Submission by Professor Christopher Symes, Adelaide Law School

Submission is made only on Option 2 under Part 9. APPOINTING LIQUIDATORS ON A CAB RANK BASIS and the questions of a Government Liquidator.

QUESTIONS

**81. On a scale of one to ten, where one is ‘ineffective’ and ten is ‘highly effective’, please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.**

8/10

**82. Should consideration be given to establishing a government liquidator to conduct small-to-medium external administrations? Please provide your reasons**.

Yes I believe it is a must that a government liquidator is established.

Over time there would be a decrease in the amount of illegal phoenix activity because the wider community (including those contemplating phoenixing) would recognise that companies cannot be commenced and not remain active or if they fail to be properly liquidated with a liquidator conducting investigations into their failure.

However, the real goal of a government liquidator is to reconcile all companies in existence in Australia, that is either they are active (from signs like Annual Statements being completed, Tax returns being lodged) or they are dormant/abandoned and possibly a ‘oldCo’ in a phoenix. It is these dormant companies that the government liquidator investigates and is then appointed to wind up.

At present there are over 2.3 million companies registered in Australia with no statistics on those that are dormant. ASIC first used its powers in 2013 to deal with abandoned companies after the changes to the legislation. In 2016, they reported that by 19 July 2016 they had wound up 84 companies that owed a total of 258 employees more than $4.4m in entitlements. So we can observe that new Part is being used by ASIC. In a media release on 27 August 2013 ASIC reported they had used their new powers for the first time and this was over 6 companies that owed 57 employees over $730, 000. Other media releases followed:14-210MR on 25August 2014 reported that ASIC had wound up 14 companies owing more than $350,000 in entitlements, 14-333MR on 12 December 2014 noted ASIC winding up 9 companies owing more than $310,000 and 32 companies in 2014 for more than $1.4m. In 2016 the media release already referred to 16-227MR reported that ASIC had exercised its powers to wind up 13 abandoned companies who owed 27 employees more than $556,000. In the few months before this, on 18 April, ASIC reported 9 abandoned companies with at least 28 employees owed more than $890,000.

What all these Media Releases on the statistics of abandoned companies reveal is that there are few abandoned companies being liquidated by government and then only those with some outstanding employee entitlements that have been identified. It is not fanciful to think that the number of abandoned companies could well exceed 100,000 companies even though in 2016 ASIC records that 123,050 companies were deregistered. Every year there are over 250,000 companies commencing operation (246,051 in 2016) and once registered there is then a ‘black hole’ unless they make contact with government through their Annual Statement (including the Extract of Particulars) (s345A). A government liquidator could shine light into this black hole.

**83. What are the benefits and risks of this approach?**

There are highly trained staff working for ASIC in insolvency-related areas and more could be recruited if the role of a government liquidator was accepted as part of the insolvency landscape. As an example, as the government has become more invested in employee entitlements in insolvency over say the last 15 years through EESS, GEERS and FEG, the calibre of staff attracted to work in such government-centred insolvency has increased.

The benefits would include a new body of government professionals who would have a highly developed understanding of insolvency that could assist in its regulation.

Perhaps the greatest benefit would to achieve a reconciliation between the number of companies registered, those that are active and those that a processed through to de-registration. If this reconciliation cannot be achieved then the focus must turn to limiting those who can commence a company and continue to enjoy the benefits of limited liability and separate legal entity.

Of course, there would be the benefits in having a government liquidator who brings to the task independence and has little likelihood of any conflicts of interests.

**84. If a government liquidator is created, what external administrations should they conduct? Please provide your reasons.**

The government liquidator should be appointed over ‘no asset’ companies that are being liquidated. Registered liquidators have for many years complained that they are appointed to companies with few assets and that this is a cost to their practices. It should, therefore, relieve some of the pressure in the insolvency practitioner remuneration debate. Registered liquidators could even offload their ‘no asset’ liquidations to be finished by the government liquidator. Vice versa, if a company was identified to hold assets after the government liquidator was appointed then a registered liquidator could be appointed to complete the liquidation and de-registration functions.

The government liquidator should investigate suspected dormant companies and then move to wind them up as abandoned companies under existing legislative powers. The reasons to use the government liquidator for such a task is the public duty aspect of such a role.

**85. How do you believe a government liquidator should be funded?**

There would be occasional companies administered by the government liquidator where assets would be uncovered and so some recovery of the government liquidator’s fees may be possible, but in the main these no asset companies and the abandoned companies could not be relied upon to provide any funds. The expense of a government liquidator would have to be borne by the Government but this is an acceptable price for having less phoenixing and world leading corporate regulation.

To conclude I fully support the establishment of an office of the government liquidator and I firmly believe it will greatly assist in the fight against illegal phoenixing as well as give the entire corporate insolvency system more credence.

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