13 April 2012

Mr Tim Bryant
Committee Secretary
Senate Economics Legislation Committee
SG. 64
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: economics.sen@aph.gov.au

Dear Mr Bryant

Corporations Amendment (Phoenixing and other measures) Bill 2012

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

1 Summary

The IPA supports:

- giving ASIC an administrative power to order the winding up of a company. However we query how such liquidations will be funded as they will invariably be of assetless companies;
- including a regulation making power to prescribe methods of publication of events relating to the external administration of a company. The IPA has consistently supported internet based communications in insolvency;
- imposing a notification requirement on insolvency practitioners in relation to paid parental leave payments; and
- the amendments to s 497 and s 601AH of the Corporations Act.

2 Winding up by ASIC

We note that a precondition of any payment to employees of a failed company under the existing General Employee Entitlements and Redundancy Scheme (GEERS) is that the company has been formally placed into liquidation.[1] Hence, the Bill provides ASIC with powers "to order the winding up of a company", if the grounds in proposed clause 489EA are met. The effect of such an order is that the company is deemed to have gone into creditors voluntary liquidation under s 491 of the *Corporations Act*: clause 489EB. ASIC would have the power to administratively appoint a liquidator to the company under clause 489EC, and determine the remuneration of the liquidator.

In relation to the intended use of this power by ASIC, the Explanatory Memorandum says at 1.4 that

[1] We do not know whether this will remain the case under the Fair Entitlements Guarantee Bill 2012 by which the government says it will replace GEERS.

> ... giving ASIC the power to place abandoned companies into liquidation will enable a liquidator to investigate and report on alleged misconduct related to possible phoenixing behaviour; or to investigate and take action in respect of uncommercial transactions entered into by the company's directors prior to deregistration or abandonment of the company.

2.1 Funding

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

This was a general issue raised by the IPA in its submissions to the Senate Economics References Committee in its 2010 inquiry into insolvency practitioners and ASIC.[2]

We do note from the government's December 2012 insolvency law reform paper[3] a proposal to increase the availability of ASIC's Assetless Administration Fund. An example is given[4] in the paper of a company suspected of having been involved in phoenix activity but

"there are no assets left in the company and no practitioner is willing to accept an appointment to that company".

The proposals paper says that

"ASIC might (depending upon competing demands for regulatory resources) provide funding towards the costs of a practitioner performing the mandatory tasks in the administration (in order to induce a practitioner to accept the appointment) as well as towards preparing and providing a report on whether it has been involved in phoenixing".

The government is yet to announce its response to the submissions made to those proposals.

2.2 Remuneration

The Bill requires ASIC to "determine the remuneration to be paid to the liquidator" (clause 489EC(1)(b)). We do not understand why this need necessarily be the case. It may be that these companies in liquidation do have creditors – many would have employee creditors for example – and the existing provisions of the Corporations Act place the responsibility for remuneration approval on the creditors: s 499(3). There is also a minimum fee allowed under the Act where there is no creditor approval – s 499(3A). We do agree however that if there are no funds, and no creditors, there should be some default arrangement whereby ASIC may determine the remuneration. There is no guidance in the Bill as to how ASIC might determine remuneration, but we note that the Explanatory Memorandum says that ASIC "will not be restricted in how it may choose to structure the remuneration of the liquidator": 1.21.

[2] See chapter 8 of its report – *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, September 2010.
[3] *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*, 14 December 2011.
[4] At [224.1].

Given the Senate Economics References Committee's focus on harmonisation of the laws of personal and corporate insolvency,[5] where possible, and the government's acceptance of this,[6] we draw to this Committee's attention the comparable process in bankruptcy, under s 161 of the *Bankruptcy Act*, where the default arrangement is that the Inspector-General in Bankruptcy may decide upon the trustee's remuneration. The bankruptcy regulations[7] deal with the matters to which Inspector-General must have regard in doing so. We suggest that criteria be provided in relation to ASIC's powers.

2.3 Assetless companies and their directors and a role for ASIC

We have queried whether there is to be any funding provided in this regime. The lack of funding in corporate insolvencies leads to another issue.

