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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Secretary

Inquiry into Corporate Insolvency in Australia

Please find below response to Questions on Notice (Question 1) that were posed during the Public Hearing in Sydney on Tuesday, 21 February 2023.

QUESTION 1: Could you give your view about the proposed public funder model to do the work of liquidators (a public liquidator)?

A number of submissions to the present Inquiry mention the notion of a public funder model to do the work of liquidators (government liquidator), similar to the role of the Official Trustee in Bankruptcy[1] - not a completely unfamiliar concept, in other words. Those in favour of this model justify the suggestion with reference to the fact that some insolvent companies may avoid the liquidation process and everything that entails, due to liquidators refusing appointment in cases where there is no funding available to cover liquidator remuneration. In those instances, the company will be deregistered instead. An obvious result is that the important regulatory and investigative functions fulfilled by liquidators will not apply in respect of those companies – an issue that could be overcome by having access to a government liquidator (a liquidator of last resort) that could act in the winding-up of these companies. Those advocating for a government liquidator also mention the role it could play to address concerns regarding unfunded work by insolvency practitioners and note the utility of the government liquidator in other common law countries, such

[1] Michael Murray and Jason Harris, Submission no 18, p 4; SCOLA, Submission no 37, p 7; Michael Brennan, Submission no 73, to name but a few.

as New Zealand, the United Kingdom and Singapore.[2] Opposing arguments focus on the cost implications of such a step. Brennan submits that the costs involved to do the job "properly" would be "prohibitive"[3] and provides useful figures based on AFSA's performance to support this statement.

It cannot be denied that a government liquidator could fulfil a useful and important function and it is obvious why many would be attracted to this idea. That said, Brennan's arguments regarding costs are sound, especially given the evidence that he provides regarding AFSA's recent policy to outsource files to the private sector. It is also important to note that some of the jurisdictions that are held up as examples to demonstrate the utility of a government liquidator (particularly the United Kingdom and Singapore), possess uniform insolvency legislation, unlike Australia.

On the basis of the above, my view is, in short, that the possibility of a government liquidator merits serious consideration. However, this is not an unqualified statement, and I would suggest proceeding with caution if the current insolvency regulatory framework is maintained, for a number of reasons. First, the extent of the issue requires proper investigation. The Brennan submission, for example, questions whether data relied on in support of the argument that companies are increasingly being deregistered, rather than liquidated, has been interpreted correctly.[4] Secondly, it should be noted that ASIC is a very different type of entity compared to AFSA,[5] with some of the submissions appearing to hint at an uneasy relationship between the regulator (ASIC) and insolvency practitioners.[6] The successful operation of a potential government liquidator should therefore not be assumed, purely based on the operations of the Official Trustee, as the contexts are quite distinct. Thirdly, cost implications may be an ultimate hurdle to this type of reform and the question may well be asked whether the money could not be better spent elsewhere. Should the costs of creation of an AFSA type body in a corporate context prove to be prohibitive, consideration should at least be given to improved funding for work undertaken by private liquidators to ensure that insolvent companies are not able to avoid existing regulatory measures. Fourthly, the role of such a body should be carefully considered to ensure optimum achievement of regulatory and policy objectives.

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[2] See eg Michael Murray and Jason Harris, Submission no 18, p 4; SCOLA, Submission no 37, p 7.
[3] Michael Brennan, Submission no 73.
[4] Michael Brennan, Submission no 73.
[5] ARITA Submission no 36, p 75.
[6] See eg ARITA Submission no 36, p 70; Michael Brennan, Submission no 73.

Many are calling for a more comprehensive review of the Australian insolvency law framework, recommending adoption of uniform insolvency legislation along with the creation of a new for purpose agency.[7] In the long run, such a system could likely prove to be more cost-efficient and could perhaps create a better environment and scope for the creation and operation of a body similar to the Official Trustee in respect of companies in liquidation. Such reform could also address concerns about the extent to which ASIC would be able to take on an additional burden associated with the functions of a government liquidator, in light of the expansiveness of its current regulatory remit and relationship with insolvency practitioners, as well as allow for careful consideration of the role and function of such a body.

Yours sincerely,

Sulette Lombard

[7] See eg ARITA Submission no 36, p 7; pp35 – 37.