Government Response to the

Report of the Parliamentary Joint Committee on Corporations and Financial Services

'CORPORATE INSOLVENCY LAWS: A STOCKTAKE'

GOVERNMENT RESPONSE TO THE REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES, 'CORPORATE INSOLVENCY LAWS: A STOCKTAKE'

On 14 November 2002, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) agreed to consider and report on the operation of Australia's insolvency and voluntary administration laws. The report, entitled *Corporate Insolvency Laws: A Stocktake*, was presented on 30 June 2004 and tabled on 3 August 2004.

The Government's response to the Committee's recommendations is outlined below.

Recommendation 1 The Committee recommends that the law should require administrators to make available a statement of independence before the first meeting of creditors disclosing any professional, personal or business relationship between the administrator or his/her firm and the company or its officers, members or creditors. There should be provision for appropriate sanctions for false or misleading statements. Further, the Committee recommends that the administrator be under an obligation to disclose conflicts of interest if and when they arise.	The Australian Government ('the Government') supports this recommendation. The impartiality and independence of administrators are cornerstones of the voluntary administration procedure. Details about the timing and content of the statement of independence will be developed in consultation with stakeholders.
Recommendation 2 The Committee recommends that creditors should be able to appoint a different person as liquidator when the administration ends and the company proceeds into liquidation, and when a deed of company arrangement ends and the company proceeds into liquidation.	The Government supports this recommendation. Adoption of this recommendation will enhance the rights of creditors under the voluntary administration procedure.

Recommendation 3 The Committee recommends that an administrator should be prohibited from using a casting vote in a resolution concerning his or her replacement.	The Government rejects this recommendation. The exercise of the casting vote is sufficiently regulated by the requirement that it must be exercised in what the administrator perceives to be the overall best interests of the company, and the right of creditors to challenge the exercise of the vote in court. The Government will require administrators to publish reasons for the way they exercise a casting vote. This will inform creditors (and the courts) considering a challenge to a casting vote.
Recommendation 4 The Committee recommends that the prohibition in s 595 - inducements to be appointed liquidator etc. of a company - be extended to include not only members and creditors, but also directors and any other person or entity.	The Government supports this recommendation. Addressing this loophole in the prohibition on inducements will assist in promoting administrator independence and competition in the industry.
Recommendation 5 The Committee strongly endorses the heavy emphasis that the Australian Securities and Investments Commission (ASIC) places on practical experience in external administration, especially managerial skills, as a prerequisite for registration as a liquidator and recommends that it should not be weakened. It does, however, recommend that the criteria for registration as an insolvency practitioner be broadened to recognise qualifications in other relevant disciplines including legal practice.	The Government supports this recommendation in principle. Current requirements for registration provide sufficient flexibility for practical experience and a range of academic qualifications to be taken into account.

Recommendation 6 The Committee recommends that the law should provide for procedures to be in place to monitor insolvency practitioners to ensure that they continue to meet on-going registration criteria in regard to education including continuous education requirements, skills, resources, membership of an appropriate professional body, experience and fitness for registration.	The Government supports this recommendation in principle. The Companies Auditors and Liquidators Disciplinary Board may cancel a registered liquidator's registration if the registered liquidator fails to perform their duties or functions adequately or properly, or if they are not a fit and proper person to remain registered. To facilitate monitoring of these requirements by ASIC, the Government will replace the existing triennial reporting requirement with a more detailed annual reporting requirement. The Government will also give ASIC the power to cancel registration where a practitioner dies, becomes disqualified by reason of bankruptcy or becoming a person disqualified from managing corporations, or is convicted of a criminal offence.
Recommendation 7 The Committee recommends that the Government consider establishing an advisory council comprising representatives of professional organisations including the Insolvency Practitioners Association of Australia, CPA Australia, the Institute of Chartered Accountants in Australia, and the Law Council to assist ASIC in relation to the regulation, appointment, registration and removal of registered and official liquidators as well as on issues relating to the maintenance of professional standards of insolvency practitioners.	The Government rejects this recommendation. The proposed advisory council would largely duplicate existing mechanisms to allow for consultation with relevant professional organisations.

