.

Economic downturns and corporate renewal processes are an inherent part of free market economies. Distress to some represents opportunities for others, including in terms of investments and recapitalisations. IPs have an important role to play in those contexts. Above all else, they ought to bear in mind their commercial and legal obligations, and the fact that markets, governments, courts and their stakeholders are looking at them to act reasonably and responsibly both in advance of, during and after any downturn. The PMC Report regrettably paints a bleak picture. The reference to "*people being hit hard*" is calculated. It is not only intended to alert governments to the need to recalibrate fiscal policies, but is also intended to warn and prepare others in financial markets. Judges with oversight of external administrators will (and already do) take judicial notice of market and economic conditions. Those factors will be relevant in their assessment of the conduct of IPs, particularly in relation to the competing interests or unrecognised interests of stakeholders.

The courts will assist, and hear from, all aggrieved stakeholders

Whether "aggrieved persons", "interested persons", "appropriate persons" or "dissatisfied persons", domestic and foreign restructuring regimes have, and will continue to, cast wide nets in hearing from, and giving standing to, entities who wish to challenge or judicially review either the decisions made by IPs, or their conduct. That trend will likely gather pace as the recent economic developments filter through in terms of their impacts on legislative reform and judicial oversight of insolvent estates. In that context, IPs must recognise the expanding nature of their duties (and

corresponding liabilities both pre- and post-appointment) in seeing through their transactions, adjudications and claims. IPs need to act cautiously before embarking upon claims (irrespective of internal or external funding arrangements) or concluding contentious transactions.

In respect of claims, the risk profiles for external administrators, in the context of both types of funding, are different, and requires the assessment of unique metrics and threshold questions – both of law and commerce. Those assessments are far more complex than simply identifying a potential claim, assessing its merits, seeking or securing funding, and embarking on litigation. Recourse to court processes and invoking the coercive powers of a court are avenues routinely available and familiar to IPs, but just because those avenues exist, and a legal and commercial basis mightbe present to take coercive, recovery or enforcement action, does not mean that the first step need always be litigation. Indeed, taking that approach naturally invites scrutiny, not limited to that from the court (which occupies an oversight function in any event), but from a very broad (and sometimes unknown) range of stakeholders and regulators, including from overseas. Proponents of claims would also be best served pausing to critically assess the implications of their support for external administrators by paying regard to the current economic, legislative and judicial contexts relevant to insolvent estates.

In respect of transactions, exercising expeditious legal and commercial judgment calls will always be part of the mandate of IPs. However, the need to act decisively and quickly should not come at the cost of not properly discharging one's duties. That is particularly so in circumstances where, firstly, competing transactional interests are at play and, secondly, where creditors are looking to administrators for robust and well-reasoned rationales for why one transactional path should be favoured over another.

For further reading, see our insight.

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[1] See, for example, The Bank of England Monetary Policy Report published on 3 November 2022 (MPC Report).

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