PAUL BARD LAWYERS

Our Ref: JDC/90004

7 November 2017

James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir,

Submissions by Paul Bard Lawyers to the Discussion Paper on Combating Illegal Phoenixing

Please find attached my submission on the Discussion Paper on Combating Illegal Phoenixing, I apologise for the delay in providing my submissions.

Yours faithfully

Jeffrey Chard
Solicitor Director, [redacted]

Encl.

Submissions by Paul Bard Lawyers to the Discussion Paper on Combating Illegal Phoenixing

Thank you for your invitation to provide submissions on your discussion paper "**Combating Illegal Phoenixing**".

General Submissions.

Before addressing the questions raised in the discussion paper, the writer makes the following general submissions.

Wrong Emphasis on Phoenix Activity

A) The writer believes the terms "***Phoenix activity***" and "***illegal Phoenix activity***" are very imprecise terms, and do not directly address the problem or malevolence of improper activities.
   1) There is nothing improper or wrong with a promoter or a director forming a new company rising from the ashes of a failed company, and it is to the benefit of all, **where**.
      (i) The new company has paid proper value for the plant and equipment and assets (including intellectual property) of the failed company, and
      (ii) the failed company receives that value
   2) The new entity often takes over the employees of the failed company (including entitlements obligations (removing obligations on FEGG). It is sometimes the case that part of the consideration paid by the new company is the obligation to take over the entitlements of the failed company. That activity is legitimate provided that:
      a) The new company has resources to meet those employ obligations. It is sometimes a case that the new company is undercapitalised and often fails very shortly after.
   3) There is a benefit to the community in permitting an established business structure to continue. However, there is a need to protect the community from poorly run business practices that may continue in a new company structure.
   4) There is a benefit to creditors of the failed company, in a new company continuing to be able to trade to complete WIP contract, to permit the recovery of WIP incurred by the failed company, provided that the recovered WIP is received by the failed company.

5) It should be recognised that, any goodwill in the earlier business, is in most cases held by the director:
    (i) Any goodwill that vested in the company is very difficult to realise by a liquidator
        (1) Liquidator would not be able to procure restraints from the directors or employees a purchaser of the goodwill would expect
6) **<u>There is, however, a mischief where</u>**
    (i) plant and equipment all is transferred to the new entity for an undervalue;
    (ii) the new company paying as part of the consideration for the transferred assets, the assumption of liabilities to certain creditors of the failed company[1]; or.
    (iii) There is a fraudulent intent by using the corporate veil and conducting the businesses of the prior failed company to avoid certain liabilities.

The Real Issues

B) While the Discussion paper is titled "*Combating Illegal Phoenix Activity*", it appears more interested in combatting activity that deprives the DCT[2] of receiving payment. The writer believes that it is unhelpful to describe that activity under the general term of "*Phoenix activity*" and "*illegal Phoenix activity*." While it is beyond the writer to describe all activity that would be the concern of the DCT, the writer believes that the DCT and the Government should be concerned with the following activity

C) The writer believes the following mischief should be addressed where:
    1) *A person or entity causes a company to conduct its affairs to incur debts or liabilities in that company with the intention that the company is liquidated (or abandoned) without ever paying those liabilities" (**"the load and dump activity"**)*
    2) Assets of the company are transferred at an undervalue to a new entity ("**the undervalue transfer activity**") with the intention that the other company is abandoned.
    3) Assets of a company are transferred to a new entity, where the consideration given for the transaction, has the effect of preferring some creditors at the

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[1] This has the effect of disadvantaging the non-assumed creditors.

[2] It is recognised that the DCT is most often the most disadvantaged creditor in any activity)

disadvantage of other unsecured creditors of the failed company ("**the unfair transfer activity**"). For example, the new entity agrees to take on debts of specific creditors of the failed company.

4) Fraudulent Schemes. ("**the fraudulent schemes**") It is impossible to describe these schemes with any precision, primarily because they can be overly complex and have a strong element of artificiality whose genuine tax benefits are often illusory but which could allow invalid benefits to be initially claimed. Such schemes would include the "bottom of the harbour schemes."

