Australian Government

The Treasury

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Mr David Sullivan
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Sullivan

INQUIRY INTO CORPORATIONS AMENDMENT (INSOLVENCY) BILL 2007

I refer to your letter of 14 December 2006 to the Secretary of the Department of the Treasury, Dr Ken Henry, inviting a submission on the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007 (Exposure Draft).

The Committee proposed to examine the Exposure Draft with regard to certain recommendations of its report, *Corporate Insolvency Laws: A Stocktake*, tabled on 3 August 2004, which were not incorporated in the Bill. The Government's response to the Committee's report was tabled on 13 October 2005.

This submission addresses the following recommendations identified by the Committee: 3, 7, 10, 12, 13, 14, 25, 29, 31, 32, 33, 34, 43, 44, 47, 52, 54, 55, and 58.

It does not address the other recommendations identified by the Committee as implementation and/or consideration of a response to these recommendations are properly matters for the ASIC or the Insolvency Practitioners Association of Australia (IPAA). ASIC is an independent statutory authority established under the *Australian Securities and Investments Commission Act 2001* and is responsible for the administration and enforcement of the *Corporations Act 2001* (the Corporations Act). The IPAA is a self regulatory private sector professional association.

The submission sets out the recommendation and the Government Response that was provided on 13 October 2005. Where appropriate, additional comments that may be relevant or assist the Committee in understanding the Government Response are provided. In some cases no additional comments are provided.

Introductory comment

The measures in the Exposure Draft reflect a number of recommendations of the Parliamentary Joint Committee on Corporations and Financial Services, the Corporations and Markets Advisory Committee, and other advisory bodies.

In implementing these reforms, advice was sought from practitioners and industry groups through the establishment of the Insolvency Law Advisory Group. This Group provided technical advice and a practical perspective on how best to implement reform.

One general message that we took from our work with the Advisory Group was that there is a degree of familiarity with the existing legal framework, and that any legislative reform should be limited to the extent necessary to address market developments and changing policy priorities. Extensive law reform or a 're-write' of the obligations in Chapter 5 was not supported. Another general message was the need to avoid unnecessary regulatory burden, given that in many cases the company under external administration has only limited assets available.

The reform package has generally been well received, with comments mainly focussing on the content of the proposed Declaration of Relevant Relationships and the proposed regime for the 'pooling' of external administration processes for related companies.

Recommendation 3

The Committee recommends that an administrator should be prohibited from using a casting vote in a resolution concerning his or her replacement.

Government Response

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.

In addition, it may be noted that:

A prohibition may be ineffective on the basis that the administrator can effectively confirm their own appointment by simply refraining from using their casting vote to effect their removal. As the Committee has noted in its 2004 Report the default position will be that the administrator retains his/her position.

It is important that the voluntary administration proceed expeditiously and not be obstructed by the inability of creditors to reach a decision. The policy intent for the use of the casting vote in the voluntary administration procedure, set out in the explanatory statement to the Corporations Regulations (Amendment) Regulation 1993, SR No 135 of 1993, para 111, arguably remains persuasive. The explanatory statement noted:

> *The term 'casting vote' thus has a broader meaning in this context than is usual and will allow the chairperson to effectively decide between the interests of the creditors with the preponderance in numbers and the interests of the creditors with the preponderance of value. It is envisaged that the exercise of such a casting vote would be most appropriate in circumstances such as where:*
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> - *the creditors with a majority in value have such an overwhelming interest that it is inappropriate to allow a majority in number, who do not have the same monetary interest, to carry the day, or vice versa;*
> - *or the inability to arrive at any decision, because of continuing deadlocks, affects the welfare of the company concerned.*

The Corporations and Markets Advisory Committee reviewed the exercise of the casting vote in both its 1998 *Report on Corporate Voluntary Administration* and its 2004 *Report on the Rehabilitation of large and complex enterprises in financial difficulties* and recommended that the

casting vote be retained generally (recommendation 13, 1998 Report and recommendation 10, 2004 Report).

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.

Government Response

The proposed advisory council would largely duplicate existing mechanisms to allow for consultation with relevant professional organisations.

In addition, it may be noted that:

ASIC and the Courts are charged with responsibilities under the Corporations Act for the supervision of insolvency practitioners. The Companies Auditors and Liquidators Disciplinary Board is a professional standards body established under the *Australian Securities and Investments Commission Act 2001* to discipline insolvency practitioners and ensure integrity within the profession. Courts have inherent jurisdiction in relation to the supervision of insolvency practitioners.

