Law Council
OF AUSTRALIA

Inquiry into Australia's Insolvency Laws

Law Council of Australia Submission to Parliamentary Joint Committee on Corporations and Financial Services

February 2003

Table of Contents

Executive Summary

The Law Council commends the initiative to review Australia's insolvency laws ("Inquiry"). This is a welcome opportunity to make a meaningful contribution to further enhancing the operation and effect of these laws.

This submission has been prepared by the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia ("Committee") in conjunction with the Council's Secretariat. The submission has been endorsed by the Business Law Section, but has not been considered by the Council of the Law Council of Australia. The submission and recommendations in relation to the appointment of liquidators reflects the long standing position of the Law Council. The recommendations in this submission can be summarised as follows:

The Appointment, Removal and Functions of Administrators and Liquidators[1]

1. That the legislative and ASIC policy requirements for registration of corporate insolvency practitioners as liquidators be amended to broaden the categories of persons able to act as liquidators.

2. That the eligibility for registration as a liquidator be based on an assessment of an applicant's suitability to undertake the role as liquidator. The assessment should consider matters such as:

   - Tertiary qualifications;
   - Experience in work likely to enable the applicant to carry out successfully the functions as a liquidator;
   - Membership of professional bodies; and
   - 'Fit and proper person' requirements.

3. That if ASIC is to continue to act as the principal regulatory authority for liquidators, then an advisory body to ASIC be established in relation to ASIC's functions on the appointment, registration and removal of liquidators and the maintenance of professional standards. Membership of the advisory body should be drawn from professional bodies such as IPAA, ICAA, ASCPA and the Law Council of Australia.

4. That if the requirement for registration is to include professional membership, then the Law Council of Australia and its Constituent Bodies be recognised for these purposes.

[1] Including Registered and Official Liquidators

Duties of Directors – Insolvent Trading Claims

5. Part 5.7B of the Corporations Act ("Act") be amended to make it clear that damages recoverable in an insolvent trading claim include debts incurred together with trading losses and capital losses incurred during the period of insolvency.

6. Directors of holding companies should be liable for the insolvent trading of a subsidiary company (even though they are not a director of the subsidiary).

7. The Act be amended to make it clear that directors are only severally liable for insolvent trading.

8. In circumstances where a Deed of Company Arrangement has been wholly effectuated, the directors be released from all claims that arose prior to the appointment of a Voluntary Administrator.

Rights of Creditors – Voluntary Administrations

9. Administrators should table a statement of personal interest at the first meeting.

10. Administrators should disclose the "past and projected fees" at the first meeting and provide details of fees (present and future) with the notice of the second meeting.

11. Creditors should have the ability to appoint their own liquidator if a company goes into liquidation by resolution of creditors at the second meeting.

12. The moratorium should be extended to prevent creditors unilaterally terminating contracts with a company in administration for at least 10 days from appointment.

13. Deed administrators should have the ability to seek a court order to transfer shares in the company.

14. Only creditors who have suffered a loss during the insolvency period should share in the proceeds of an insolvent trading claim which is calculated by reference to their loss and damage. All creditors should share in any recovery that is referrable to trading losses and capital losses the company has suffered.

15. Directors who meet insolvent trading liabilities should have rights of subrogation to prove in the administration for the amount they have paid.

The Cost of External Administrations

16. Cost savings can be achieved by modifying reporting requirements.

Treatment of Employee Entitlements

17. The law with respect to employee entitlements receiving a priority only from floating charged assets should remain unchanged.

Reporting and Consequences of Suspected Breaches of the Act

18. Reporting and prosecution proceedings under the Act are generally sufficient.

Compliance with and Effectiveness of Deeds of Company Arrangement

19. Since the implementation of Part 5.3A of the Act, Deeds of Company Arrangement have operated effectively.

Phoenix Companies

20. Reforms are necessary to prohibit the use of Phoenix companies where assets are transferred for no or insufficient value.

1. Introduction

The Law Council commends the initiative to review Australia's insolvency laws. This is a welcome opportunity to make a meaningful contribution to further enhancing the operation and effect of these laws. The Committee's detailed recommendations in this submission are set out as follows:

2. The Appointment, Removal and Functions of Administrators & Liquidators[2]

2.1 Recommendations

- That the legislative and ASIC policy requirements for registration of corporate insolvency practitioners as liquidators be amended to broaden the categories of persons able to act as liquidators.