D) Also, in addition to activity in which there is or could be mischief, there are sometimes other activities that operate to deprive the DCT of receiving payment where mischief is not (always) intended, where

1) a legitimate company and its directors are placed in a difficult position due to market forces ("**the failing sub-contractor activity**")
2) a property development company:
   a) Carries out a property development;
   b) Obtains payments of GST credits during the development;
   c) Dispose of all the assets of the development; and
   d) leave the development company with no assets to pay the final GST liability due arising from the sale of the development. ("**developer GST activity**")

E) The "**load and dump activity**" or **"developer GST Activity"** may not even arise in a typical Phoenix transaction. It may arise where a company has been incorporated deliberately to "load and dump" – "load" the company with liability and then "dump" the company The writer believes that existing corporation's law does not adequately address that activity.

F) Remedies are available under 5.7B of the Corporations Act to address the "***undervalue transfer activity***."

G) The "**unfair transfer activity**" generally arises where:

1) The new company as part of the consideration paid for the assets and undertakings of the failed company agrees to take on liabilities of creditors of the failed company. The mischief in this activity arises where the consideration is being paid for the plant and equipment assets of the failed company so that those assets are transferred from the failed company so that they are not available to the creditors as a whole.

2) There are sometimes genuine commercial reasons, why a new incoming company wishes to ensure that certain creditors are paid.
   a) The new company will wish to ensure good relations with trade suppliers. It is appropriate that in those cases, that any goodwill being paid by the new company, it is reduced by the value of those creditors. Often is the case, however, is that no good will is paid for (unfortunately, most of the goodwill in practical terms vests with the director) and the value of the creditors assumed by the new company, depletes the value of the assets available to the creditors as a whole.
   b) The new company will wish the ensure, that the liabilities of transferring employees it agrees to continue to employ is adjusted for for in the price paid. There is a smaller mischief in these transactions, as most employees are priority creditors of the failed company (so that the other creditors are not disadvantaged).
3) The writer believes that the remedies available under the current 5.7B of the Corporations Act do not cope well with trying to set aside "**unfair transfer activity**." While remedies may exist, it may be convoluted to rely upon them and the relief or remedy is challenging to quantify.
4) The "**failing sub-contractor activity**" can arise where
   a) The company has entered into a troublesome sub-contract with a head contractor;
   b) The sub-contract is unprofitable, or the head contractor is restricting payments to the sub-contractor.
   c) The directors of the sub-contractor genuinely but mistakenly believe that the sub-contractor will be able to trade out of its problems, or has recourse against the main contractor.

   This mischief in the above activity arises not necessarily from the decisions of the director, but as a consequence of the existing law, and or from the actions of the main contractor.

   d) The main contractor if often aware that the sub-contract is unprofitable, and that the sub-contractor will fail during the project. The sub-contractor enters into the contract due to very difficult competition. The directors of the sub-contractor often have limited education and commercially naïve. In some

cases, where the main contractor is its principle or only client, the sub-contractor debtor is under the influence of the main contractor's director.

e) As the current law stands:

(i) It would be unwise for a director of a company in trouble making any payment to the DCT, as that payment will be an unfair preference, and the director will be liable to indemnify the DCT against any preference claim.

5) The "**Developer GST Activity**" may arise unintentionally or as a result of a deliberate intent to defraud.

a) Unintentional GST Activity will arise in an unsuccessful property development. The mischief arises where the development company has received the benefit of GST refunds but fails to account when the development is sold.

b) Intentional GST Activity becomes apparent, where not at arm's length finance arrangements are entered into, where all the profit of the project is delivered the friendly (but greedy) financier, leaving the development company penniless to meet its obligations.