ASIC holds regular liaison meetings with the IPAA, leading insolvency firms and senior insolvency lawyers who include members of the ICAA, CPA Australia and the Law Council.

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.

Government Response

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.

In addition, it may be noted that:

Implementation of this recommendation would pose considerable difficulties. Not all directors may have responsibility for the maintenance (and retention) of the company's financial records. It may expose directors who are innocent of any wrongdoing in relation to the maintenance of the financial records to potentially significant costs and be seen as draconian, for example, in a case of fraud on the part of other directors or other persons or in the case of accidental destruction or loss of the company's records. In this regard, we note it is important to provide a balance between providing sanctions for misconduct and avoiding the introduction of disincentives for entrepreneurship and responsible risk taking.

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" would be subject to considerable variation and subjective determination. These uncertainties may give rise to costly litigation. Recovery would be precluded in cases where directors are bankrupt or have no assets.

The Corporations Act indirectly provides a sanction for directors for failure to comply with section 286 (the provision requiring companies to maintain financial records). Under section 344 ASIC can take action against a director for failing to take reasonable steps to comply or secure compliance by the company with section 286 where the director's failure is dishonest.

In addition, statutory presumptions apply to the insolvent trading provisions and operate to assist a liquidator in establishing the insolvency of a company at a particular time. Section 588E creates a presumption of insolvency where a company fails to keep or retain financial records in contravention of section 286. A presumption of insolvency avoids the evidentiary difficulty which a liquidator faces when a company has inadequate records or no records at all.

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.

Government Response

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.

In addition, it may be noted that:

Item 10 of Schedule 4 of the Exposure Draft will require administrators to include 'any other information known to them that will enable creditors to make an informed decision about the matters in paragraphs 439A(4)(b)(i)-(iii)'.

After considering the advice of the Insolvency Law Advisory Group, the original wording proposed in the Government's response and recommended by the Corporations and Markets Advisory Committee (see recommendation 5 of the Committee's 1998 *Report on Corporate Voluntary Administration)* was varied to take account of perceptions that it could create uncertainty, add to the cost of voluntary administrations and impose too high a standard on administrators. There was a concern that the original formulation could have been interpreted as requiring administrators to provide information that was not known to them or information that that is not relevant to the matters for which a statement is prepared, namely the matters in section 439A(4)(b((i)-(iii).

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.

Government Response

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.

In addition, it may be noted that:

Removal of the 'insolvency' prerequisite in the case of uncommercial transactions would arguably make the corporate insolvency clawback provisions too broad and potentially allow liquidators to call into question many of the transactions that a company may have entered into in the two years prior to the commencement of the liquidation. It would depart from the general principle that companies should be able to deal with their property in accordance with general corporate governance norms until the point where the interests of creditors are likely to be adversely affected.

A power on the part of a liquidator to revisit or challenge many of a company's transactions in a relation back period may cause injustice to third parties that have dealt in good faith with the company. It could disrupt business if large numbers of transactions entered into by companies during the relation back period were able to be challenged. The requirement of insolvency is a limitation on this power.

If the insolvency prerequisite is removed, the criteria for voidability of an uncommercial or related party transaction become quite broad. Such broad provisions may increase the cost and duration of many insolvency proceedings, often with little ultimate benefit to creditors (as much of the proceeds would be eroded by increased practitioner costs and legal costs of recovery). It is important to place some limitation on the power of a liquidator to claw back uncommercial transactions. Most corporate insolvencies are not accompanied by any wrongdoing on the part of a company or its directors. A power on the part of a liquidator to revisit or challenge many of a company's transactions in the relation back period may cause injustice to third parties that have dealt in good faith with the company. The requirement of insolvency is a limitation on this power.

While the Bankruptcy Act provides for the claw back of payments regardless of whether the recipient of the property is able to establish the bankrupt's solvency at the time of the transfer, there are important differences between corporations and natural persons. Generally corporations engage in a greater number and size of transactions than most individuals. If a similar approach were taken in corporate insolvency it would cast doubt on a greater number of transactions with consequent business uncertainty. It is appropriate that the rules for personal bankruptcy and corporate insolvency differ in some areas to reflect the differing significance of competing policy considerations.

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'.

Government Response

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 program 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. Additional information about this program is provided in the ASIC submission.

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).

Government Response

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.

In addition, it may be noted that:

A determination about remuneration is an important question for the efficient and speedy conduct of an external administration.

It would appear from the recent decision of the NSW Supreme Court in *Krejci as liquidator of Eaton Electrical Services* [2006] NSWSC 782 that the exercise of a casting vote in the circumstances considered by the Committee would constitute a breach of fiduciary duties.

