24 January 2012

The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email: insolvency@treasury.gov.au

Attention: Mr Andrew Hall

Dear Mr Hall

Corporations amendment (phoenixing and other measures) Bill 2012

The Insolvency Practitioners Association (IPA) makes this submission on the Bill and is grateful for the opportunity to do so. The IPA is the peak professional body representing company liquidators and trustees in bankruptcy, and lawyers, financiers, academics and others practising or otherwise interested in insolvency law and practice.

1 Summary

The IPA supports:

- giving ASIC an administrative power to order the winding up of a company. However we query how such liquidations will be funded as they will invariably be of assetless entities;
- imposing a notification requirement on insolvency practitioners in relation to paid parental leave payments;
- including a regulation making power to prescribe methods of publication of events relating to the external administration of a company. The IPA has consistently supported internet based communications in insolvency; and
- the amendment to s 601AH of the Corporations Act.

2 Winding up by ASIC

We note that a precondition of any payment to employees of a failed company under GEERS is that the company has been formally placed into liquidation. Hence, the Bill provides ASIC with powers "to order the winding up of a company", if the grounds in proposed clause 489F are met. The effect of such an order is that the company is deemed to have gone into creditors voluntary liquidation under s 491 of the *Corporations Act*. ASIC would have the power to administratively appoint a liquidator to the company under clause 489F, and fix the remuneration of the liquidator.

In relation to the intended use of this power by ASIC, the draft Explanatory Document says that

> In addition ASIC would be able to place abandoned companies into liquidation for the purpose of enabling a liquidator to investigate and report on alleged misconduct; or to investigate and take action in respect of uncommercial transactions entered into prior to deregistration. This may also provide an additional mechanism to aid in addressing possible phoenix company behaviour.

2.1 *Funding*

We query whether there is to be any funding provided by ASIC or otherwise to the appointed liquidator. Invariably these companies would be without assets and it is unreasonable to expect liquidators to consent to appointments where payment of their remuneration is unlikely. While liquidators run this risk with any liquidation to which they consent, the risk of non-payment is higher given that these companies are defunct and no creditor has shown any interest in pursuing their winding up. Any assets of the deregistered company will have vested in ASIC. Even if there are potential recoveries from voidable transactions, it is unlikely that there will be any funds available to initially pursue such actions.

We do note that it is proposed to increase the availability of the AA fund. At 224.1 of the insolvency law reform proposals paper[1] an example is given of a company suspected of having been involved in phoenix activity but "there are no assets left in the company and no practitioner is willing to accept an appointment to that company". The paper says that "ASIC might (depending upon competing demands for regulatory resources) provide funding towards the costs of a practitioner performing the mandatory tasks in the administration (in order to induce a practitioner to accept the appointment) as well as towards preparing and providing a report on whether it has been involved in phoenixing". That paper also proposes law reform to allow insolvency practitioners to assign causes of action, for consideration, partly as an anti-phoenix measure.

2.2 *Remuneration*

We also ask on what basis ASIC would "fix the remuneration to be paid to the liquidator" (clause 489H(1)(b)) and whether that wording is sufficiently flexible - for example by way of allowing ASIC to fix a set fee, or to fix remuneration for work to be done.[2] Also, if it happens that other creditors of the liquidated company came to light, we ask whether ASIC's remuneration approval process would continue, or whether the normal approval process for creditor approval would apply, under s 506 of the Corporations Act?

2.3 *Assetless companies generally*

We have queried whether there is to be any funding provided in this regime. The lack of funding in corporate insolvencies leads to another issue. The IPA often receives inquiries from well-intentioned directors wanting to put their insolvent company into voluntary liquidation and asking for a liquidator to be appointed. However, the company will invariably be without assets, and the director without funds, and a liquidator member of the IPA will generally and understandably not consent to the appointment. In such cases, the directors in effect often do decide to "abandon" their company, and unpaid employees may be involved. The IPA raised this problem as a general issue in corporate insolvency, in our July 2011 submission to the 2 June 2011 options paper.

There is nothing in this Bill that would directly accommodate those directors. However we raise the prospect that directors may be able to initiate a voluntary winding up of their insolvent assetless company, through a request made to ASIC, in particular where there are employees involved, in order to have ASIC liquidate the company. That is a matter that ASIC could consider as being an avenue for such directors if this Bill becomes law.