Ways to Combat Improper Activity

H) Improper Activity such as "load and dump" activity and Intentional "Developer GST Activity" needs to be addressed completely differently to "undervalue transfer activity," "unfair transfer activity, "failing subcontractor activity" and "unintentional Developer GST Activity." The writer believes:

"Load And Dump Activity" And **intentional "Developer GST Activity."**

1) That a criminal offence should be established to address the "**load and dump**" activity and "Intentional Developer GST Activity," to the effect that

"a person or entity should not conspire to cause, or cause a company to conduct its affairs to incur debts or liabilities in that company with the intent that the company be liquidated (or abandoned) without paying those liabilities."

a) There is a high level of "*mens rea*" in this offence, and in a lot of cases would be very difficult to prove. However, this is a reflection of the seriousness of the offence and the penalties that should be imposed, but that the court should have regard

b) The writer does not believe that offence should give rise to a civil penalty, the burden of proof should be to criminal standard and require a custodial sentence.

c) If this criminal offence is established, it may well also establish breaches of Section 184, and the civil penalty provision of 181 -183.

2) In addition to criminal offences, a liquidator in most cases would have recourse the remedy provisions under 5.7B of the Corporations Act.

(i) Antecedent transactions resulting in the company:

(1) being loaded with debt and

(2) being without assets

would have obvious artificiality and uncommerciality.

(ii) The amendments proposed in paragraph 3)a) below would also assist in the liquidator in being able to investigate those transactions.

<u>Undervalue Transaction Activity" And "Unfair Transfer Activity</u>

3) . Amendments should be made to the Corporations Act, to assist in addressing "*undervalue transaction activity*" and "*unfair transfer activity*." Those amendments should be addressed to:

a) To make it easier and cheaper for the liquidator to investigate the affairs of the failed company by :

(i) Strengthening The power of a liquidator to be able to issue notices for the production of documents:

(1) By being able to issue those notices to:

(a) any party involved in the transactions,

(b) Officers, employees, or advisors to the company;

(2) By prescribing evidentiary consequences, where a recipient fails to produce documents in response to a notice (as in Section 81G of the Bankruptcy Act).

(ii) Prescribing power for a liquidator to interrogate persons or entities involved in a transaction that may be an undervalue transaction activity or an unfair transaction activity. To avoid abuse, those interrogatories should be issued only with the consent of ASIC;

b) To create evidentiary presumptions to shift the evidentiary burden in certain types of transactions such as.

(i) A presumption that any antecedent transfer of assets from the failed company was an undervalue transaction.

(ii) A presumption any person or company who receives a transfer of property from a failed company was a close associate of the director of the failed company, within the meaning of Section 588DA;

(iii) A presumption that the part of a loss suffered by a company, due to an uncommercial transaction, is equal the difference between the value of the debts assumed by the party (obtaining of the transfer of the company's property less any amount assumed by that company in relation to a priority debt of the company (provided that the transferring company has been released from the liability) by the transaction.

c) amending section 588FB, by inserting a sub-paragraph to the effect

"*(3) A transaction may be an uncommercial transaction:*

(a) if the transaction results in the diminution in the assets of the company that would be available to meet the claims of ordinary unsecured creditors in a winding up

(b) If an agreement between a company supplying labour to another company does not provide for a full reimbursement of the cost of employing works in the supplying company."

Failing Sub Contractor Activity

4) To address to "**failing sub-contractor activity,**" the following is proposed:

a) The Defence against unfair preference claims available a creditor under 588FA(3) for "running account balance defences" be expressly extended to cover payments made the DCT.

b) The Prescribed Payment Scheme could be extended for certain industries to include a requirement that a principal contractor, deducts from payments to its sub-contractor, a and additional prescribed percentage unless the sub-contractor provides a statutory declaration to the effect that:

(i) That no BAS and IAS returns for the sub-contractor are more than 2 months outstanding; and

(ii) That either

(1) That it has paid all remittances to the DCT; or

(2) That it has entered into a payment arrangement with the DCT

Unintentional GST Developer Activity

5) the following proposals should be considered :
   a) Payment of GST refunds to special purpose development vehicles ("SPV"), should be retained during the development unless the SPV is grouped to an established holding company for GST purposes.
   b) The DCT has available to it, "garnishee" powers under the Tax Administration Act, and are actively using those remedies. Also, it already has information of impending sales from:
      (i) the issue of clearance certificates under the *foreign resident capital gains withholding regime*; and
      (ii) the state OSR (at least in NSW) where all contracts for sale, need to be issued with Land Tax Certificates.
   c) A *foreign resident capital gains withholding type regime* could be extended to also applying to GST payments.

