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Senate Economics Legislation Committee
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Friday, April 13, 2012

Dear Sir / Madam

Corporations Amendment (Phoenixing and Other Measures) Bill 2012

The ACTU welcomes the opportunity to comment on the above Bill. We acknowledge that the Bill contains measures that deliver on some of the commitments contained in the *Protecting Workers' Entitlements* policy. We broadly support the Bill and offer the following comments for your consideration.


Amendments in Part 1 of Schedule 1

We support these amendments on the basis that they have the potential to decrease the time it takes for employees of insolvent companies to access funds through GEERS/*Fair Entitlements Guarantee*. Whether or not these powers prove to be effective in realising that goal will depend on training, resourcing and investigation commitment within ASIC.

Each of the fact based criterion in section 489EA would give rise to a reasonable presumption of abandonment and it is reasonable that any remaining property in such companies is distributed through the usual liquidation process with employee creditors supported by GEERS/*Fair Entitlements Guarantee*. The policy based/discretionary elements in sections 489EA(1)(d), 489EA(3)(b) and 489EA(4)(a) are appropriate additions as compared to the exposure draft, reflecting that the decision is an administrative one. Including such discretionary elements probably also has the side effect of discouraging judicial review (we note that the prospect of merits review has been removed by Item 4 of the schedule).

We support the shorter time limits for the giving of notice by ASIC of a winding up order as compared to the exposure draft, as well as the relief provision where the relevant identity/address details are unknown. The prohibition in section 489EA(7) on the making of an administrative order while judicial proceedings are underway is also sensible and appropriate.

An issue may arise in connection with section 489EC. The relevant "Insolvency Event" that acts as the trigger for GEERS (and potentially *Fair Entitlements Guarantee*) payments is the appointment of a liquidator. The proposed amendments provide for ASIC to appoint a liquidator with the liquidator's consent and to determine the liquidator's remuneration, however the amendments do not suggest an intention to alter the regular position that the liquidator is remunerated from the property of the company.

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In the case of an abandoned company with no assets, this could have two consequences:

- Potential liquidators may be unwilling to consent to accepting an appointment;
- If they do accept an appointment, they may rely on section 545 and perform little if any investigation or other activities.

As GEERS requires (and potentially the *Fair Entitlements Guarantee* may also require) the cooperation of the liquidator in the calculation of entitlements and payments, it is possible that the policy goal stated in the explanatory material may not be realised. Further, in the absence of funds for proper investigation, contraventions associated with the insolvency of the dormant company may remain undiscovered and under deterred. In light of this, while supporting the amendments as proposed we would be interested in participating in additional consultation regarding complementary arrangements that might further support the policy goal.

Amendments in Part 2 of Schedule 1

In terms of the alteration to various publication arrangements, we note that the general approach is to substitute or augment the current publication requirements with publication in a manner to be prescribed by Regulations. The types of publications events which are impacted by the proposed legislation, and our comments in relation to them, are set out below.

Items 5 and 6

These items deal with the notice requirements for meetings ordered by a Court in relation to a proposed compromise between a company (or other registered body) and its members/creditors. Such notices are accompanied by explanatory statements containing particulars specified in the Act. Unlike other forms of meetings that are associated with insolvency and other events, there does not appear to be requirement (either in the Act or the Regulations) for an advertisement, or an advertisement in a particular form, to be made. Presumably the current practice is for the Court to decide on a case by case process the manner of personal notification and advertisement (if any) of the notice of meeting and an associated advertisement. The proposed amendments will bring some uniformity to the process.

Items 7, 8,9,10 and 11

These amendments will generally apply where a company has appointed an administrator and the administrator is giving notice of the first and second meeting of creditors, and where the liquidator appointed through the second creditors meeting is giving notice of the winding up. The giving of notice for the first meeting occurs very early in the administration process and the administrator may not at that time be aware of the identity and contact details of all creditors. This is reflected in the requirement under section 436E(3)(a) to give written notice of the meeting to "as many of the company's creditors as is reasonably practicable". The corresponding requirement for newspaper publication of the notice of meeting probably reflects an effort to ensure creditors can still access information that could impact their interests. We acknowledge that publication in a newspaper is not the most effective way of ensuring creditors are informed of these matters and we welcome a revision of this publication requirement. Given that the model for "publication in the prescribed manner" proposed in Item 26 seems to contemplate ASIC publishing or redistributing notices that it receives, we suggest that ASIC establish an e-mail subscription service. Members of the public could choose to subscribe to public notices in respect of companies based on some searchable

criteria such as the ACN or ABN. This would ensure creditors or other interested parties (such as unions who represent employees of a given company) are made aware of companies proceeding into administration and can stay informed as the administration progresses to the second meeting of creditors and into liquidation, or if the administrator is replaced. We note however that there may be some stakeholders (for example law firms) that rely on law notices and related publications in newspapers so we would recommend retaining newspaper publication at least for a transitional period while all stakeholders were educated as to the change in practice.

