PPB ADVISORY

27 October 2017

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

**By email only: phoenixing@treasury.gov.au**

Dear Sir

## Submissions – Combatting illegal phoenixing (the Consultation Paper)

PPB Advisory appreciates the opportunity to provide feedback and comments regarding an important area of reform for the national economy and legal framework governing Australians corporations legislation.

We summarise the key points of our submissions as follows:

- We endorse the introduction of a phoenix offence defined as a failure to independently assess a transaction and empowering ASIC and/or Liquidators with the ability to claw back phoenixed assets from illegal phoenix operators.
- We recommend that legitimate restructuring and honest business rescues should be encouraged by the legislation. The requirement for an independent assessment of asset transfers would legitimise many corporate restructurings, preserve business and employment, and avoid the value destruction which often occurs in insolvency. It would conversely make it easier to identify phoenix offences where such steps were not undertaken and without the need for the HRE designation.
- We support measures to prevent directors from abandoning companies and backdating their resignation dates.
- We support restrictions on the voting rights of related party creditors on resolutions that seek to replace incumbent external administrators. This will better empower all creditors (including the ATO) and ensure that independent practitioners administer insolvent entities.
- We support the extension of the DPN regime to incorporate unpaid GST liabilities and recommend this be extended to all companies. By making all directors personally liable for unpaid GST liabilities (pursuant to a DPN) we consider this will be a significant deterrent from insolvent trading and phoenix behaviour.
- We do not support the introduction of a cab-rank system for external administrations. We foresee some practical difficulties as well as serious shortcomings in that approach.
- We endorse the establishment of a Government Liquidator that would have the capacity to act in all external administrations. This would provide an efficient, low cost service to wind up insolvent entities and act much in the same way as the Official Trustee does in bankruptcy.

The basis and our reasoning for the above is detailed in these submissions.

Our submissions in response to the Consultation Paper are set out as follows:

## Part A. Response to Questions in the Consultation Paper

## Part B. Legitimising corporate restructuring

## Part C. About PPB Advisory

We would welcome the opportunity to discuss the contents contained herein at your earliest convenience.

Yours faithfully

**Mark Robinson**
Partner
PPB Advisory

Contact name: Mark Robinson
Telephone number: [redacted]
Email: [redacted]

# Part A. Response to Questions in the Consultation Paper

PPB Advisory responds to each of the Questions in the Consultation Paper as follows:

## Part 1 – Broad reforms

### Section 1 – Phoenix hotline

#### Questions 1 to 5

We have no specific comments on these issues but generally support the introduction of a 'phoenix hotline'.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

### Section 2 – Phoenix offence

#### Questions 6 and 7

We have no specific comments on these issues.

#### Question 8 – Should ASIC retain control of the issuing of such notices to ensure that they are not issued inappropriately?

We consider that both ASIC and Liquidators should have the power to issue the notice.

Any notice issued by a Liquidator should be lodged with ASIC and published on the insolvency notices website.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

#### Question 9 – Are there other regulators who should also be able to issue such notices?

We do not support the right for regulators (or any other parties including creditors) to have the power to issue such notices.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

#### Question 10 – Should liquidators have the ability to independently issue such notices in cases where they suspect that illegal phoenixing has taken place?

Yes, we consider that Liquidators should have the power to issue such notices. This would provide a further avenue of recovery (that is presently unavailable) for Liquidators to maximise returns to creditors.

We further recommend that the notice require the recipient to take active steps to comply and/or have it set aside within a strict timeframe, otherwise it is deemed that the transaction is void.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

### Question 11 – How long should the law allow for the recipient to respond?

We recommend a period of 21 days (or 15 business days).

We understand this is consistent with the position outlined by ARITA which we endorse.

### Question 12 – What course of action should be pursued where the recipient fails to comply with a notice?

We recommend that Liquidators have the right to apply to Court to:

1. obtain security over the business and/or assets subject to the phoenix offence held by successor company;

2. appoint themselves as a Court Appointed Receiver to the business and/or assets subject to the phoenix offence held by the successor company;

3. obtain a judgment debt for the amount specified in the notice against both the director of the insolvent entity as well as the successor company and its own directors.

We further recommend that any breach of the notice, including non-compliance should attract strictly liability penalties. ASIC should have a mandate to criminally prosecute such breaches.

If only ASIC is empowered to issue these notices then we submit that ASIC should bear the cost of enforcement (i.e. – to be an active respondent and not defer to the Liquidator).