- That the eligibility for registration as a liquidator be based on an assessment of an applicant's suitability to undertake the role as liquidator. The assessment should consider matters such as:

  - Tertiary qualifications;

  - Experience in work likely to enable the applicant to carry out successfully the functions as a liquidator;

  - Membership of professional bodies; and

  - 'Fit and proper person' requirements.

- That if ASIC is to continue to act as the principal regulatory authority for liquidators, then an advisory body to ASIC be established in relation to ASIC's functions on the appointment, registration and removal of liquidators and the maintenance of professional standards. Membership of the advisory body should be drawn from professional bodies such as IPAA, ICAA, ASCPA and the Law Council of Australia.

- That if the requirement for registration is to include professional membership, then the Law Council of Australia and its Constituent Bodies[3] be recognised for these purposes.

2.2 Relevant Statutory Provisions and Supporting Statements

- Section 1282 of the Act (copy attached as appendix A)

- ASIC Policy Statement 40 – Registration of liquidators – experience criteria (copy attached as appendix B)

[2] Including Registered and Official Liquidators

[3] Being the Law Institute of Victoria and the Legal Profession Law Societies and Bar Associations of each Australian State and Territory.

2.3 Proposed Reform of Entry Requirements for Registered Liquidators

The rationale behind improving entry requirements for persons who wish to practise as an insolvency practitioner has been aptly described as being:

"…based on the desirability of ensuring that public and, in particular, creditors and shareholders can have confidence in the expertise and judgment of practitioners and be confident that returns to them will be maximised. This is clearly an important objective. However, it is also important that the restrictions imposed do not form unnecessary impediments to competition within the market for insolvency practitioners' services. Anti-competitive effects can result in unnecessarily high costs and reduce efficiency…"[4]

The Law Council submits that the current entry requirements for registration as liquidators are unjustifiably restrictive. Their effect, as currently interpreted, is that persons in professions other than accounting are unlikely to fulfil the entry requirements. This approach has the effect of disbarring applicants whose experience, expertise and professional membership standards may be more extensive and onerous than the current requirements though technically not satisfying these requirements.

An extensive analysis of this issue was conducted by the Commonwealth Law Reform Commission ("CLRC") in its General Insolvency Inquiry Report in 1988 ("Harmer Report").[5] The issue was again considered by a specialist working party appointed by the Commonwealth Attorney-General in its paper "Review of the Regulation of Corporate Insolvency Practitioners, Report of the Working Party, June 1997 ("Working Party").

Both Reports concluded that the requirement that a registered liquidator be a qualified and practising accountant or a member of a professional body of accountants by itself is unnecessary. The CLRC recommended against retaining this requirement. The Working Party also concluded that there is some scope for broadening the entry requirements to include applicants other than those from the accountancy profession.[6]

The Law Council supports the Working Party's recommendation to retain a registration system for entry for insolvency practitioners. It also agrees with the Working Party's observation that the real issue is that of professional standards, expertise and the competencies of an applicant.

[4] *Review of the Regulation of Corporate Insolvency Practitioners*, Report of the Working Party, June 1997: Paper prepared by a Working Party appointed by the Commonwealth Attorney-General

[5] Australian Law Reform Commission 1988, *General Insolvency Inquiry*, Report No. 45, Australian Government Publishing Service, Canberra.

[6] *Review of the Regulation of Corporate Insolvency Practitioners*, Report of the Working Party, June 1997: Paper prepared by a Working Party appointed by the Commonwealth Attorney-General at page 86

The Law Council contends that the assessment of applications for registration of a liquidator should take account of the individual attributes of the applicant. In doing so, the assessment would have regard to matters such as:

- Tertiary qualifications;
- Experience in work likely to enable the applicant to successfully carry out the functions as a liquidator;
- Membership of professional bodies; and
- 'Fit and proper person' requirements.

The Working Party considered that accounting and legal skills need to be brought to bear in conducting an insolvency administration, but that tertiary qualifications in both disciplines is not necessary. In particular, it noted that:

"…An administrator should be able to obtain external expert advice on specific accounting or legal issues, so long as the practitioner has the ability to correctly interpret and apply the advice received".[7]

The Law Council believes this conclusion is correct. A liquidator should ideally hold qualifications in either law or accountancy. The essential point is that the practitioner has developed through experience in either the practice of law, acting as an accountant and/or business experience, the ability to manage the liquidation.