2.4 *Drafting*

We also make these comments on the drafting of the Bill.

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[1] A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia, 14 December 2011.

[2] See *Re Korda; in the matter of Stockford Ltd* [2004] FCA 1682; (2004) 140 FCR 424 at [5]; Gidley re Aliance Motor Body Pty Ltd [2006] FCA 102; (2006) 150 FCR 345

- While ASIC can make various "orders" under the Corporations Act, to say that ASIC may "order the winding up of a company" (cl 489F) could confuse such a process with an order of a Court under s 459A;
- The liquidator is appointed "for the purpose of winding up the affairs and distributing the property of the company": cl 489H. We assume these words are not meant to express any limitation on the powers of that liquidator, for example under section 506 and section 477.
- We assume also that the ASIC order and the ASIC appointment of the liquidator are to be contemporaneous.
- We have mentioned the issue of remuneration approval. We note the terminology proposed is that ASIC "may fix the remuneration to be paid to the liquidator": cl 489H. The word "fix" differs from the use of the word "determine" in s 473 and s 449E; although the word "fix" is also used in section 473, perhaps inconsistently; and it is the word used in bankruptcy: s 162 of the *Bankruptcy Act*. There is merit in having consistent words.
- "An appointment of a liquidator by ASIC must not be made without the consent of the liquidator": cl 489H. This drafting may be loose. It contrasts with the wording in s 532(9) whereby an obligation is imposed upon the liquidator to "consent in writing to act as liquidator".

Generally, we assume that the law proposed in this Bill fits in with the remainder of the external administration provisions in Chapter 5 of the Corporations Act, in particular in relation to the powers and responsibilities of liquidators.

Also, we assume that this Bill will align with any reforms coming out of the insolvency law reforms proposals paper. We have mentioned one above, as to the proposed changes to the availability of AA funding.

3 Miscellaneous Amendments - Creditors Voluntary Winding Up – Meeting of Creditors

We agree with the proposed amendment of subsection 497(1) of the *Corporations Act*, as to the convening of the creditors meeting. The IPA in fact alerted Treasury to that drafting error in 2008: see (2008) 20(2) A Insol J 38.

4 Paid Parental Leave

The IPA agrees with the obligation to be imposed on practitioners under clause 600AA to notify the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) if the employer in external administration is a "paid parental leave employer'.[3] We note this obligation is to notify "as soon as possible": cl 600AA.

We note this is necessary in order to allow FAHCSIA to determine whether to continue paying paid parental leave payments to the company (for example, we assume, if employee were retained by the liquidator in a trade-on) or to make the payments directly to the employee.

We point out that this requirement should also appear in the *Bankruptcy Act*, in relation to individual employers, including those operating a business through partnerships.

5 Section 601AH and related issues

Although not referred to in the explanatory statement,[4] we note that this section concerning the reinstatement of a company by ASIC, is to be amended, in relation to a deficiency in its

[3] We assume that IPA's submission to FAHCSIA of 4 October 2010 on this proposed law has been taken into account.

[4] It is explained at 311-314 of the insolvency law reform proposals paper.

drafting: see *Foxman v Credex* [2007] NSWSC 1422. We also alerted Treasury to this issue in 2007. We agree with the proposed change.

We also point out that other reform may be needed of this or related provisions. In *Tan v ASIC* [2011] NSWSC 58, Justice Barrett said that law reform consideration could usefully be given to "uncertainties arising from the Commonwealth legislation with respect to the recreation of deregistered companies", referring to *Foxman v Credex* and to a number of other court decisions.[5] We have not analysed these in detail but wish to bring them to your attention.

6 Contact

Please contact either myself or the IPA's Legal Director, Michael Murray (02 9080 5826 and mmurray@ipaa.com.au), if we can assist further.

Yours sincerely

R Erskine

Robyn Erskine
President

[5] *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 441; (2006) 200 FLR 125; *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd* [2006] NSWSC 690; (2006) 201 FLR 296, *GIO General Ltd v Sabko Ltd* [2007] NSWSC 251; (2007) 70 NSWLR 743; *Consolidated Capital Services Pty Ltd* [2007] NSWSC 680; *Brown v Hodgkinson* [2008] NSWSC 625; and *Re Data Tech Communications (Aust) Pty Ltd* [2009] NSWSC 402.