We note the each of the provisions proposed to be amended contains a time period for the giving of notice. We presume the intent is to preserve via regulations the short time periods currently prescribed by the Act and we would favour shorter periods where practicable.

Item 12

This amendment would apply to circumstances where an application has been made to an eligible Court for the winding up of a company. The current requirement to advertise such applications is contained in the *Federal Court (Corporations) Rules* and requires newspaper publication in lieu of any other order of the Court. The change to the notice requirements will add to, rather than be a substitute for, this require in the absence of an amendment to those Rules. We would support the e-mail subscription model described above becoming the default position in this case along with suitable transitional arrangements. We support a short time period for the giving of such notice. We also support the retention of the Courts' jurisdiction to order alternative forms of notice as circumstances may require.

Item 13

This amendment would be a substitute for the existing provision which leads to publication of notice concerning voluntary winding up in the government gazette. We would support the e-mail subscription model described above being utilised for such notices, and a short time period for the giving of notice.

Items 14 and 15

These amendments deals with the giving of notice by a liquidator of creditors meeting (or adjourned creditors meeting) following a resolution by a company to wind up voluntarily. The amendment would be a substitute for the current requirements relating to newspaper publication. We would support the e-mail subscription model described above being utilised for such notices, and a short time period for the giving of notice under section 497(2)(d). We note that it is intended that the notice period for the purposes of section 498(3) is preserved by Item 15.

Item 16

This amendment deals with the giving of notice of the final meeting and explanation of the final account. The amendment would be a substitute for the existing provision which leads to publication of a notice in the government gazette. We believe the e-mail subscription model would be an acceptable substitute.

Item 17

This amendment deals with the giving of notice by a liquidator in relation to disclaimers of property. These disclaimers may relate to assets or contractual rights which, for whatever reason, the company and any other interested parties have neglected or forgotten about. Our proposed e-mail subscription model would not be appropriate in such instances as the affected parties may not identify themselves as such by subscribing to notices in respect of the company. It is

important that the notices are distributed widely in such instances and we would support the retention of the existing notice provisions (including by moving them to the relevant regulation) in addition to any other forms of notice that may be prescribed.

Items 18 -19 and 24-25

These amendments deal with the process of providing notice of voluntary deregistration. We have no comment on these proposals as we believe that the criteria for voluntary deregistration under section 601AA(2) make it unlikely that external interests will be affected by it.

Items 20-23

These amendments deal with the process of providing notice of ASIC initiated deregistration in circumstances other than winding up, amalgamation or reconstruction. Deregistration in such circumstances does have the potential to prejudice external interests. Accordingly, we would support an e-mail subscription service as described above being one form of notice that is prescribed.

Many of the proposed amendments referred to in Part 2 of Schedule 1 will require publication of *prescribed information* in the prescribed manner. We note that there are not pre-existing definitions of what would constitute *prescribed information* for each matter dealt with in each relevant amendment. There is no overall definition of *prescribed information* proposed, unlike the position adopted in Item 26 in relation to *prescribed manner*. We nonetheless presume that the broad powers in section 1364 will permit regulations specifying the *prescribed information* for each of the amendments.

Amendments in Part 3 of Schedule 1

Items 27 and 28

We support these amendments as they will ensure minimal disruption to paid parental leave payments to employees of companies which are subject to insolvency events.

Item 29

We support the amendment on the basis that it permits ASIC to be subject to supervision of the Court in respect of property vested in ASIC as a consequence of reinstatement under 601AH(1).

Amendments in Schedule 2

We make no comment on these amendments save to refer to the administrative transitional arrangements we suggest above in respect of certain amendments affecting notice provisions.

Yours faithfully,

Trevor Clarke
Senior Legal & Industrial Officer
Australian Council of Trade Unions