The Law Council submits that lawyers experienced in commercial practice or insolvency law will often have the capacity to undertake a liquidation. Just as liquidators will currently seek expert advice on legal matters, so can advice be sought on particular accountancy issues by a liquidator. The key requirement is the ability to understand the needs and entitlements of a company's creditors, employees, shareholders and other parties and how to achieve the realisation of the assets of a company's operations to best match those entitlements.

The Law Council does not support a prescriptive assessment of an applicant for registration in terms of skills and experience. 'Tick a box' style compliance such as the 'period of time working under supervision of a liquidator' is less a true indicator of capacity than individual assessment of overall skills, experience and personal history. While experience with a liquidator will undoubtedly be an effective means to gain skills and experience, it need not be the only means.

The issue of professional membership is however very relevant for lawyers. Currently, the Standing Committee of Attorneys-General ("SCAG") is conducting a review of existing legal profession

[7] Ibid at page 87.

regulation throughout Australia ("Model Laws Project"). The Senate Committee should be aware of this process and policy statements of SCAG indicating that impending legislative reform will require that a person must hold a practising certificate issued by a law society or bar association in Australia in order to hold one's self out as being a lawyer and being entitled to practise as a lawyer.

In the circumstances, the Law Council recommends that any proposed registration criteria for lawyers should retain the need for professional membership including a specific requirement that an applicant lawyer should hold a current practising certificate. This is unique to the legal profession and is intrinsic to the entitlement to practise.

Such requirements reflect the significant body of professional and ethical regulation to which lawyers alone are subject, as opposed to any other professionals such as accountants. As officers of the courts, lawyers (unlike any other profession) are obliged to uphold a wide range of duties and obligations that draw heavily on the moral and ethical concepts of trust, honesty, integrity, fairness, justice and independence in the performance of their office. These standards of ethical and professional conduct, as well as the associated obligations and duties of lawyers, are vital to the efficient function of the Australian legal system and the confidence of the community in the Australian system of justice. These factors have historically shaped the higher expectations demanded of the legal profession and the process of continuing scrutiny to which lawyers are subject to when seeking entry and continuing rights to practise.

Any failure to comply with the significant body of ethical and conduct obligations, as well as the strict professional standards with which each legal practitioner must comply, may result in the withdrawal of their right to continue to practise in addition to other disciplinary consequences. It would be an absurd result if the professional requirements entitling a lawyer to continue the right to practise were not reflected in the entry requirements for registration as they relate to lawyers.

The Law Council also recommends the establishment of a formal mechanism through which a number of professional organisations, including the Law Council of Australia, may play a direct advisory role to the ASIC (and any other related disciplinary board for liquidators) in its regulation, appointment, registration and removal of liquidators, as well as on issues relating to the maintenance of professional independence and integrity of all corporate insolvency practitioners.

Given the extensive and thorough work of the CLRC in the Harmer Report and the Working Group on these matters, the Law Council urges the Parliamentary Joint Committee to recommend that immediate attention be given to implementing the appropriate legislative reforms to adopt the recommendations of those reports.

The Law Council also recommends that existing statutory procedures relating to complaints and discipline for registered liquidators should be reviewed insofar as they intersect with those processes conducted by legal professional bodies (as opposed to just accounting professional bodies). The Law Council would be happy to provide further submissions dealing with these issues if requested by the Parliamentary Joint Committee.

3 Duties of Directors

3.1 Recommendations

- Part 5.7B of the Act be amended to make it clear that damages recoverable in an insolvent trading claim include debts incurred together with trading losses and capital losses incurred during the period of insolvency.

- Directors of holding companies should be liable for the insolvent trading of a subsidiary company (even though they are not a director of the subsidiary).

- The Corporations Act be amended to make it clear that directors are only severally liable for insolvent trading.

- Directors of a company that have been subject to a Deed of Company Arrangement which has been wholly effectuated be released from all claims that arose prior to the appointment of a Voluntary Administrator.

3.2 Proposed Reform in Relation to Duties of Directors

The duties of directors, officers and employees set out in Part 2D.1 of the Act are generally sufficient. The Committee welcomes the introduction of the Business Judgment Rule (section 181).

There are some provisions in the Act relating to insolvent trading which need clarification and reform.

Pursuant to section 588M of the Act, a liquidator may recover from a director as a debt due to the company, an amount equal to the amount of the loss and damage the creditor(s) has suffered during the period of insolvency. The authorities make it clear that the loss and damage is the sum total of debts incurred (being the sum total of creditors claims) during the period of insolvency which includes interest and statutory penalties.

