



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

23 January 2012

Tim Beale
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Dear Mr Beale

***Exposure Draft: Corporations Amendment
(Phoenixing and Other Measures) Bill 2012***

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members are all involved in governance, corporate administration and compliance with the Corporations Act, with primary responsibility to develop and implement governance frameworks in public listed and public unlisted companies, as well as in private companies, government-owned corporations, not-for-profit organisations and other public sector agencies.

CSA welcomes the opportunity to comment on the Corporations Amendment (Phoenixing and Other Measures) Bill 2012. However, CSA is disappointed that the consultation period for the exposure draft commenced on 20 December 2011, just before the Christmas and New Year's holiday period, with a one-month response time frame. It is common practice for a majority of Australians to take leave at the Christmas and New Year's holiday period, with many returning during the middle or end of January. This leaves stakeholders who may wish to comment on this bill with only a very short time frame in which to examine the draft legislation, canvass views and generate discussion among those with relevant expertise. When stakeholders do not have sufficient time to review the proposed reforms and consider their impact, it cannot be said that effective consultation is taking place.

General comments

CSA supports the introduction of the Corporations Amendment (Phoenixing and Other Measures) Bill 2012, noting that the bill introduces the power to the Australian Securities and Investments Commission (ASIC) to be able to order the winding up of a company under certain pre-requisite conditions. The pre-requisite conditions are captured in ss 489F(1)-(3) and must be demonstrated before ASIC is able to administer an order to wind up a company. For example, s 489F(2) states that: 'ASIC may order the winding up of a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment'. CSA notes that in accordance with the notes in the explanatory

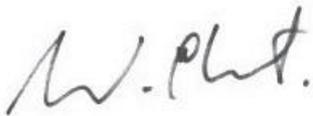
memorandum, ASIC does not need to provide notice to a company of its intention to procure an order to wind up a company under ss 489F(1)-(3) because of the presence of objective evidence of abandonment of the company, for example, a failure to pay a review fee.

However, CSA notes that s 489F(4) requires that ASIC, in identifying that a company is 'not carrying on business' gives to the company and each director of a company a notice stating ASIC's intention to make an order to wind up the company. The notice must be given at least 28 days before the order is made, and the company must be advised that a written objection to the notice must be received within 14 days in order to negate the order to wind up the company.

The explanatory memorandum explains that ASIC cannot use its power under s 489F(4) if a company or director objects; however, neither the explanatory memorandum, nor the draft bill provide any further information about the content required in the objection. CSA notes, therefore, that the section has the potential to invite either an objection which includes reasons and supporting information negating the contention that the company is 'not carrying on business', or a simple objection which states merely that the directors object to the issuing of the order to wind up the company.

CSA recommends that further clarification be provided about the process required to deem a company 'not carrying on business' as required in s 489F(4). CSA notes that this may include the introduction of further controls within the legislation which require an objecting company or director to provide supporting reasons or information to disprove the contention that a company is not carrying on business.

Yours sincerely

A handwritten signature in dark ink, appearing to read "W. Kloot". The signature is written in a cursive, slightly slanted style.

WL te Kloot
PRESIDENT