Recommendation 8 The Committee recommends that, in its enforcement programs for the lodgement of reports as to the affairs of a company (RATAs), ASIC take greater account of the quality of reports provided.	This recommendation is a matter for ASIC.
Recommendation 9 The Committee is concerned about the allegations of poor record keeping and believes that the current penalty regime for breaches of section 286 may not be adequate. The Committee recommends that the Government review the penalties attached to breaches of section 286 with a view to making them more effective as a deterrent.	The Government supports this recommendation in principle. The requirement to keep written financial records that correctly record and explain a company's transactions and financial position and performance, and enable true and fair financial statements to be prepared and audited is a fundamental obligation of every company. The appropriateness of the penalties for breach of section 286 will be considered in the context of a broader review of penalties and offences under the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* ('the Corporations Act').
Recommendation 10 The Committee recommends that the Government consider amending the law to permit an administrator or a liquidator to recover from directors who have failed to ensure that company records are complete and up-to-date, the costs and expense of reconstructing the company's financial records in order to prepare a full and complete report on the affairs of the company. Directors would be held jointly and severally liable.	The Government rejects this recommendation. A provision along the lines proposed would be subject to uncertainty both as to the liability of individual, non-culpable directors and the quantum of any potential liability.

Recommendation 11 The Committee recommends that ASIC issue a practice note as to what constitutes insolvency for the guidance of company directors passing solvency resolutions and making director's declarations.	This recommendation is a matter for ASIC.
Recommendation 12 The Committee recommends that reg. 5.3A.02 - administrator to specify voidable transactions in statement - be amended to include rights of recovery against the company's directors for insolvent trading.	The Government supports this recommendation in principle. A principles-based approach is preferred to the prescription of a detailed checklist of matters to be included in the report. Accordingly, the Government will introduce a requirement that the administrator's statement to creditors include 'any other matter material to the creditors' decision' (see response to recommendation 17 below). Adoption of this recommendation will permit an administrator to address the question of insolvent trading in their statement to creditors.
Recommendation 13 The Committee recommends that insolvency be removed as a prerequisite for the avoidance of uncommercial transactions which may be challenged by a liquidator. Such transactions are to have taken place during the two year period preceding formal insolvency.	The Government rejects this recommendation. The current provision strikes a balance between promoting certainty for business and preventing the dissipation of company assets in the lead-up to insolvency. Removing the insolvency requirement for uncommercial transactions has the potential to cast doubt on many company transactions and disrupt business. The requirement of insolvency provides an important link with company transactions that are most likely to disadvantage creditors as a whole.

Recommendation 14 The Committee recommends that the threshold test permitting directors to make the initial appointment of an administrator under the voluntary administration procedure be revised in order to alleviate perceptions that the VA procedure is only available to insolvent companies. The Committee notes the suggestion that the test be reworded to read 'the company is insolvent or may become insolvent'.	The Government rejects this recommendation. The current test allowing directors to make the initial appointment of an administrator is not restrictive and strikes an appropriate balance between facilitating corporate rescue and protecting the rights of creditors. The current test does not limit use of the procedure to circumstances of actual or present insolvency. Any misconception about the current test would be best handled through education and compliance programmes. ASIC is preparing a comprehensive suite of information sheets in this area, and also operates an insolvent trading programme that adopts a proactive strategy whereby companies at risk of insolvency are visited by ASIC and directors encouraged to seek professional advice on turnaround strategies.
Recommendation 15 The Committee believes that the first meeting of creditors should be retained but the time frame for the meeting be extended. It does not favour a lengthy extended period. The Committee recommends that the first meeting be held within eight business days after the beginning of the administration with a requirement for five business days' notice of the meeting to creditors.	The Government supports this recommendation. It will enhance the opportunities for creditors to participate in the first meeting of creditors.
Recommendation 16 The Committee recommends that the period for holding the second meeting of creditors be extended to 25 business days with a new convening period of 20 business days. The adjournment period is to remain at 60 days.	The Government supports this recommendation. It will enhance the opportunities for creditors to participate in the meeting, and give administrators more time to conduct an examination of the company's circumstances and options for its future.