The Government considers that there are other ways to address concerns about the level of remuneration. Amendments to the law in the Exposure Draft will require disclosure of the basis of remuneration charged by insolvency practitioners, the calculation of that remuneration, and the nature of work that has been performed. There will be statutory criteria for the basis of remuneration charged by an external administrator. The law will require external administrators to provide sufficient information to enable a court or a meeting, or committee, of creditors to assess remuneration as reasonable. ASIC will have the power to apply to a Court for a review of the remuneration charged in specific cases. In short, insolvency practitioners will face greater scrutiny of their remuneration under the proposed legislation.

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.

Government Response

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.

In addition, it may be noted that:

In October 2005, the Government allocated $23 million to ASIC over four years to establish an 'assetless administration' fund and a complementary enforcement program. The fund finances preliminary investigations and reports by liquidators into the failure of companies with no or few assets, where it appears to ASIC that enforcement action may result in the investigation and report. The administration of this program will provide improved information about assetless companies. Additional information about this program is provided in the ASIC submission.

As noted below in relation to recommendation 58, the lodgement of forms electronically by insolvency practitioners will enable ASIC to progressively capture more empirical data about external administrations, including administrations with no or few assets, and make meaningful and relevant data more widely available.

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.

Government Response

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.

In addition, it may be noted that:

The Committee's recommendation was made in the context of measures to combat the incidence of fraudulent phoenix company schemes.

The Government has provided funding for a number of ASIC programs to combat fraudulent phoenix companies and other abuses of the corporate form. They include the assetless administration fund, the National Insolvent Trading Program, the liquidator assistance program and

company surveillance programs undertaken by ASIC. The Government has also announced changes to the tax law arising out of the Review of Taxation Secrecy and Disclosure Provisions. These changes will allow the ATO to provide additional information to ASIC in support of its role in corporate and insolvency regulation. This will assist ASIC to detect and address fraudulent phoenix activities. This legislation is expected to be introduced into Parliament later this year.

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.

Government Response

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.

In addition, it may be noted that:

The Australian Business Register now provides a facility to allow a person to check the trading name of a business (the name that an entity trades under, or is known as, by its suppliers or customers) against the associated entity name and Australian Business Number.

At the Council of Australian Governments (COAG) meeting on 14 July 2006, COAG agreed that the Small Business Ministerial Council (SBMC) would develop a model that delivers a seamless, single on-line registration system for both ABN and business names, including trademark searching and report back to COAG with its recommendations, cost implications and a proposed timeline for implementation by the end of 2006. The SBMC is progressing its consideration of this matter with a view to presenting a model to the next COAG meeting scheduled for April 2007.

It may also be noted that recommendation 6.4 of the Banks Report ('Rethinking Regulation' January 2006) stated that the Australian Government should work with the states and territories to streamline business name, Australian Business Number and related licensing registration processes and report back to COAG; and improve information available to business about these obligations. The Government has agreed to the recommendation. In its response to the Banks Report, it indicated that it will work closely with the states and territories through the Small Business Ministerial Council to streamline business name registration across Australia, and potentially other registration processes. It will also seek to improve the information available to business through these processes.

If COAG approves a seamless, single on-line registration system for both ABN and business names at its forthcoming April meeting, a business proposal or public discussion paper may be issued outlining the features of a possible model. The completion of the COAG review will permit consideration to be given to whether concerns about business names identified by the Committee have been or are appropriately addressed.

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.

Government Response

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.

In addition, it may be noted that:

Sections 1323 and 1324 of the Corporations Act and section 12GD of the *Australian Securities and Investments Commission Act 2001* permit courts to freeze assets of persons. The Committee may note, for example, actions taken to freeze assets of Westpoint directors in relation to the Westpoint group of companies: 'Information for Westpoint Group Investors' at http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/Westpoint+bulletin?openDocument

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.

Government Response

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.

In addition, it may be noted that:

It is the Government's policy to facilitate the use of company structures where it suits the needs of business in order to foster productivity and innovation in the economy. The freedom to incorporate a company has long been a feature of corporations laws. In 2003, the Government abolished annual returns, streamlined document lodgment requirements and overhauled corporations law fees. It reduced the cost of incorporation from $800 to $400 from 1 July 2006. It has announced that it will allow companies to make annual reports available on the internet and to send hard copies on request.