### Question 13 – What are some of the challenges ASIC is likely to face in seeking compliance with the notice?

There is a risk that parties whom are subject to this notice will seek to delay and/or otherwise obfuscate enforcement of the notice.

In these circumstances, we recommend that the Court, upon receipt of any application for non-compliance with a notice, have discretion to simultaneously:

1. issue freezing orders the same time an application to Court is made for enforcement of non-compliance with the notice; and/or alternatively

2. appoint a Provisional Liquidator to the party suspected of non-compliance and take control of the assets which have been allegedly transferred to the phoenix entity.

This would protect and prevent the phoenixed assets from being transferred again and/or otherwise dissipated.

We further recommend that:

3. there is a presumption of service if the notice is issued to the successor company's registered office - this will avoid disputes regarding service thereby reducing costs and making the process to clawback assets more effective and efficient; and

4. the Liquidator is entitled to trace through to the proceeds the fruits of any funds paid for the assets which are subsequently disbursed - this could operate by way of lien and attaches to the assets and/or monies, thereby protecting the interests of the creditors of the insolvent entity.

### Question 14 – Do you think that such an arrangement will reduce the cost of taking recovery action or seeking compensation for the loss suffered?

The combination of short time frames along with the imposition of strict liability for any breaches of these notices will assist in reducing (but not eliminate) the costs associated with recovery actions.

### Question 15 – Are there safeguards which should be implemented in respect of the proposals?

Please refer to our response to Questions 12 and 13.

### Questions 16 to 21

We have no specific comments on these issues but are generally supportive of the proposed reforms.

## Section 3 – Directorships

### Questions 22 to 33

We have no specific comments on these issues but are generally supportive of the proposed reforms.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

## Section 4 – Voting rights

### Questions 34 to 46

We have no specific comments on these issues but are generally supportive of the proposed reforms.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

## Section 5 – Promoter penalties

### Questions 47 to 54

We encourage professional bodies in the accounting and legal profession to be more active in taking action and disciplining any of its members who promote such schemes under existing laws, codes of conduct and professional standards as well as the proposals outlined in the Consultation Paper.

We otherwise have no specific comments on these issues but are generally supportive of the proposed reforms.

### Section 6 – Extending the Director Penalty Notice (DPN) regime to Goods and Services Tax (GST)

#### Questions 55 to 57

We strongly support the extension of the DPN regime to incorporate non-payment of GST.

We recommend this be expanded to cover all directors and not be limited to those designated as High-Risk Phoenix Operators (**HRPO**).

Our experience shows that many companies continue to trade whilst insolvent largely due to their ability to defer compliance with their GST obligations. This is a feature common to many insolvencies regardless of whether phoenix behaviour is suspected and/or has occurred.

We consider that by extending the DPN regime to cover GST in all insolvency scenarios, this will act as a strong deterrent for directors from non-compliance with their tax obligations and discourage insolvent trading.

#### Question 58 – Are there alternative approaches to securing outstanding payment of GST from companies and their directors?

Under existing legislation any unpaid tax debts which were incurred when the company was trading whilst insolvent is presently recoverable against its directors (including shadow and de-facto directors) and its holding companies.

Alternative approaches to the proposed reforms could involve some holding or corporate grouping mechanisms by which outstanding tax obligations of an insolvent become a deemed liability of parents or related entities. This could be limited to those designated as HRPOs.

### Section 7 – Security deposits

#### Questions 59 to 67

We have no specific comments on these issues but recommend that the ATO's right to garnishee third parties be extinguished following the appointment of an external administrator to the recalcitrant tax payer.

This will ensure the existing priorities provided in the *Corporations Act 2001* (Cth) are not circumvented.

## Part 2 – Dealing with Higher Risk Entities (HRE)

### Section 8 – Targeting HREs

#### Questions 68 to 73

We fail to see any significant benefits which flow as a result of the HRE designation.

These would be limited to obtaining security deposits or attaching liabilities to related parties for outstanding tax obligations.

We otherwise do not consider there would be much merit with the HRE designation, particularly in the context of winding ups (for the reasons detailed in our responses to Questions 74 to 85 below).

## Section 9 – Appointing Liquidators on a cab-rank basis

### Question 74 – Please rate how effective you think this measure will operate to deter and disrupt illegal phoenix activity

We understand that ARITA will be making more detailed submissions on this issue which we endorse.