Recommendation 17 The Committee recommends that the administrator's report to creditors at the second meeting of creditors be required to include 'any other matter material to the creditors' decision'.	The Government supports this recommendation. The requirement will enhance the quality and quantity of relevant information being made available to creditors for the meeting which will determine the company's future.
Recommendation 18 The Committee further recommends that ASIC publish a guidance note to assist administrators in ensuring that administrators include all matters material to the creditors' decision in their administrator's report.	This recommendation is a matter for ASIC.
Recommendation 19 The Committee recommends that the Government consider alternatives to the current advertising and gazettal requirements for external administrations.	The Government supports this recommendation. An examination of the current advertising and Gazettal requirements will assist in identifying unnecessary requirements so as to permit their removal or alternative means to be adopted in their place.
Recommendation 20 The Committee recommends that the Government consider making technology and e-commerce options more widely available to enhance communication with stakeholders in external administrations and reduce the costs of external administrations.	The Government supports this recommendation. The use of alternative technology and e-commerce options where possible to enhance communication with stakeholders in external administrations may assist in reducing the costs of external administrations.

Recommendation 21 The Committee recommends that the provisions of Chapter 5 be amended with a view to permitting alternative methods of conducting minor procedural meetings.	The Government supports this recommendation. Allowing for alternative methods of conducting minor procedural meetings may assist in reducing the cost of external administrations.
Recommendation 22 The Committee recommends that ASIC provide, from the perspective of an unsophisticated, unsecured creditor who may be affected once only by an insolvency proceeding, a series of Frequently Asked Questions or other suitable materials that address the issues they may need to consider as creditors of a failed company, and which explains the law and outlines options and issues that they may need to address.	This recommendation is a matter for ASIC.
Recommendation 23 The Committee recommends that a court should have the power to review the remuneration of administrators and deed administrators on the application of ASIC.	The Government supports this recommendation. Adoption of this recommendation will bring the procedures for review of the remuneration of administrators into line with those applying to liquidators.
Recommendation 24 The Committee recommends that ASIC work with the professional bodies to encourage the promotion of best practice standards in remuneration charging and in particular the provision of adequate disclosure of the basis of fees charged by insolvency practitioners and on a more timely basis.	This recommendation is a matter for ASIC.

Recommendation 25 The Committee recommends that an administrator should be prohibited from using a casting vote in a resolution concerning his or her remuneration (see also recommendation 3).	The Government rejects this recommendation. The exercise of the casting vote is sufficiently regulated by the requirement that it must be exercised in what the administrator perceives to be the overall best interests of the company, and the right of creditors to challenge the exercise of the vote in court. The Government will require administrators to publish reasons for the way they exercise a casting vote. This will inform creditors (and the courts) considering a challenge to a casting vote.
Recommendation 26 The Committee recommends that ASIC, in consultation with the relevant professional bodies, implement appropriate means to educate unsecured creditors about the different methods of fee setting available and the rights which creditors have with regard to the setting of fees (see also recommendations 22 and 50).	This recommendation is a matter for ASIC.
Recommendation 27 The Committee recommends that ASIC periodically sample the fees charged by insolvency practitioners and make public a comparative report.	This recommendation is a matter for ASIC.
Recommendation 28 The Committee is of the firm belief that the problem of assetless companies must be addressed. It recommends that the Government establish an assetless company administration fund to finance preliminary investigations of breaches of directors' duties and fraudulent conduct using the skills of registered insolvency practitioners.	The Government supports this recommendation. The Government will also provide additional funding to ASIC to enhance its enforcement activity in this area.

Recommendation 29 The Committee recommends that, as a step towards a better understanding of the nature, effects and extent of insolvent assetless companies, the Government should commission an empirical study of assetless companies.	The Government rejects this recommendation. The establishment of an assetless administration fund and enhanced enforcement activity in this area will provide the opportunity to obtain improved information about assetless companies.
Recommendation 30 The Committee further recommends that as a first and immediate step, ASIC begin to collate statistics on insolvent assetless companies and publish such figures on a triennial basis together with an analysis.	This recommendation is a matter for ASIC.
Recommendation 31 The Committee recommends that ss 206D and 206F should not be subject to a requirement to have managed two or more failed corporations. They should permit a court, or ASIC in its discretion, to disqualify a person from being a director where essentially two conditions are met: the person is or has been a director of a company which has failed (as defined in s 206D(2)) and the person, as a director of the company (either taken alone or taken together with his/her conduct as a director of any other company) makes him or her unfit to be concerned in the management of a company.	The Government rejects this recommendation. Unlawful phoenix activity typically involves two or more corporate failures. The Government recently amended the Corporations Act to extend the maximum disqualification periods from managing corporations, for insolvency and non-payment of debts, from 10 to 20 years. In addition, ASIC may now apply to a court to have an automatic five-year disqualification order extended by up to a further 15 years. The Government will amend the ASIC Act to restore the longstanding interpretation of disqualification and banning orders as being 'protective' rather than 'penal' in nature.