On the other hand, with a similar breach under section 588G(2), the Court may make a civil penalty order under section 1317E(i) of the Act. Pursuant to section 588J(2), a liquidator may intervene and be heard on the application and obtain orders that a director be made liable to compensate the corporation for loss and damage resulting from the contravention. In this instance, the damage is the

"corporation's" loss and damage and not the "creditor's" loss and damage.

The categories of loss and damage to be claimed pursuant to sections 588G(2) and 588J(2) are much wider than those pursuant to section 588M and arguably include damage for trading losses and capital losses. There may, in some instances, be an overlap between "trading losses" and "debts incurred", but that is a matter for a court to determine on a case by case basis.

There needs to be consistency. If a director is found liable for insolvent trading, is the maximum claim the sum total of the debts incurred during the period of insolvency (the sum total of creditor's claims) or should it be the sum total of the debts that are incurred during insolvency together with damages the corporation has suffered for trading and capital losses? The Committee recommends that the Act be amended to make it clear that the liability extends to both.[8]

Pursuant to section 588V of the Act, a holding company is liable for the insolvent trading of its subsidiary. The Committee recommends that this be extended to include directors of a holding company having a liability for insolvent trading by the holding company's subsidiary. The Committee refers to the Air New Zealand (the holding company) and Ansett (the subsidiary) scenario. This is particularly important where the directors of the subsidiary are different to the directors of a holding company. As a matter of policy, why should the directors of a holding company not be liable for the insolvent trading of a subsidiary only because they are not a director of a subsidiary? As it stands, structuring of companies using trading subsidiaries with different directors is open to abuse.

There is a need for clarification in the Act relating to the prosecution of directors in civil claims for insolvent trading. The Act does not set out whether the liability of directors is joint or joint and several. This becomes problematic if a Court exercises its discretion pursuant to section 1318 of the Act to excuse a director wholly or in part for liability for having acted honestly. For example, if one director is partly excused does this mean that the remaining directors are jointly liable for the whole of the claim? Alternatively, are the directors severally liable for the remaining claim?

If directors are jointly liable it is unfair that in circumstances involving one director (who may be asset rich) and another director (who may be asset poor) the 'asset rich' director bears the majority if not the whole of the judgment. The Committee recommends that there be legislative change to make it clear that directors are severally liable for a portion of a claim that a Court may find each one liable for.

The liability of directors for insolvent trading after a Deed of Company Arrangement has been entered into, and wholly effectuated, needs

[8] See this submission *"Proposed Reform in relation to the Rights of Creditors – Proceeds from Insolvency Trading"* at sub-paragraph 4.3

clarification. In these circumstances, the company is returned to the control of the Directors and may continue to trade. If it is subsequently wound up in insolvency for a subsequent debt, depending on the timing, it is open for a liquidator of the company to:

- proceed against the directors for insolvent trading for the period prior to the Deed of Company Arrangement; and

- proceed against the preferred creditors whose claims have been compromised through the Deed of Company Arrangement.

These scenarios are contrary to the purpose of Part 5.3A of the Act, namely to release all claims. The release would not come into effect if the Deed is set aside.

The Committee recommends that there be some statutory provision to the effect that the directors and creditors are released from any claim arising prior to the appointment of the Voluntary Administrator if a Deed has been wholly effectuated. The only exception would be if a subsequent liquidator wishes to take some action, then it would be for that liquidator to seek to set aside the Deed.

4 Rights of Creditors

4.1 Recommendations

- Administrators should table a statement of personal interest at the first meeting.

- Administrators should disclose the "past and projected fees" at the first meeting and provide details of fees (present and future) with the notice of the second meeting.

- Creditors should have the ability to appoint their own liquidator if a company goes into liquidation by resolution of creditors at the second meeting.

- Creditors with approval of the Court should have the ability to appoint an administrator.

- The moratorium should be extended to prevent creditors unilaterally terminating contracts with a company in administration for at least 10 days from appointment.

- Deed administrators should have the power (with a court order) to transfer shares in the company.

- Only creditors who have suffered a loss during the insolvency period should share in the proceeds of an insolvent trading claim which is calculated by reference to their loss and damage. All creditors should share in any recovery that is referrable to trading losses and capital losses the company has suffered.

- Directors who meet insolvent trading liabilities should have rights of subrogation to prove in the administration for the amount they have paid.