### Question 75 – Are there alternate measures that would be more effective?

Please refer to our response to Questions 82 to 85 and Part B of this paper.

### Questions 76 to 78 – Currently, it is intended that the cab-rank be restricted to circumstances where a HRPO is or has recently been an officer of the company. Should a cab-rank apply to all external administration appointments? Should it be applied more widely, but limited to specified types of external administration appointments where certain criteria are met?

We do not support a cab-rank approach for HRPOs and/or for all external administrations.

Our view is that this would produce suboptimal outcomes that would result in practitioners being appointed to matters where they do not possess the requisite experience, skills, and/or relationships with key stakeholders to effectively manage the external administration.

We further consider there would be some practical difficulties in introducing a cab-rank system. This particularly compounded where the designation of HRPOs is confidential and only known to the ATO.

By way of example, any creditor other than the ATO, pursuing a court ordered winding up, would not be aware if the debtor company had a HRPO designation. We contend however that in this scenario there is no apprehension of bias (rather the ATO and third party creditor's interest would be aligned) so it would seemingly make the requirement for a cab-rank approach redundant.

Similarly, there would be nothing preventing director/s from approaching any Registered Liquidator to put the company into external administration. In absence of publishing a list of HRPOs, specific legislation would need to be enacted authorising ASIC or ATO with the power to replace practitioners to companies designated as HRPOs. This would an unnecessary layer of procedure that will invariably increase costs and extend the process. In our view such outcomes are undesirable.

We rather consider the proposed reforms contemplated within this Consultation Paper that limit the rights of related parties to vote on replacement resolutions act as a better safeguard to ensure practitioners are independent as opposed to a cab-rank approach.

We separately highlight that under a cab-rank system there would be no incentive for debtors to fund their own liquidation which would result in a greater funding requirement for the program. At present such funding is usually negotiated directly with the proposed practitioner before the appointment.

We otherwise understand that ARITA will be making more detailed submissions on this issue which we endorse.

### Question 79 – Who should administer the cab-rank and how should it be administered?

Should this proceed we recommend that a panel of preferred suppliers is established. A formal procurement process should be implemented but some of the key criteria would include considerations of independence, willingness of practitioners to work at fixed rates, and an established track record of investigating and litigating antecedent transactions with the utmost highest standards of ethical behaviour, impartiality and professionalism.

We recommended this should be administered by a specialist team within ASIC or the Government Liquidator.

### Question 80 – How do you think such a system should be funded?

A cab-rank system could be funded through existing consolidated revenue.

An alternative approach may be for a specific industry levy and/or a general increase in the annual registration fees payable by corporations could potentially contribute towards the cost of the cab-rank system.

In our experience however, public funding of Registered Liquidators is generally inadequate to meet stakeholder expectations.

### Question 81 – Please rate how effective you think this measure will be to deter and disrupt illegal phoenix activity

We do not consider that a Government Liquidator will be effective in deterring illegal phoenix activity but nevertheless see merit in establishing one (refer to our responses to Questions 82 to 85 below).

### Questions 82 to 85

We consider there is merit in establishing a Government Liquidator.

They could act in the same manner as the Official Trustee. Our view is that it should not be limited to HRPOs but rather available as a cost-effective means for directors to avail themselves of insolvency services which would result in an orderly wind down of a company's affairs and deregistration of insolvent entities. This would be particularly useful for assetless administrations (which account for up to 80% of all liquidations) where, in many cases, no investigation and actions are required. We highlight that we have made previous submissions on this issue and attach a copy of our submissions on the *Options Paper: a modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* dated 28 July 2011 (refer to Part C).

It would be at the discretion of the Government Liquidator to appoint a professional firm to undertake the external administration thereafter. We would expect that more complex matters and those with assets would be suitable matters to outsource to the private profession. Streamlined provisions providing for notifications to creditors and other key stakeholders would need to be developed. This practice is consistent with that of the Official Trustee in bankruptcy matters.

## Section 10 – Removing the 21-day waiting period for a DPN for HRPOs

### Questions 86 to 90

We have no specific comments on these issues but are generally supportive of the proposed reforms so long as this applies to HRPOs.

The 21-day waiting period should otherwise be available for directors of corporates which do not have this designated status. This period provides directors with the ability to consider their restructuring options. Such directors should be encouraged to seek a timely and legitimate restructuring of their business, rather than being punished.