Recommendation 32 The Committee recommends that the Government in association with the Council of Australian Governments review the adequacy of the arrangements for the checking of the business names of companies on State Business Names Registries against the ASCOT database of company names and ACNs.	The Government supports this recommendation in principle. The Government will raise the question of the adequacy of arrangements for the checking of the business names of companies on State Business Names Registries against the ASCOT database with an appropriate ministerial forum.
Recommendation 33 The Committee recommends that the Government consider the proposal to create a statutory process analogous to a Mareva injunction to enable the courts to freeze assets of a director or manager which are prima facie assets on which the corporation has a just claim.	The Government rejects this recommendation. The Corporations Act already empowers the court to freeze assets of a director or manager where ASIC is investigating an act or omission by a person which may constitute a breach of the Act. 'Proceeds of crime' legislation contains similar powers.
Recommendation 34 The Committee recommends that the Government review the processes in place for registering a company with a view to improving the measures for determining the bona fides of those applying to register a company.	The Government supports this recommendation in principle. Company registration requirements should balance the need to promote integrity in business dealings and avoidance of the imposition of unnecessary compliance costs or risks on business.
Recommendation 35 The Committee recommends that ASIC consider establishing a hot-line and guidelines for its operation in conjunction with strategically located employees for the purpose of facilitating possible early detection of, and intervention to prevent the implementation of, illicit phoenix activities.	This recommendation is a matter for ASIC.

Recommendation 36 The Committee recommends that the insolvency related implications and recommendations of the Companies and Securities Advisory Committee's *Report on Corporate Groups* should be examined by the Government and its response made available to the Committee as soon as possible.	The Government supports this recommendation in principle. The Government has announced an integrated set of proposals to improve the operation of Australia's insolvency laws. The recommendations made in the *Report on Corporate Groups* were considered in the context of developing those proposals.
Recommendation 37 The Committee recommends that in its enforcement programs for the lodgement of external administrators' statutory reports, ASIC also take greater account of the quality of reports provided.	This recommendation is a matter for ASIC.
Recommendation 38 The Committee recommends that the level of funding for ASIC take account of the demands and complexities of corporate insolvency laws and the need to investigate properly and enforce contraventions of the law exposed by corporate collapses.	The Government supports this recommendation. The Government will continue to ensure that ASIC is appropriately funded.
Recommendation 39 The Committee requests that ANAO conduct a performance audit of ASIC's processes in receiving and investigating statutory reports.	The Government will refer this recommendation to ANAO.

Recommendation 40 The Committee recommends that ASIC consider enhancing its capacity to provide more comprehensive, comparable analyses of statutory reports of liquidators for the assistance of journalists, academic researchers, the public and the Government and its own management requirements. Such information should be assessed in terms of maintaining public confidence in the administration and enforcement of corporate laws.	This recommendation is a matter for ASIC.
Recommendation 41 The Committee recommends that ASIC continuously evaluate the incidence of possible failures to keep books and records adequately as disclosed in external administrators' reports on an annual comparative basis. This measure would allow ASIC to assess the effectiveness of its annual programs for the enforcement of financial reporting requirements.	This recommendation is a matter for ASIC.

Recommendation 42 The Committee recommends that the maximum priority proposal not be adopted. The emphasis in any reform proposals in relation to employee entitlements should be on preventative measures to minimise the risk of loss of employee entitlements and modifying current behaviour to ensure directors and managers of companies take greater responsibility in meeting the cost of employee entitlements in the event of business failure.	The Government supports this recommendation. Protection of employee entitlements should not be considered in isolation from the rest of the insolvency regime. The Government has announced an integrated set of proposals to improve the operation of Australia's insolvency laws, including a range of initiatives intended to complement the general body of rules concerning the duties of company officers and to strengthen creditor protections. ASIC operates an insolvent trading programme that adopts a proactive strategy whereby companies at risk of insolvency are visited by ASIC and directors encouraged to seek professional advice on turnaround strategies. In addition, the Government remains strongly committed to the protection of employee entitlements in the event of employer insolvency. Since the introduction of the first federal employee entitlements scheme in January 2000, over 52,000 Australian workers have received in excess of $645 million in assistance for their entitlements lost due to the insolvency of their employer. The Government will further enhance GEERS, improving access to the scheme in relation to underpaid wages, payment in lieu of notice and employees who resigned or were terminated in the lead-up to insolvency. Additional funding