4.2 Proposed Reform in Relation to Rights of Creditors – Voluntary Administrations

The Committee is of the general view that creditor's rights are sufficiently protected in all forms of insolvency administrations under the provisions of the Act. There are some matters that deal with creditor's rights at meetings of creditors and in particular those pertaining to voluntary administrations that could be refined.

- Creditors know little or anything about an administrator at the first meeting. It would be useful if an administrator was required to table a profile and statement of personal interest at the first meeting.

- Creditors have little (if any) time to consider administrator's fees. An administrator should disclose to creditors their past and projected fees and expenses at the first meeting and provide details of fees (present and future) with the notice of the second meeting.

- A draft Deed of Company Arrangement, or at least a detailed outline of the written arrangement, should be made available to creditors for inspection a reasonable time prior to the voting on any proposal. It would be preferable for the detailed written outline to be sent with the Notice for the holding of the second meeting. A copy of the Deed in its final form should be made available for inspection by creditors a reasonable time prior to execution.

- Presently only directors and a secured creditor over the whole or substantially the whole of a company's assets can appoint an administrator. Creditors should have the right to appoint their own nominee as liquidator when a company under administration goes into winding up at the second meeting pursuant to section 439C. Creditors at an early stage often want an independent liquidator to be appointed to investigate the conduct of all matters pertaining to the company including the conduct of the administrator.

- Creditors should have the ability in certain circumstances to request a Court to exercise its discretion to appoint an administrator rather than only having the ability to apply to wind up or appoint a provisional liquidator.

- Where a liquidation follows a Deed of Company Arrangement, post Deed creditors should only have a priority in the liquidation over pre-administration creditors where the Deed Administrator is

personally liable for the debts owed to the post Deed creditors or where the pre-administration creditors have agreed, at the second meeting of creditors, to include in the Deed, priority for post Deed creditors.

- There must be safeguards to protect the interests of creditors who allow insolvency practitioners the right to sell property subject to liens or retention of title clauses. The legislation must make it clear that their rights will not be affected or lost despite sale or transfer of subject goods.

- After an administrator is appointed pursuant to Division 6 of the Act, there are certain moratoriums put in place with respect to creditors not enforcing rights against the company and guarantors of the company without leave of the Court. This should be further extended to include contracting parties. The Committee recommends that for a period of a reasonable time, say 10 days or even for the whole of the convening period, without leave of the Court or permission of the Administrator, no creditor or party can terminate any contract (such as a lessor or supplier) or enforce rights pursuant to a contract with the company (such as making a demand under a bank guarantee).

  The whole purpose of the Harmer recommendations enshrined in Part 5.3A of the Act, and in particular section 435A, is to provide for the administration of a company in such a way that will maximise the chance of the company continuing to exist or, if that is not possible, to maximise the return to creditors.

  In many administrations the appointment of an administrator triggers the enforcement by some creditors or third parties of their rights pursuant to contracts which effectively obliterates the business of a company overnight and eliminates any opportunity an administrator may have to negotiate a sale of the business and/or assets. This is seen with profound effect in many building industry administrations where building contracts are terminated, monies owing withheld and bank guarantees called upon. In these circumstances the administrator is denied the opportunity to complete profitable contracts or assign or novate them to third parties for value.

  Another example was seen in the One-Tel administration where communication supply services were lost overnight leaving the administrator with little or no value in the company's subscribers.

- Administrators of a Deed of Company Arrangement presently do not have the power to transfer or issue shares in the company. Some arrangements may require the transfer of shares as part of the sale of assets. The Committee is of the view that Administrators should be given the power, with Court approval, to transfer or issue shares if required by a DOCA as an overall sale of the business and/or reconstruction of the company.

4.3 Proposed Reform in Relation to Rights of Creditors – Proceeds from Insolvent Trading Claims

If a claim for insolvent trading is met, should not the proceeds of that claim after payment of any costs that the liquidator has incurred in respect of pursuing the claim be paid to those creditors who have suffered the loss or damage as a result of the insolvent trading, which loss or damage was measured in arriving at the quantum of the claim?

As the law presently stands, a creditor who extended credit when the company was solvent shares pro rata with creditors who extended credit when the company was insolvent. The Committee recommends changes so that the proceeds of an insolvent trading claim which is measured by the loss that the creditors have suffered during the period of insolvency are the only creditors who share in the recovery.

As set out in paragraph 3.2, the Committee recommends that the law be amended so that a liquidator can sue for trading losses and capital losses. These damages could be recovered for the benefit of all creditors.