The Need for Funding

I) The Government has to understand, that its legislation that requires companies to collect and remit the tax. It imposes a considerable burden on the company with the obligation. While there is the overwhelming convenience in imposing those obligations, by its very nature, it allows situations where the unscrupulous can take advantage and cause mischief.

J) <u>If the Government is concerned to address the above activities, it must also be prepared to fund liquidators (and the ASIC investigators) to investigate and prosecute claims. A liquidator cannot be expected to incur substantial costs in investigating activity, without proper funding and indemnities (that also preserve his independence.</u>

A Different Collection Approach Needed

K) It may also be wise for the DCT to reconsider its approach to debt collection:
   1) It is recognised and applauded that the DCT is taking an earlier role in collecting debts before the arrears becomes too large.
   2) The DCT, however, does not adopt a commercial approach in dealing with defaulting companies.

a) It notoriously takes a hard line in voluntary administrations and in dealing with payment arrangements which only encourages some of the activities discussed above.
   (i) I have seen multiple occasions, where the DCT has voted to reject a reasonable DOCA proposal, resulting in the the winding up of the company, and the liquidator looking to the Commissioner for un fair preference payments, for payments made to it in the prior 6 months.

b) A more commercial approach by the DCT to payment arrangements (including a remission of GIC and other penalties conditional upon compliance with a reasonable payment arrangement would provide substantially better outcomes for all.
   (i) The DCT does not appear to appreciate, that most directors and companies do not intentionally avoid complying, but get into difficulty in occasions for reasons which they are not at fault:
      (1) Defaulting head contractor;
      (2) Fraud
      (3) Force majeure
   (ii) Liquidation in almost all occasions results:
      (1) in the loss of inherent value of the business (to the economy generally)
      (2) A substantial loss to the company placed into liquidation, as it is notoriously difficult for a company in liquidation being able to recover its debtors.

Response to Questions

L) We respond below to the question in the discussion paper adopting the same numbers as the paper.

1) One.

2) It is perceived that the following parties are the best position to report suspected illegal Phoenix activity:
   a) The liquidator of the failed company (after investigating the affairs of the failed company);
   b) The Deputy Commission of Tax (it is often the most vulnerable creditor. While the DCT of describes itself as being an involuntary creditor, it is vulnerable only

because it imposes on the company obligation to retain and remit taxation liabilities).

c) The ASIC (through registration activities)

i) A layperson, would not be able to distinguish legitimate activity from a malevolent activity.

3) There are considerable risks in that the hotline would be used for improper purposes of a disgruntled person merely wishing to cause mischief. Any report made would be without any evidentiary worth, and may expose the person providing the information with defamatory liability (we believe it is inappropriate that the legislation gives them protection from that liability other than for the similar protection provided in section 535 to a Liquidator)

4) the Deputy Commissioner of taxation, because;

a) the DCT is the most common victim of malevolent activity; AND

b) the DCT is best positioned to assess the credibility of any report

5) Any reports made should be confidential. It is perceived that any benefit from hotline report, should be limited purely to point the direction where further investigations should be carried out to assess the worth of the report.

6) Six.

7) The ability to issue a notice similar in effect to a 139ZQ notice is a very powerful tool by liquidator or trustee in bankruptcy.

a) Unfortunately, they can easily be abused and improperly places the burden of proof upon the recipient. Liquidators could easily use them for improper purposes to extort improper claims against parties

b) It should not be limited to seeking to redress Phoenix activity.

c) Indeed, it is perceived that the benefit of 139ZQ type notice may be more appropriate to be in addition to the general remedies available to liquidators under part 5.7 B of the Corporations Act

8) The ASIC should retain the control of issuing any such notices.

a) Both the ASIC and liquidator should be personally responsible for the costs incurred by any recipient to set aside such notices to ensure all that the notices are issued appropriately.

b) The burden of proof should rest with the ASIC and liquidator in establishing the validity of the notice. However, it may be appropriate that the liquidator is given further powers for investigation as discussed above.