Recommendation 43 The Committee recommends that the Minister for Finance request the Corporations and Markets Advisory Committee to review the operation of the *Corporations Law Amendment (Employee Entitlements) Act 2000* to determine its effectiveness in deterring companies from avoiding their obligations to employees. Furthermore, in light of the evidence suggesting that some corporations deliberately structure their business to avoid paying their full entitlements to employees and more generally unsecured creditors, the Committee recommends that the review look beyond the effectiveness of the Act and consider, and offer advice on, possible reforms that would deter this type of behaviour.	The Government rejects this recommendation. The measures introduced through the *Corporations Law Amendment (Employee Entitlements) Act 2000* are one part of a suite of measures intended to protect creditors. The Government has announced an integrated set of proposals to improve the operation of Australia's insolvency laws, including a range of initiatives intended to complement the general body of rules concerning the duties of company officers and to strengthen creditor protections. The proposed assetless administration fund, and additional funding for ASIC to investigate and prosecute misconduct in the area of corporate insolvency, should allow for more rigorous testing of this area of law.
Recommendation 44 The Committee recommends that the Government explore the various measures proposed for safeguarding employee entitlements such as insurance schemes or trust funds giving particular attention to the costs and benefits involved in the schemes.	The Government supports this recommendation in principle. The Government is committed to the protection of employee entitlements through the GEERS scheme, but remains willing to examine and explore other measures which might enhance the operation of the scheme or provide employees with similar levels of protection. Further investigation would need to have regard to previous findings of consultations conducted by the Government (in August 1999 and January 2001), the need to maintain an environment in which Australian enterprises remain competitive and the experience of comparable international systems.

Recommendation 45 The Committee recommends that the Government monitor the impact of the quarterly arrangements for the collection of the superannuation guarantee charge to determine whether there is a need for strengthened enforcement measures.	The Government supports this recommendation. The Australian Taxation Office (ATO) will review the impact of the amendments to the SG legislation on levels of compliance. The review, to be conducted three years after the introduction of the quarterly SG regime, will evaluate the effect on compliance levels in general. This timeframe was outlined in the Regulation Impact Statement covering the introduction of the quarterly SG regime. In the 2004-05 Budget the Government allocated additional funding to the ATO to undertake increased compliance activity. One of the identified areas for increased compliance activity was the quarterly superannuation guarantee arrangements.
Recommendation 46 The Committee recommends that the Government clarify inconsistencies between the *Superannuation Guarantee (Administration) Act 1992* and the Corporations Act and clarify how the Superannuation Guarantee Scheme is intended to operate in relation to employers that are under one or other form of external administration.	The Government supports this recommendation. Appropriate clarification of the treatment of the SG Charge under the *Superannuation Guarantee (Administration) Act 1992* and the Corporations Act will improve the prospect of employees recovering outstanding superannuation obligations in the event of employer insolvency.

Recommendation 47 The Committee recommends that the Government clarify the priority afforded superannuation contributions required to be made after the 'relevant date' of an external administration.	The Government rejects this recommendation. The law currently affords priority treatment to standard superannuation contributions payable after the 'relevant date' (the commencement of an external administration). The decision cited by the Parliamentary Joint Committee was subsequently the subject of a successful appeal. The Government will continue to examine and monitor court decisions that consider the operation of the relevant law in non-standard cases, with a view to clarifying the law where appropriate.

Recommendation 48 The Committee recommends that the Government consider the inclusion of superannuation contributions in GEERS.	The Government rejects this recommendation. Arrangements are already in place for securing the superannuation entitlements of employees. Where an employer does not make required superannuation contributions to a complying superannuation fund or retirement savings account on behalf of its eligible employees, the Commissioner of Taxation will raise a Superannuation Guarantee (SG) charge. Consistent with the Government's 2001 election commitment, employers have been required to make at least quarterly SG contributions on behalf of their employees since 1 July 2003. These arrangements encourage employers to make regular superannuation contributions, which benefit employees in a number of ways. They lower employee exposure to the loss of superannuation benefits in the event of employer bankruptcy or insolvency. More frequent superannuation contributions provide more timely evidence of non-compliance, which in turn facilitates earlier intervention by the ATO. The quarterly SG arrangements have only been operating since 1 July 2003 and it is too early in the implementation process to judge the effectiveness of the arrangements.