The Committee also recommends that if the proceeds of the claim should be applied to those creditors who have suffered the loss or damage, the director(s) who has met the claim should have a right to subrogate and prove to the extent that those creditors claims have been satisfied.

5 The Cost of External Administrations

5.1 Recommendations

- Cost savings can be achieved by modifying reporting requirements.

5.2 Proposed Reform in Relation to the Cost of External Administrations

The Committee considers the cost of administrations generally reasonable but thinks that there can be some savings by streamlining some reporting requirements and the amount of material that is required to be sent in hardcopy form to creditors. The requirements should be made more flexible so that information can be sent by email or in an abbreviated form and available for inspection.

6 Treatment of Employee Entitlements

6.1 Recommendations

- The law with respect to employee entitlements receiving a priority only from floating charged assets should remain unchanged.

6.2 Proposed Reform in Relation to Treatment of Employee Entitlements

The Committee holds the firm view that the law as it stands should remain unchanged. Reference should be made to a submission made by the Law Council in September 2002 to the Commonwealth Department of Treasury which is **attached**. (see Appendix C)

An additional matter the Committee raises is in respect to directors' duties pursuant to part 5.8A of the Act. Section 596AB provides that a person must not enter into an agreement or transaction with the intention of or with the intention that includes the intention of preventing the recovery of the entitlements of employees of a company or of significantly reducing the amount of those entitlements.

If a person contravenes this section in relation to the entitlements of employees of a company in circumstances where the company is being wound up, and where the employees have suffered loss or damage, then that person is liable to pay compensation to the company. The amount that the liquidator may recover from the person is an amount equal to the loss or damage suffered by the employees as a debt due to the company.

There are two deficiencies. Firstly, only the person who enters into an agreement or transaction can be liable for compensation. Most agreements or transactions entered into with the intention of defeating employees' entitlements are most likely to be entered into by corporations and not individuals. Where "a person" is a corporation, the directors of that corporation should also be liable for compensation.

Secondly, due to the GEERS scheme, in most cases the employees will have suffered no loss or damage. At this stage, it would seem unclear as to whether there would be any claim against any person for compensation if the Commonwealth Scheme satisfied the employees' claims and if so, whether or not the Commonwealth has rights of subrogation.

The Committee recommends reform in this area to clarify these two issues.

7 Reporting and Consequences of Suspected Breaches of the Corporations Act

7.1 Recommendations

- Reporting and prosecution proceedings under the Act are generally sufficient.

7.2 Proposed Reform in Relation to Reporting and Consequences of Suspected Breaches of the Corporations Act

The operation of reporting is generally sufficient. It is noted with the increased number of prosecutions against directors failing to provide section 429 reports and section 475 reports has resulted in a much higher level of cooperation from directors in filing these reports.

8 Compliance with and Effectiveness of Deeds of Company Arrangement

8.1 Recommendations

- Since the implementation of Part 5.3A of the Act, the operation and effectiveness of Deeds of Company Arrangement has worked well.

8.2 Proposed Reform in Relation to Compliance with and Effectiveness of Deeds of Company Arrangement

Since the implementation of Part 5.3A of the Act, the operation and effectiveness of Deeds of Company Arrangement has worked well. There is one area of concern. An aggrieved creditor has to incur the expense to obtain a court order to set aside a Deed that is "not in the interests of creditors" and/or entered into only with "vote stacking" by related entities at the second meeting. There should be a more efficient way to deal with this. Directors and/or promoters of Deeds should be required to provide reasons to ASIC, on the application of an "interested person" why the Deed should not be set aside. If ASIC is not persuaded by the "show cause" the onus should then be on the directors and/or promoters to make application to Court seeking a declaration that the Deed is valid and enforceable.

9 Phoenix Companies

9.1 Recommendations

- Reforms are necessary to prohibit the use of Phoenix companies where assets are transferred for no or insufficient value.

9.2 Proposed Reform in Relation to Phoenix Companies

The Law Council of Australia recommends that there be specific amendments to the Act to prohibit the use of Phoenix companies and to impose severe penalties on directors or any related parties being involved in the use of Phoenix companies which involve the transfer of assets for no or insufficient value.

Appendix A

Section 1282 – Registration of Liquidators

Appendix B

Policy Statement 40: Registration of liquidators – experience criteria

Appendix C

Submission by Law Council in Sept 2002 to Commonwealth Department of Treasury