## Section 11 – Power to retain refunds

### Questions 91 to 94

We have no specific comments on these issues but are generally supportive of the proposed reforms.

We further understand that ARITA will be making more detailed submissions on this issue which we endorse.

## Part B. Legitimising corporate restructuring

We recommend that any legislative reforms to corporate restructuring should encourage legitimate and honest business rescues.

The Consultation Paper itself highlights that the *"steps involved in the illegal phoenixing of a company – for example the formation and liquidation of a company and the transfer of assets to another entity - are largely identical to those involved in the honest rescue of a business"*

Below we recommend potential legislative responses to legitimise corporate restructuring:

I. Independent assessment of asset transfers
II. Disclosure of phoenix behaviour

Each of these proposals involve an active and positive step being taken by directors of companies seeking to legitimise the restructuring of an insolvent entity. We consider that the recuse and turnaround of distressed businesses is a positive for the Australian economy as it, inter alia, achieves preservation of employment and key customer contracts as well as alleviate the destruction of shareholder wealth, which often accompanies insolvency.

Conversely the introduction a legislative blueprint for legitimate restructuring will assist regulators and practitioners in in identifying illegal phoenix behaviour for prosecution by highlighting transactions where such positive steps were not taken.

Such reforms have been adopted and/or being considered for implementation in foreign jurisdictions such as New Zealand (**NZ**) and the United Kingdom (**UK**).

We recommend that these reforms could act in addition to or as an alternative to those proposed in the Consultation Paper.

### Item I. Independent assessment of asset transfer

We submit one option to legitimise honest business rescues and restructurings that involve the transfer of assets from an insolvent entity to a successor company is to introduce the requirement of an independent assessment and process being undertaken by a Registered Liquidator who ultimately executes the transaction as an external administrator. This would effectively permit what in business vernacular is referred to as "pre-packing".

We recommend that the legislation should require:

1. directors to not cause a company to enter into a transaction for the sale of its assets and/or business that would leave it unable to pay all its debts;

2. only external administrators have the power to enter into such a transaction thereby ensuring assets are sold at market value and creditors are paid pursuant to pari passu principles in accordance with existing priorities under the *Corporations Act 2001* (Cth);

3. failure to comply with the above is an offence;

4. the sale transaction will be deemed void unless it was an arms length purchaser without notice; and

5. directors are personally liable to pay the market value of assets to the insolvent company (or any shortfall in recovery).

A model which allows pre-packing of asset and business sales that are independently assessed and performed by Registered Liquidators already exists in the UK.

We are aware there has been some longstanding criticism of the UK 'pre-pack' model from Australian commentators. We consider however that the new Statement of Insolvency Practice 16 which took effect from November 2015 (following the recommendations of the Graham Review in June 2014) addressed many of these concerns.

The recent changes include, inter alia, the proposed external administrator being required to:

- conduct broad marketing campaigns for the sale of assets
- commission detailed valuations of all assets
- ensure minimum professional indemnity coverage limits for valuers
- perform a viability assessment of the successor company (for related parties only)
- provide full disclosure to creditors of the transaction following their appointment.

The Graham Review also culminated in the establishment of the 'pre-pack' pool. This is an independent body whom assess the legitimacy of 'pre-packaged' asset sales to related parties and provide an opinion as to whether the transaction should proceed.

In our view, these are some of the safeguards that could be implemented to legitimise corporate restructuring and deter illegal phoenix behaviour.

We consider there is significant merit in emulating a similar 'pre-pack' model to the UK on the basis that it:

1. simplifies the definition of a phoenixing offence, i.e. – failing to engage an external administrator and/or independent body such as the 'pre-pack' pool;

2. ensures legitimate restructurings are performed by Registered Liquidators whom are licensed, regulated and covered by professional indemnity insurance (as opposed to unregulated pre-insolvency advisors);

3. is self-funding and does not require any government funding (through the cab-rank or Government Liquidator route); and

4. prevents illegal phoenixing at the first instances, rather than at the second or subsequent instance.

## Item II. Disclosure of phoenix behaviour

NZ introduced its own 'phoenix company' rules in late 2007. These are contained in sections 386A to 386F of the *Companies Act 1993* (NZ).

The approach in NZ does not seek to distinguish between legitimate or dishonest restructuring but rather seeks to cure any concerns regarding phoenix behaviour through disclosure. In this way it empowers creditors, whom are the key stakeholders in any insolvency procedure, to determine if they wish to continue dealings with successor company.