9) No. The power should reside with the ASIC. The writer is concerned that other regulators would not be independent in the issue of the notices.

10) No for similar reasons stated in paragraph 9 above.

11) The recipient should be given at least 90 days to make an application to set the application aside. Provision should be made that application to be made to the AAT; the review process should adopt similar procedures and obligations as in a taxation appeal.

   a) The author notes that in an administrative appeal, normally it is required to object to the decision to issue the notice, and then to apply for a review of a decision not to uphold the objection.

   b) That review process may be burdensome for both the ASIC and the recipient of the notice. It is perceived that the better course would be to enable an appeal from the decision of the ASIC to issue the notice and then for the ASIC then file documents which it relied upon deciding to issue the notice.

12) Legal proceeding should be commenced by the liquidator.

13) As stated in the previous paragraph It should be the liquidator and not the ASIC who should seek compliance with the notice where The effect of non-compliance with the notice should only provide a rebuttable presumption that the claim described the notice is valid.

14) The effect of the notice would be to reduce the evidentiary burden on liquidator to pursue a claim.

15) See paragraphs 8) to 14) above.

16) See my answer in paragraph7)c). The issue of a 139ZQ notice should be supplementary evidentiary provision to the voidable transaction provisions (part 5.7 B). It should not replace the existing law.

17) No. I repeat my general comments in paragraphs A) to H), (particularly H)1) above. The mischief is not in the phoenix activity, but in the activity described in paragraph C) above.

18) An offence should include being part of a conspiracy for the offence to commit. I repeat my general comments in paragraphs A) and B) above. See my comment in paragraph H)1)

   a) As I stated in my general comments in paragraph F any designation activity as a legal Phoenix activity, must make it an offence that is intended to defraud creditors. I would prefer that any criminal offence is directed towards a "lump

and dump" activity. "Undervalue transaction activity" or "unfair transaction activity" should be addressed by amendments to part 5.7 B of the Corporations Act.

19) As I stated above, we do not believe applying tests is an appropriate method of determining whether or not there is a breach of any offence
   a) A breach of section 286 does not prove a mischievous activity. A breach of that section may give rise to presumptions regarding the solvency that may assist in the liquidator be able to set aside certain transactions.
   b) There is a danger that a breach of those sections being abused when making claims against innocent third parties to a transaction.
   c) Maybe it is appropriate to provide that when a tribunal is determining whether there is the necessary *mens rea* to have regard to the objective conduct of the person involved. Those factors may include for example a breach of Section 286 by the defendant (or by another with his objective consent)

20) One

21) As I have stated above in paragraphs A) to H), the mischief is not in the alleged Phoenix activity, but in the intention of the person carrying it out or in the consequences of the transaction.

22) 5

23) Yes providing that law was amended to permit an ex-director to lodged appropriate notification of the ASIC without having authorisation from the company.

24) It is accepted that there may be an unethical practice to backdate resignations of directors. The concern is that it may unfairly prejudice an innocent but naïve director who has properly resigned.

25) 90 days by the ex-director.

26) The onus to lodge a document should be primarily on the the company, but the ex-director should also be given the authority to lodge.

27) An application initially to the ASIC, failing that an appeal to the AAT or Federal Court

28) One

29) Yes,
   a) The ASIC should have power to administratively appoint a liquidator or other external administrator to a company that does not have any director.

i) That power should only be exercised after the ASIC first communicating and putting the shareholders on notice.

b) It is unfair to impose a burden on the last director to cause a company to be wound up. '

i) A director does have, and should not have, the power to resolve the company be put into liquidation. It has to be, and should be, by a resolution of shareholders.

ii) While a director, if he has concluded that the company was insolvent, could by resolution appoint a voluntary administrator under Part 5.3A, he may not have the funds to do so.

iii) The writer is also concerned that it may impose unfair burdens upon a director where that director may have little practical control and wishes only to extricate himself from liabilities and responsibilities that he was not aware.