The Government is concerned to ensure that persons who become directors of companies exercise their powers in good faith in the best interests of the company and for a proper purpose. Persons must provide detailed information when applying to register a company. There are substantial penalties for company officers providing or authorising the provision of misleading information to ASIC. Specifically, such a contravention is punishable by a fine of $22,000 or five years imprisonment, or both. ASIC conducts a surveillance initiative to ensure that company officers banned from managing corporations comply with their disqualification.

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.

Government Response

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.

Government Response

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.

In addition, it may be noted that:

A review of GEERS is scheduled to be conducted in the 2008-09 Budget context. As part of this review, the Department of Employment and Workplace Relations will be considering previous findings and international examples of protecting employee entitlements 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.

Government Response

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.

In addition, it may be noted that:

The Exposure Draft includes a number of initiatives aimed at strengthening the protection of employee entitlements in the event of employer insolvency. Under the Corporations Act, employee entitlements already rank highly in the statutory order of payment in the distribution of the property of an insolvent company. However, under the current law there is some uncertainty about the standing of SGC in different forms of insolvency proceedings. The proposed measures will clarify the status and priority of the Superannuation Guarantee Charge ('SG charge') in insolvency. They will give SGC the highest priority, along with wages and superannuation, that employee entitlements enjoy under the law. SGC will enjoy a superior priority over other unsecured creditors such as suppliers, subcontractors, customers and creditors whose debts are secured by a floating charge. These measures will significantly improve the prospect of recovery of outstanding superannuation obligations in the event of employer insolvency.

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.

Government Response

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 creditors, a court or an interested person 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 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.

Government Response

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.

In addition, it may be noted that:

The Exposure Draft introduces greater flexibility into the process for placing a company into liquidation through a creditors' voluntary liquidation. It proposes to relax the requirement to hold the members' meeting and creditors' meeting on the same day. The required timing for the creditors meeting will be extended to 8 business days after the day of the members' meeting. The extension of this time period will mean that, in circumstances where a meeting of members can be called directly after the directors' meeting (by using the facility for members to consent to short notice under subsection 249H), an insolvent company may be placed into a creditors' voluntary winding up almost immediately. The proposed requirement to convene the creditors' meeting within 8 business days after the day of the meeting at which the resolution for voluntary winding up is proposed will align the timing of the creditors meeting in a creditors' voluntary liquidation with the first meeting in voluntary administration.

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.

Government Response

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.

In addition, it may be noted that:

Companies have incentives to continue to trade with enterprises in external administration. Such commercial decisions should be left to individual companies to determine in light of their, and their counterparty's, circumstances.

The Corporations and Markets Advisory Committee gave further consideration to the enforceability of ipso facto clauses in its 2004 *Report on the Rehabilitation of large and complex Enterprises in financial difficulties* (p. 69 ff). It reviewed the arguments for and against prohibiting the enforcement of ipso facto clauses during any form of external administration and recommended that there be no change to the current position under which ipso facto clauses can be enforced.

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.

Government Response

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.

In addition, it may be noted that:

ASIC collects information from insolvency practitioners about the impact of corporate insolvencies through the lodgement of insolvency reports by receivers, administrators and liquidators. Online lodgement of forms enables ASIC to progressively capture more empirical data about external administrations than has previously been possible and make meaningful and relevant data more widely available.

ASIC Practice Note 50 outlines insolvency practitioners' reporting obligations under the Corporations Act and ASIC's requirements for effective electronic lodgement of documents. Schedule B to Practice Note 50 requires, among other things, the reporting of information about the impact of insolvencies on different classes of creditors. It requires information about unpaid employee entitlements (superannuation, wages, annual leave, pay in lieu of notice, redundancy and long service leave), unpaid taxes and charges, amounts owed to secured and unsecured creditors, whether books and records exist/are adequate, practitioner remuneration, contraventions of the Act, and the causes of failure. Practice Note 50 states that ASIC will use Schedule B information for statistical purposes. The data will be collated and published in an aggregated and anonymous form, and will be available to Government, the profession and others.

ASIC collects information from insolvency practitioners about the impact of corporate insolvencies through its Registered Liquidator Portal, which enables online lodgement of insolvency forms, including statutory reports, by receivers, administrators and liquidators. These forms enable ASIC to capture more empirical data about external administrations than has previously been possible and make meaningful and relevant data more widely available.

ASIC provides assistance to academics undertaking empirical research into insolvency procedures for publication.

Thank you for the invitation to make a submission. The contact officers in relation to this submission are Matthew Brine (6263 2870) and Frank Donnan (6263 3217).

Yours sincerely

Geoff Miller
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