More specifically the NZ legislation prohibits phoenix behaviour subject to either Court approval or the successor company notifying all creditors and suppliers within 20 business days detailing the particulars of the phoenix transaction and their involvement with the insolvent entity.

Any breaches to this exception will result in the liabilities of the insolvent entity being deemed debts of the successor company and its directors.

We accordingly consider that there may be some merit in adopting some similar provisions in addition to a 'pre-pack' model.

## Part C. About PPB Advisory

PPB Advisory is a professional advisory firm employing more than 300 people with offices in across Australia (in Sydney, Melbourne, Brisbane and Perth) and Singapore. We specialise in corporate recovery and restructuring, management consulting and corporate advisory.

Our dedicated corporate restructuring team comprises of 17 partners and over 130 staff nationally of which 23 are registered liquidators.

PPB Advisory has a proud history of contributing to the development of legislation and policy in Australia and has made numerous public and private submissions to both federal, state and local governmental agencies and departments including the ASIC, and both the Department of Employment and the Department of Treasury, Commonwealth.

PPB ADVISORY

Our Ref: ADMIN:SDP:YW

28 July 2011

Manager
Governance and Insolvency Unit
Corporate and Capital Markets Division
The Treasury
Largton Crescent
Parkes ACT 2600

**By Email: Insolvency@treasury.gov.au**

Dear Sir/Madam

**Options Paper: a modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia.**

PPB Advisory Statutory Recovery Group is the market leader in administering small (often assetless) official liquidations and bankruptcies for unsecured creditors.

In our opinion a combined strategy relating to small matters of:

- Streamlining official liquidations
- Funding official liquidations, and
- An alternative to official liquidations

will minimise liquidation costs, reduce cross subsidy and reduce the number of official liquidations to be funded.

Our law reform submission relating to small appointments is in 5 sections:

A. Streamline official liquidations to make them as cost effective as possible.
B. Provide funding for assetless official liquidations and allow official liquidators to refuse unfunded work.
C. Company initiated Provisional Deregistration for assetless insolvent companies.
D. PPB Advisory Statutory Recovery qualifications and experience.
E. Statistics used in this submission.

Level 46, MLC Centre
19 Martin Place
Sydney NSW 2000
GPO Box 5151
Sydney NSW 2001
t: +61 2 8116 3000
f: +61 2 8116 3111
www.ppbadvisory.com

I would be delighted to provide more detailed information, clarification or answer any questions at your convenience.

Yours faithfully

**PPB Advisory**

**Scott Pascoe**
Partner

# A. Streamline Official Liquidations

The case for streamlining official liquidations to eliminate unnecessary costs is compelling:

- 40% of all liquidations are assetless and more than 60% have assets at less than $10,000.[1]
- More than 50% of official liquidations administered by PPB Advisory are assetless.
- 96% of official liquidation pay no dividend.

The cost of administering all assetless official liquidations is estimated at not less than $8.25m per annum. This represents between 16.5% and 25% of the total fees billed in all official liquidations.

Official liquidation fees are set at high rates as they are often not paid in full (or all all). Creditors of funded matters effectively subsidise the cost of unfunded matters (Options Paper paragraphs 180 and 181). High cost of liquidations is the source of complaints about insolvency practitioners. Often the regulatory response to complaints is to increase the regulation of Insolvency Practitioners. However, the cost of compliance with this additional regulation further increases costs and therefore complaints.

For example, with respect to independence, Insolvency Practitioners are required to prepare and forward a Declaration of Independence Relevant Relationships and Indemnities (DIRRI) at first contact in each official liquidation. Whilst this requirement is voluntary (except for IPA members) we estimate this requires one hour per liquidation and the estimated cost to the market is approximately $1 million per annum with half of this unrecoverable.

A further example was the introduction of minimum remuneration in 2007. A liquidator is required to convene a meeting of creditors without quorum in order to be entitled to draw a $5,000 fee. The cost of convening the meeting (including notice to all creditors and advertising) significantly diminishes the benefit of the default entitlement.