30) See paragraph 29)

31) No for the reasons set out in paragraph 29).

32) See paragraph 29). I do not believe it is appropriate for a company without a director to be deregistered. Deregistration only imposes further burdens upon a creditor or a member to apply to the court for appropriate relief (first requiring the reinstatement of the company to the register before the creditor is able to commence proceedings against the company)

33) see paragraph 29).

34) Two

35) The proposal would unfairly prejudice innocent parties who may be related associated with the director. It is often the case that related party creditors are the primary creditors of the failed company. Sometimes reflecting the commitment that the director and the related party had in the failed company. It is inappropriate for minor disgruntled creditors to hijack the winding up of a failed company. There should be provisions (as we believe that there are) for a disgruntled creditor to apply to the court for appropriate relief if he believes that that was carried inappropriately by related party creditors.

36) We do not believe that "related creditor" as defined in the act is sufficiently broad. It is agreed that the definition is complex, but for example, it would not (the last time I looked) include a company whose director is the son of the director of the failed company.

37) Having regard to my reply in paragraph 35) no.

38) All creditors should be required to substantiate their preferred debt if required. To my knowledge Is the current practice of liquidators to require when appropriate vouching of the alleged debt where the debt is perceived to be the related party. This substantiation may include the request the provision of bank statements evidencing the provision of any loan or other contemporaneous documents.

39) No for the reasons stated in paragraph 35).

40) Yes

41) It should apply for all administrations.

42) Yes

43) As a practical matter, the restrictions, if imposed, would only affect smaller company liquidations;

44) To all, except where the related party creditor, is the beneficiary of possible undervalued transaction activity or unfair transaction activity.

45) The assignment of their debt to another party who is a related. Under bankruptcy law, the assignee of any debt is only permitted to vote further value that he, she or it paid to obtain the assignment.

46) I believe the question is inappropriate and causes me to question the motives of the committee. In my experience liquidators do not collude with related party creditors or any creditor or interested persons. There is a natural and understandable tendency that a liquidator would not wish to be removed, notwithstanding if related party debts are not sufficiently substantiated, the liquidator or chairman in my experience properly exercise his obligations to consider whether or not the debt should be admitted for voting. That decision could be subject to review by a court.

47) 7

48) As I have I explained in my general comments in paragraph H)1) above, an offence should be created to address what I've described as being "the lump and dump activity" and other intentional activity. It should not be specifically addressed other errant activities[3] such as what I have described as "undervalue transaction activity" or "unfair transaction activity." The offence should include those who have conspired with the directors of the errant company.

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[3] Those described in paragraphs C)2),C)3), G),G)4) and G)5)b)

49) Promotors and advisers of the lump and dump activity" and other intentional activities need to face criminal prosecution and penalties commensurate with the loss. Strong custodial penalties should be imposed. While there is an inherent difficulty in obtaining a successful prosecution, that is warranted appropriate considering the seriousness of the proposed offence.

50) I would suggest a provision to the factors set out in paragraph H)1)

51) There is a strong element of *mens rea* in the criminal provision that I have proposed.

a) Criminal provisions are not appropriate for other errant activities[4]

b) There is sufficient protection in requiring a prosecution to prove beyond reasonable doubt the element of *mens rea* necessary for the prosecution.

c) If a party to the conspiracy has necessary *mens rea* they cannot be innocent notwithstanding how they were involved.

i) Any legal advisor that may have been involved in a transaction has an obligation of confidentiality to the client and should not be put into a position, where that duty conflicts with a need to protect himself.

(1) Privilege does not extend to stopping the lawyer to produce transactional documents but properly extends to protecting legal advice.

ii) Protections should be in place to ensure that a prosecution of a legal adviser is not instituted for an ulterior motive of putting inappropriate pressure on a legal adviser. (including requiring an advisor to produce evidence requiring him to corroborate his advisor status).

iii) To sufficiently protect the legal advisor and justice generally, it may be necessary for the approval of an appropriate authority (Crown Prosecutor, or the Attorney General) be obtained before any prosecution of a legal advisor is commenced, where the appropriate authority be required to be satisfied that there are proper grounds on admissible evidence for commencing the prosecution and obtaining a conviction.