The IPA often receives inquiries from well-intentioned directors wanting to put their insolvent company into voluntary liquidation and asking for a liquidator to consent to be appointed. However, the company will invariably be without assets, and the director without funds, and a liquidator member of the IPA will generally and understandably not consent to the appointment. In such cases, the directors in effect often do decide to "abandon" their company, and unpaid employees may be involved. The IPA raised this problem as a general issue in corporate insolvency, in our July 2011 submission to the 2 June 2011 government options paper. It contrasts with the situation in personal insolvency where a debtor wishing to go voluntarily bankrupt may enlist the Official Trustee in Bankruptcy. This issue was not directly addressed in the government's 14 December 2011 proposals paper.

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

2.4 The role of ASIC and of practitioners

In that respect, we draw your attention to comments made in a submission to Treasury on an exposure draft of this Bill by Professor Helen Anderson about previous phoenix reform proposals the existing powers of ASIC.[8] She refers, for example, to the lack of data from ASIC to determine whether it in fact exercises powers to prosecute phoenix misconduct of directors of deregistered companies. She suggests that this Bill "aims to shift at least some of the responsibility for detecting and prosecuting phoenix activity from [ASIC] to a liquidator". She then makes the point that the IPA also makes, that "where the deregistered companies are without assets, it is questionable whether liquidators will be willing to accept these appointments". We broadly agree with Professor Anderson's comments.

[5] Recommendation 2

[6] Government Response to the Productivity Commission Annual Review of Regulatory Burdens on Business: Business and Consumer Services at http://www.finance.gov.au/publications/response-to-pc-bcs/

[7] *Division 4--Trustee's remuneration, Subdivision 2--Trustee's remuneration decided by Inspector-General*

[8] http://www.treasury.gov.au/documents/2336/PDF/Helen_Anderson.pdf, submission dated 19 January 2012, Associate Professor Helen Anderson, University of Melbourne.

3 Publication of insolvencies

The IPA generally supports the change allowing publication of corporate insolvency notices on a website and indeed supports the use of internet based communications generally.[9] In the interest of harmonisation of the law, we point out that personal insolvency notices can be published by trustees on an ITSA website under authority of provisions in the Bankruptcy Act and Regulations. We assume the arrangements in this Bill for corporate insolvency would not be materially different.

4 Paid Parental Leave

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

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

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

5 Section amendments

5.1 Section 601AH and related issues

Although not referred to in the Explanatory Memorandum,[10] we note that section 601AH, concerning the reinstatement of a company by ASIC, is to be amended, in relation to a deficiency in its drafting raised in the court decision in *Foxman v Credex* [2007] NSWSC 1422. We also alerted Treasury to this issue in 2007. We agree with the proposed change.

We have also pointed out to Treasury that other reforms to this section and related provisions have been suggested by the courts. In *Tan v ASIC* [2011] NSWSC 58, Justice Barrett said that law reform consideration could usefully be given to

"uncertainties arising from the Commonwealth legislation with respect to the recreation of deregistered companies"

referring to *Foxman v Credex* and to a number of other court decisions where reform suggestions have been made.[11] We have not analysed these cases in detail but have drawn them to Treasury's attention.

[9] This is an important aspect of the proposals in *A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*, 14 December 2011.
[10] It is explained at 311-314 of the insolvency law reform proposals paper.
[11] *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 441; (2006) 200 FLR 125; *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd* [2006] NSWSC 690; (2006) 201 FLR 296, *GIO General Ltd v Sabko Ltd* [2007] NSWSC 251; (2007) 70 NSWLR 743; *Consolidated Capital Services Pty Ltd* [2007] NSWSC 680; *Brown v Hodgkinson* [2008] NSWSC 625; and *Re Data Tech Communications (Aust) Pty Ltd* [2009] NSWSC 402.

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

We agree with the proposed amendment of subsection 497(1) of the *Corporations Act*, as to the convening of the creditors meeting. The IPA in fact alerted Treasury to that drafting error in 2008.[12]

6 General - consistency with external administration provisions in Chapter 5 of the Corporations Act

Apart from the need for harmonisation between personal and corporate insolvency laws, we generally assume that the law proposed in this Bill fits in with the remainder of the external administration provisions in Chapter 5 of the Corporations Act, in particular in relation to the powers and responsibilities of liquidators. Also, we assume that this Bill will align with any reforms decided upon by government coming out of the insolvency law reforms proposals paper.

7 Contact

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

Yours sincerely

Robyn Erskine
President

[12] See (2008) 20(2) A Insol J 38.