Recommendation 49 The Committee recommends that the law be amended to make it mandatory for a deed of company arrangement to preserve the priority available to creditors in a winding up under s 556(1), unless affected creditors agree to waive their priority. The amendment should, however, allow creditors or the administrator the right to initiate court proceedings to have the deed upheld if in the Court's view the deed offered the dissenting creditors a better return than they would obtain in a liquidation.	The Government supports this recommendation. Mandating the priority of employee entitlements in a deed of company arrangement will improve the operation and fairness of insolvency laws, enhance the prospect of payment of employee entitlements in the event of employer insolvency and improve the standing of ordinary employees in voluntary administrations.
Recommendation 50 The Committee recommends that ASIC work with the IPAA to educate unsophisticated creditors about their rights in the process of formulating a deed of company arrangement and during the period in which the company is subject to a DCA.	This recommendation is a matter for ASIC.
Recommendation 51 The Committee recommends that the IPAA take note of the criticism raised about insolvency practitioners and the information they make available to creditors about DCAs. It would like to see the IPAA adopt a strong and active position to ensure that its members take seriously their responsibilities and obligations to inform creditors about all aspects of the DCA.	This recommendation is a matter for the IPAA.

Recommendation 52 The Committee recommends that the law be amended to clarify that a DCA which incorporates any form of promise of future performance should not be regarded as finalised until all such promises have been fulfilled.	The Government rejects this recommendation. The law imposes minimal restrictions on deeds of company arrangements (DCAs). It aims to allow creditors maximum flexibility in their formulation. Adoption of a provision in the terms proposed may impose unintended restrictions on the ability of creditors to formulate and accept DCAs. The law already includes many safeguards against abusive arrangements in DCAs. It requires information to be provided in the statutory report to creditors, prohibits unfairly discriminatory deeds, imposes liability on administrators for misleading and deceptive conduct and empowers a court to terminate a deed. The law should not unduly limit the discretion of creditors to approve a DCA, provided they are in a position to make an informed consent. ASIC has recently released guidance on information to be provided to creditors where the administrator proposes the establishment of a creditors trust.
Recommendation 53 The Committee recommends that ASIC work with the IPAA to inform unsophisticated creditors about the options open to them for the purpose of monitoring the fulfilment of terms of DCAs and reporting on compliance.	This recommendation is a matter for ASIC and the IPAA.

Recommendation 54 The Committee recommends that the creditors' voluntary liquidation procedure should be retained and entry to the procedure simplified to enable directors to place a company immediately into liquidation. Where an enterprise is not viable, the law should allow for its swift and efficient liquidation to maximise recoveries for the benefit of creditors.	The Government rejects this recommendation. Adoption of this recommendation would confer an inappropriate power on the directors of companies. Creditors, not directors, should have the right to place a company in liquidation, or to apply to a court to have a company placed in liquidation. A power in directors to place a company directly into voluntary liquidation is not comparable to the power of directors to place a company into voluntary administration. The voluntary administration procedure ensures that creditors ultimately determine the future of the company, including possible liquidation.
Recommendation 55 The Committee recommends that the law be amended so as to permit administrators to apply to a court for an order that a party to a contract may not terminate the contract by virtue of entry by a company into voluntary administration. The court should be satisfied that the contracting party's interests will be adequately protected.	The Government rejects this recommendation. A prohibition on the enforceability of 'ipso facto' clauses would erode the freedom of contract, restricting the capacity of creditors to manage risk. The proposed amendment may introduce a high level of complexity to the law and increase the costs of voluntary administrations where an application is made to a court.
Recommendation 56 The Committee recommends that the Government review the appropriateness of the restriction on a liquidator's powers to compromise debts due to the company where the debt exceeds $20,000.	The Government supports this recommendation. It will consult ASIC and the IPAA as to the basis for determination and prescription of a more appropriate amount.

Recommendation 57 The Committee recommends that consideration be given to repealing s 506(4) and replacing it with a provision in similar terms to ss 451A and 451B (concerning the appointment of two or more administrators) i.e. where more than one liquidator is appointed, their functions or powers should be able to be exercised by any one of them, subject to the resolution or instrument appointing them providing otherwise. Consideration should also be given to similar provisions being included in Parts 5.2 and 5.6 of the Corporations Act dealing with receiverships and windings-up generally.	The Government supports this recommendation in principle In most circumstances it is more convenient for two or more external administrators to be able to act jointly and severally. The Government will consider amendments to the provisions of the Act dealing with multiple appointments to ensure they are consistent and contribute to the efficiency of insolvency proceedings.
Recommendation 58 The Committee recommends that the Government support a program of research into the impact of insolvency procedures, if necessary, by providing a specific allocation for the conduct of such research by ASIC, the professional associations and/or commissioned researchers.	The Government supports this recommendation in principle. The collection of statistical data by ASIC through forms approved by it pursuant to s 350 or prescribed forms is currently permitted by the law.