52) A person guilty of any offence relating to a "load and dump" activity, depending on the loss suffered should be exposed to a custodial penalty, commensurate with the quantum of the fraud/loss suffered.

53) Not able to comment.

54) No. Not practical.

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[4] Those described in paragraphs C)2),C)3), G),G)4) and G)5)b)

55) One

56) Directors are subject to enough liability. It is an unfortunate consequence of the DPN regime, that is only the innocent director, who believes that the failing company can be saved who suffers. The persons involved in the "load and dump" activity do not expose themselves (and/or have stooges as directors who have no assets.). It is believed that extending DPN to GST would be contrary to the then policy of the Government when GST was first introduced.

57) See 56) above. It should not be extended. This question again demonstrates the failure to distinguish different time activity and describe them all a Phoenix. A failing company almost invariably does not have a GST liability (they are loss-making – i.e., GST negative). It is unusual for a company owing GST to rise from the ashes. Form anecdotal knowledge of the writer, the DCT's concern about activity described in paragraphs D)2) and G)5) above

58) See paragraph H)5) above.

59) 5. But unwarranted

60) It is unfair to require a deposit to pay for a liability that has not yet incurred. It would impose a considerable and unfair burden on commercial activity.

61) The Garnishee provisions are already sufficient.

62) As stated in 60 it is unfair to impose security deposits. It is also unfair to impose it on High Risk. Any designation of a High-Risk Entity should be subject to review by the AAT (with an automatic stay). The designation should not be left to officers of the DCT.

63) It should not be extended. It could have a serious impact on business activity.

Due to time constraints, I am not in a position answer the balance of the questions raised in the discussion paper. I would, however, like to the following additional comments in regards to Part Two.

I. I do not believe that it would be ineffective to designate entities as Higher Risk Entities for the following reasons:
    a. It will be difficult to correlate the egregious operator with the trading entity.
    b. Any egregious operator would work around the designation (by use of aliases or stooges)

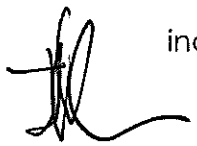
c. The DCT has sufficient intelligence to identify entities that are at higher risk so that those entities can be continually scrutinised to ensure compliance, without having to make a formal designation.
d. The DCT should not be able to make any administrative declaration. It is open for abuse by the officers of the DCT. My unfortunate experience is that some officers of the DCT do not look at matters objectively. If power is given, it must be subject to any review to the AAT (where the onus is upon the designator to substantiate the decision.

II. There are sufficient safe guards with the Declaration of Independence in the appointment of a liquidator. The CAB rank rule is in impractical for voluntary appointments, in court-appointed liquidations, the liquidator is nominated by the creditor.

III. It is frustrating to the writer, that the committee has raised concerns regarding the dishonest liquidator when the true position is that:
a. 99% of liquidators carry out their duties responsibly;
b. Liquidators need funding to investigate, but when requests are made, in the majority of cases no funding is forthcoming.
c. A liquidator is required to be independent (from all interested parties). A certain level of investigation is required, but to properly investigate the antecedent affairs of the company, they need:
i. To first, exercise commercial judgement, whether a cause of action should be pursued having regards to the risks and the potential of recovery.
ii. Second, obtain proper funding and indemnities.
iii. Many requests for funding to the DCT (and other creditors) by liquidators are rejected

IV. Option 2 the appointment of Government Liquidator, is similarly impractical for the following reasons:
a. While AFSA was taking an appointment as Official Receiver; this is now being discouraged. I understand that the practice is that in most cases, registered trustees are subsequently appointed at the Official Trustee's instigation.

b. A Government Liquidator would not be sufficiently funded. Most delinquent directors would welcome the appointment of a government liquidator as it would not have the sufficient resources to investigate.
c. We are also concerned that a government liquidator would not be independent of the DCT.



Jeffrey Chard
Solicitor, Paul Bard Lawyers

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