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10th January, 2012

By Email: insolvency@treasurey.gov.au

The Manager
Governance and Insolvency Unit
Corporations & Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir,

CORPORATIONS AMENDMENT (PHOENIXING AND OTHER MEASURES) BILL 2012 ('the Bill")

I write in response to your request for submissions.

A. Winding up by ASIC

1. Is the Bill an adequate measure?

It goes without saying that the main objective of the Bill is to address the issue of unlawful phoenix activity.

Any proposal to do so is to be commended as those businesses that "do the right thing" and pay all liabilities should not be subjected to anti competitive behaviour of those that do not.

However I query as to the preventative effect of the Bill on the unlawful activities that it is trying address.

It seems to me that if the Bill is passed in its present form a well informed promoter of a phoenix company will simply ensure that the former operating company continues to lodge its returns and pay its annual fees for a considerable period of years after the unlawful activity. In those circumstances unless a creditor takes action to wind up the company or ASIC does so pursuant to its general powers then the offending activity will remain undetected and not investigated.

So the fundamental issue that needs to be addressed irrespective of the legislative framework is the level of resources that are to be made available in order to conduct investigations and undertake prosecutions.

It seems to me to be important that in considering this Bill that the following information be obtained from ASIC, namely:

1. In the last three years how many cases of suspected phoenix activity have been reported by Insolvency Practitioners ("IP") to ASIC,

2. In the last three years of those that have been reported how many have been recommended by the IP for further investigation,
3. In the last three years how many of those reports have been investigated by the IP with:
   3.1 the assistance of the Assetless Administration Fund, or
   3.2 at the cost of the administration/other funding,
4. In the last three years how many applications for assistance by IP's from the Assetless Administration Fund in relation to phoenix activity have been rejected,
5. Of the matters investigated how many have proceeded to prosecution,
6. Is a pattern emerging as to why prosecutions have not been undertaken or alternatively have not been successful?

If this information discloses that the current mechanisms for reporting phoenix activity are working in respect of reports being made to the regulator but there is insufficient number of prosecutions due to a lack of resources then unless the question of resources is addressed the new regime will similarly be unsuccessful as the present framework. In this regard I note that the Bill does not propose to impose on the liquidator that he or she is required to investigate the affairs of the company beyond which the law currently recognises any obligation to do so. I would object if it were to do so.

2. Unintended Adverse Consequences

Whilst I acknowledge that a director must be aware of his or her responsibilities in relation to the lodging of returns and other documents with ASIC it is my experience that for a variety of reasons such as health (including alcoholism, mental health issues), a persons ability to manage his or her affairs generally or perhaps from time to time can be less than adequate.

It is my concern that the proposed winding up procedure may result in notices not coming to the attention of such persons, or even if the notices do, then such persons simply fail to deal with them with a significant adverse result being the winding up of the company.

In some instances these companies may not be insolvent and may in fact hold significant passive assets for the use and benefit of that director. This structure may have been put in place as a result of family arrangements that may have evolved over the course of a number of years.

My concern is that in essence the Bill provides for an administrative process for the winding up of a company and so I enquire as to whether any thought has been given for a similar administrative process for the removal of the liquidator and the termination of the winding up in circumstances where the company is solvent and its outstanding returns and particulars rectified. In the absence of that administrative process the liquidator, the director(s)/shareholders are faced with the prospect of making application to the court for orders for the termination of the winding up. Ordinarily this is an expensive process.

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Evidence of the extent of this potential issue would be available from ASIC by way of information on the number of requests for the re-instatement of de-registered companies where subsequent to de-registration, assets have been uncovered. Additionally the number of requests of ASIC to execute documents on behalf of de-registered companies.

I query also whether notice under the proposed Sub-section 489F(4)(b) should be given to the shareholders of the company with a shareholder having standing to object.

Further I query whether Section 489(F) should include a further provision in relation to "interested parties". It seems to me that a beneficiary of a trust of which the company is a corporate trustee, a creditor or for instance an insurance company wherein the company is a defendant in proceedings being conducted by an insurer, a government instrumentality or commission may have a legitimate interest in protecting the company from being wound up.

I recommend that some consideration be given to the form of the notice of objection required by the proposed Sub-section 489F 4(b) (iv). Perhaps a prescribed form should be included in the Regulations.

B. Appointment of Liquidator

I suggest that consideration be given to redrafting proposed Sub-section 489H(1) - Appointment of Liquidator as follows:

> *"489H Appointment of Liquidator*
>
> *(1) If ASIC orders under Section 489F that a company be wound up, ASIC:*
> *(a) must appoint a Liquidator for the purpose of winding up the affairs and distributing the property of the company; and*
>
> *(b) may, subject to sub-sections 473(3)(b)(ii), 499(3), 499 (3A) fix the remuneration to be paid to the liquidator."*

C. S497(1) – Proposed Amendment

Whilst I acknowledge that the terms "convened" and "held" have given rise to confusion it is my experience that the addition time allowed for the calling of the meeting of the company's creditors has assisted practitioners where on appointment there is a significant amount of information to be digested and/or a complex situation at hand, including a company that may still be conducting business.

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I am not aware of any detriment to creditors arising from the requirement to "arrange" the meeting of creditors within 11 days of the day of appointment and I tend to think that the additional time allows a practitioner a greater opportunity to capture details of all creditors particularly in circumstances where the books and records of the company may be less than adequate.

Further the days are not "business days" and accordingly over the December/January period in any year the number of working days available is greatly reduced.

Contra Part 5.3A of the Corporations Act which counts days as "business days".

I note also that the proposed amendment is at odds with para 299 of the *Proposals* Paper: *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*

D. Proposed S489G – Deemed Resolution that company be wound up voluntarily.

The Bill at sub-section 489G(d) dispenses with the requirement of the liquidator to call a meeting of creditors. It therefore removes the right of creditors which arises by virtue of S497 to remove the liquidator and appoint another. Is this what is intended?

If so it is contrary to the thrust of the *Proposals Paper* wherein it is proposed that creditors be given greater opportunity in replacing liquidators. (See Chapter 9 of the *Proposals Paper*).

Obviously this concern may be addressed if the reforms envisaged by the Proposals Paper provide that an ASIC appointed liquidator is subject to the wishes of creditors in the same way as other forms of insolvency administration.

If you have any query in relation to the above please do not hesitate to contact me.

Yours faithfully,

Ray Barrett.

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Lawyers