Likewise an hour taken from the time spent on each official liquidation will save the market $1 million. The following table contains our ideas of ways to streamline small official liquidations:

[1] Source of statistics and calculations throughout this paper are contained in Section E

| Task | Current Position | Desired Position |
|---|---|---|
| Notice of Appointment | Lodgement with ASIC | Unchanged |
| | Advertisement in paper | **Internet advertisement** |
| Report as to Affairs | Issue demand to officer(s) to lodge | Unchanged |
| | If no reply from initial demand, issue a follow up reminder | **ASIC to follow up officer(s) with compliance notice.** |
| | Reporting offence to ASIC and seeking their assistance | **ASIC to prosecute following compliance notice** |
| | On receipt of RATA, lodge with ASIC and Court | On receipt of RATA, **lodge with ASIC** |
| Section 476 report (Form 564) | Prepare and lodge report with ASIC within two months of receipt | **Not required** |
| Books and records | Issue demand on officer(s)/external accountants to deliver books and records to Liquidator | Unchanged |
| | If no reply from initial demand, issue a follow up reminder | **ASIC to follow up officer(s) with compliance notice** |
| | Reporting offence to ASIC and seeking their assistance | **ASIC to prosecute following compliance notice** |
| Investigations | Investigations undertaken to identify assets, voidable transactions and offences | Investigations to be limited to identify assets or voidable transactions **where the Liquidator forms the opinion that there will be realisations or recoveries** |
| EX01 report | Report to be lodged with ASIC if investigations identify offences committed by an officer(s) or company is unable to pay a dividend of 50 cents or more to unsecured creditors | **The report should be prepared only where the Liquidator has formed a view that offences are likely to be prosecuted** |
| EX02/EX03 reports | Reports prepared in situations where ASIC have requested a supplementary report | **Report to be prepared only when fully funded by ASIC** |
| Reports to Creditors | Required to convene a meeting of creditors to approve remuneration, compromise of debt or enter into to settlement agreements | **Whilst to inform/update creditors, minimum remuneration to be drawn without resolution of creditors** |
| | Send out the Report to all known creditors | **Email and website** |
| Creditor's meetings | Report to Creditors is prepared and mailed to creditors containing the Notice of Meeting | **Notice of Meeting by email and website** |
| | Creditor attendance in person or by proxy | **Meetings to be held by circular resolutions** |
| Remuneration not fixed | $5,000 if not fixed and meeting called and no quorum | **$5,000 automatic minimum entitlement** |
| Form 524 | To be lodged on every six months on all appointments | **To be lodged only where there have been transactions** |

## B. Funding Assetless Administrations

Official Liquidators should be funded for the "fairly similar and standard processes" performed in small and assetless administrations. (Options Paper paragraph 169) These "standard" services are provided for the public good. We submit that the most effective way to do so is to pay a fixed fee for the standard processes of every official liquidation.

The existing AA Fund and the options to expand the AA Fund or s305 funding (Options Paper paragraphs 666 and 667) whilst useful do not cover the above "standard" costs, merely providing funds to do future work (such as recovering assets). Therefore, the amount of cross subsidy is not reduced by these options.

Possible options for the source of funds include a levy on company registrations or an annual fee for all companies. The cost of funding (e.g, $2,000 per official liquidation) is estimated at approximately $6.6m per annum.

To become registered as an official liquidator an applicant must undertake to ASIC that he or she will not refuse to consent to act solely because the company has no assets (ASIC Regulatory Guide 186 – External Administration: Liquidation Registration). We can find no legislative basis for requiring this undertaking. We understand it dates from a time where there was a small number of official liquidators and before the introduction of voluntary administration in 1993. At that time the position of official liquidator was more profitable, assetless matters were rarer and less costly to administer.

We submit it is appropriate to relieve official liquidators from this undertaking.

The absence of a fee negotiation (described in options Paper paragraph 201) is therefore compulsory in all official liquidations. Official liquidation is the only insolvency service where practitioners must accept opportunities even if unpaid. This means official liquidations and creditors are not free to set a market price for small and assetless administrations.

Certain practitioners are known to have withdrawn their services from official liquidations as unsustainable.

# C. Provisional Deregistration

## Concept

A new type of matter to allow defunct insolvent companies to be voluntarily struck off the company register. The process would involve directors declaring the company insolvent and applying for deregistration at no or minimal cost.

Deregistration would remain provisional for a set period (e.g. 6-12 months from notice) after which it would become permanent. The company would cease to be registered on application and therefore would not be obliged to prepare financial statements, lodge tax returns, take insurance (including workers compensation) etc.