Recommendation 59 The Committee recommends that the Government ensure, particularly when contemplating changes to the law, that the two streams of Australia's insolvency laws, personal bankruptcy and corporate insolvency, harmonise where possible.	The Government supports this recommendation in principle. There are different policy considerations in corporate insolvency and personal bankruptcy, which may give rise to necessary variations in the legal frameworks. There are arrangements in place for securing cost savings and streamlining the administration of corporate and personal insolvency law. The Insolvency and Trustee Service Australia (ITSA) and ASIC have entered into a Memorandum of Understanding. ITSA and Treasury will continue to consult in the development of insolvency/bankruptcy policy.
Recommendation 60 The Committee recommends that Australia adopt the UNCITRAL Model Law on Cross Border Insolvency as proposed in CLERP Paper No 8: Proposals for Reform - Cross-Border Insolvency.	The Government supports this recommendation.
Recommendation 61 The Committee recommends that the Government play an active role in multilateral forums and international initiatives to strengthen countries' insolvency systems and develop sound practices and principles for insolvency systems taking into consideration differing national legal systems and economic circumstances.	The Government supports this recommendation. Australia is a participant in, or has participated in, a number of international fora relating to corporate law. The Government is exploring methods for the promotion and adoption of good insolvency practices and laws in appropriate international fora.

Recommendation 62 The Committee recommends that the Government examine the problem of cross border insolvency involving the misappropriation of company funds with a view firstly to preventing such activities (improved reporting on the financial affairs of a company, more effective monitoring and enforcement of requirements to keep records and the more effective use of restraining orders in respect of company assets) and secondly to holding those responsible for missing funds or assets accountable for the losses.	The Government supports this recommendation in principle. There are many aspects to the question of cross-border insolvency and the Government has examined, and continues to examine, initiatives that seek to address the problem.
Recommendation 63 The Committee recognises that cross-border insolvency and the bankruptcy of those associated with the financial transactions of a failed company are often interlinked. The Committee recommends that any measures taken in either the Corporations Act or the Bankruptcy Act to effect the recovery of debts or to punish the perpetrators of fraud involved in cross-border insolvency take account of how the laws may interact.	The Government supports this recommendation in principle. It is important that the Corporations Act insolvency provisions and the Bankruptcy Act contain effective measures to address cross-border insolvency issues.

Minority Report Recommendations	
Minority Recommendation 1 Labor members recommend that ASIC, in consultation with the Insolvency Practitioners Association of Australia, develop a code of conduct to ensure that administrators and liquidators, are independent, and are seen to be independent of the company, its members, officers and creditors when they consent to act and act in that capacity. Labor members further recommend that the provisions of the code be given statutory force by incorporation into the Corporations Regulations or other appropriate means.	The first part of this recommendation is a matter for ASIC and the IPAA. The Government rejects the recommendation to legislate the proposed code. Targeted reforms to the current principles-based framework are preferable to a prescriptive code. Mandating a detailed code has considerable disadvantages: a) it would add to the complexity of the law b) mechanisms to ensure compliance with this area of the law would need to be developed. This would add further cost and complexity to the administration of insolvency c) placing a code in legislation means it is difficult to alter if circumstances change.
Minority Recommendation 2 Labor members recommend that ASIC, in consultation with relevant industry bodies, develop a guide to fees and charges for insolvency practitioners. Practitioners should not be prevented from charging above these fees, or from calculating their fees on a different basis, provided creditors approving the remuneration are advised by the practitioner of the reasons for departure from the guide.	This recommendation is a matter for ASIC.

Minority Recommendation 3 Labor members recommend that the Government implement the Cole Royal Commission recommendation that section 206F be amended to allow ASIC to disqualify a person who on one occasion was an officer of a corporation which has been wound up and been the subject of a liquidator's report.	The Government rejects this recommendation. Unlawful phoenix activity typically involves two or more corporate failures.
Minority Recommendation 4 Labor members recommend that the Committee and the government monitor ASIC's activities under the director disqualification provisions of the Act. If it continues to be apparent that insufficient activity is being undertaken under these provisions we recommend that the Government amend the automatic disqualification provisions of the Act to more effectively discouraging phoenix company activity and repeated deliberate corporate insolvencies.	The Government supports this recommendation in principle. The proposed assetless administration fund, and additional funding for ASIC to investigate and prosecute misconduct in the area of corporate insolvency, should allow for more rigorous testing of this area of law.
Minority Recommendation 5 Labor members recommend that the Act be amended to impose an obligation on directors of a company to take appropriate action, particularly the appointment of an administrator, if the company is or is likely to become insolvent.	The Government rejects this recommendation. The law already imposes a clear obligation on directors of a company (and a holding company) to take action if a company is or is likely to become insolvent.
Minority Recommendation 6 Labor members further recommend that the Government consider further, and consult on, appropriate remedies arising from a failure to discharge this obligation, including whether adversely affected creditors ought to have a right of action in such circumstances in addition to the company itself.	The Government supports this recommendation in principle. The Government has announced measures to enhance the rights of creditors in relation to directors who have failed to take account of their interests.

Minority Recommendation 7 The Labor members recommend that the Act be amended to provide a statutory presumption of insolvency for the purposes of the application of the voidable transaction provisions. A possible formulation of this presumption is the definition proposed in the Harmer report that a company being wound up is presumed to be insolvent 90 days prior to the commencement of winding up.	The Government rejects this recommendation. The extension of the voidable transaction (clawback) provisions to persons who may have no knowledge of or control over a company's financial records may be unjust in some circumstances.
Minority Recommendation 8 Labor members recommend an alternative model for the protection of employee entitlements in circumstances of corporate insolvencies, with the objective of replacing GEERS with a scheme that: • Protects 100% of the employee's legal entitlements • Protects applicable superannuation contributions • Ensures timely access to payments • Ensures that payments are not obstructed by the terms of any Deed of Arrangement and • Does not impose additional costs on small business	The Government rejects this recommendation. Since the introduction of the first federal employee entitlements scheme in January 2000, over 52,000 Australian workers have received in excess of $645 million in assistance for their entitlements lost due to the insolvency of their employer. The Government will further enhance GEERS, improving access to the scheme in relation to underpaid wages, payment in lieu of notice and employees who resigned or were terminated in the lead-up to insolvency.

Minority Recommendation 9 The Labor members recommend that the Corporations Act be amended to require companies to include a statement in the annual report that sufficient provision has been made for accrued entitlements and that appropriate measures are in place to cover contingent liabilities. The Labor members recommend that appropriate remedies are considered in order to provide an adequate deterrent in the law against misleading statements.	The Government rejects this recommendation. Australian Accounting Standards Board AASB 119 'Employee Benefits' makes provision for the reporting of employee benefits. It requires employee entitlements including contingent entitlements such as termination or redundancy entitlements to be included in companies' financial reports. Entitlements that are expected to be paid within 12 months of the reporting date are reported at their nominal amounts. Entitlements that are expected to be paid beyond 12 months of the reporting date are reported at present value. The appropriateness of AASB 119 is a matter for the Australian Accounting Standards Board. The Government will draw the attention of the AASB to the Minority Report's recommendation.

Minority Recommendation 10 Labor members recommend that the Corporations Act be amended to enable a liquidator, creditor or ASIC to apply to the Court for an order that a related body corporate in appropriate circumstances pay the whole or part of the amount of a debt of an insolvent company. We recommend that the grounds on which a Court can make such an order be the subject of further consultation. We further recommend that intention to avoid liability ought not to be a prerequisite to the making of such an order.	The Government rejects this recommendation. The 'separate legal entity' principle allows for business risk to be transferred via contract to those creditors who are best able to bear that risk. This is fundamental to promoting enterprise and capital-raising. Additional creditor protections should be targeted to situations where creditors are unable to manage risk via contract. A general winding-back of the separate legal entity principle goes further than is required to protect vulnerable creditors, and gives rise to a number of broader policy concerns. It would reduce companies' capacity to manage risk generally, increasing the returns required for investment and putting Australian companies at a competitive disadvantage. Prospective creditors would need to assess the creditworthiness of the entire group, and the likelihood of a contribution order, introducing new risks and assessment costs.