Relevant stakeholders (shareholders, employees, ASIC and creditors) can be protected from abuse by allowing a right to administratively convert a Provisional Deregistration into an official liquidation at any time during the set period.

The stakeholder would select a liquidator, determine the scope of investigations to be conducted and fund the liquidator's costs.

The purpose of Provisional Deregistration is to acknowledge that for many small and assetless insolvent companies official liquidation is not the most appropriate form of dealing with the company. The company or its directors cannot afford the cost of a creditors voluntary winding up (Options Paper paragraph 645).

## Why official liquidation is not the best solution

Creditors often initiate official liquidation despite the fact that the prospect of a return is low (96% of official liquidations pay no dividend).

For example, the ATO may wish to bring the company's tax affairs to an end, workers compensation insurers to eliminate risk, creditors to collect debtor insurance etc. As noted in Options Paper paragraph 646 other stakeholders, including employees may be dependent on external administration for other reasons, such as to access GEERS.

The petitioning creditors' costs of winding up are wasted in assetless administrations.
Upon appointment the official liquidator is required to conduct an investigation and prepare a report for ASIC at significant cost. Liquidators reported more than 14,000 breaches of the law each year of this a few hundred directors were prosecuted. The cost of liquidators assisting ASIC with these prosecutions is significant compared with the value of the penalties obtained.

It is not practical or desirable to prosecute every breach of the law. Provisional Deregistration acknowledges that in many cases this is not required.

Provisional Deregistration would reduce the number of official liquidations and therefore reduce the funding requirement in section B above.

# D. PPB Advisory Statutory Recovery qualifications and Experience

PPB Advisory is a firm of professional advisors employing more than 300 people with offices in Sydney, Melbourne, Brisbane, Perth and Adelaide.

More than three quarters of the firm is engaged in providing insolvency services and related advice.

Our Statutory Recovery Group specialises in providing insolvency services to unsecured creditors principally via official liquidation and bankruptcy. Based in Sydney and Melbourne the Statutory Recovery Group employs more than 30 staff including 5 Official Liquidators and 5 Registered Trustees in Bankruptcy.

| Statutory Recovery Group Appointments | | |
|---|---|---|
| | Official Liquidations | Bankruptcies |
| 2008/2009 | 344 | 206 |
| 2009/2010 | 376 | 323 |
| 2010/2011 | 351 | 164 |
| **Total** | **1071** | **693** |

The statutory recovery group was appointed to more than 10% of all official liquidations nationally since 1 July 2008 and is the market leader in this specialisation.

PPB Advisory paid 42 dividends to creditors in the period 1 July 2008 to 31 March 2011 in official liquidations.

We have researched the source dividends paid and published our results in a paper: The Future of Liquidations and Bankruptcy: http://www.ppbadvisory.com/insights/d/2011-06-10/ppb-advisory-research-the-future-of-liquidation-and-bankruptcy-june-2011

In the period 1 July 2008 to 30 June 2011 PPB Advisory Statutory Recovery Group has recovered more than $1.4 million in petitioning creditors' costs in 396 official liquidations and bankruptcies.

PPB Advisory has developed in house software systems to track and measure the performance of its matters individually, as a whole and in groups.

# E. Statistics Used in This Submission

| Official Liquidation appointments: ASIC Insolvency Statistics: Series 2 Insolvency Appointments | |
|---|---|
| 2008/2009 | 3708 |
| 2009/2010 | 2935 |
| 2010/2011 | 3282* |
| Total | 9925 |
| Average PA | 3300 |

* Projected based on first three quarters published statistics

| ASIC Report 225 Insolvency Statistics External Administrators 2010 | |
|---|---|
| Assetless Administrations | 39.3% |
| Estimated Assets < $10,000 | 60.9% |
| Estimated Dividends nil | 92.9% |
| Estimated Dividends less than 11c | 97.3% |
| Number of possible misconduct identified 2009/10 | 14,652 |

| ASIC Media Centre Releases 10-15AD, 09-228AD and AD09-191 | |
|---|---|
| Number of directors prosecuted January 2009 to December 2009 | 420 |

| PPB Advisory Official Liquidation Statistics | |
|---|---|
| Assetless Administrations | 55% |
| Estimated Dividends nil | 96% |
| Minimum cost to administer assetless company | $5,000 |
| Estimated size of total official liquidation market | $33m-50m pa |
| Cost of assetless matters (1650 matters x $5,000) | $8.3m pa |