6 February 2020

The Australian Law Reform Commission
PO Box 12953
George Street
BRISBANE QLD 4003

submission via: corporatecrime@alrc.gov.au

Dear Sir/ Madam

Corporate Criminal Responsibility Discussion Paper 87

As the representatives of over 200,000 current and future professional accountants in Australia, the two major Australian accounting bodies Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) and CPA Australia (together 'the Major Accounting Bodies') make this joint supplementary submission on Chapter 11 Illegal Phoenix Activity of the Australian Law Reform Commission's *Corporate Criminal Responsibility Discussion Paper 87* (the Discussion Paper).

Improving enforcement provisions in the Combatting Illegal Phoenixing Bill.

PROPOSAL 21

The Major Accounting Bodies support this proposal. We defer to the Commission in its assessment of the potentially flawed constitutionality of s 588FGAA as currently contained in the Bill and, as such, provide the following general remarks around the accompanying analysis in the Discussion Paper:

As a matter of regulatory efficacy, there should be achieved, as far as possible, an appropriate balance between the powers of key agents within an enforcement regime. That which is proposed within the Bill is, prima facie, unduly weighted towards one body (i.e., the regulator) accompanied by a potentially cumbersome mechanism for seeking the setting aside of such orders made by ASIC (s 588GAE). Thus, what is proposed by the Commission overcomes this risk.

In the Discussion Paper's analysis of potential constitutional implications, reference is made in paragraphs 11.28 and 11.29 to comparison with powers conferred under the Bankruptcy Act 1966 and we note, in particular, the quoted observations of the Law Council of Australia to which we make the following two remarks.

CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

Chartered Accountants Australia and New Zealand
33 Erskine Street, Sydney, NSW 2000
P: +61 2 9290 1344
W: charteredaccountantsanz.com
ABN 50 084 642 571

CPA AUSTRALIA

CPA Australia
Level 20, 28 Freshwater Place,
Southbank Victoria 3006
P: 1300 73 73 73
W: cpaaustralia.com.au
ABN 64 008 392 452

First, both the substantive and procedural rules of bankruptcy should only differ between natural and legal persons where there is a sound basis for making such distinctions. The modelling of the proposed creditors-defeating disposition voidable transaction on s 121 of the Bankruptcy Act adds, we believe, weight to the need for as close as possible associated procedural alignment. Second, and relatedly, there should be avoided, where possible, the creation of gaps between both bodies of rules given the prospect that at some future time steps may be taken to bring personal and corporate bankruptcy under a single legislative regime.

In paragraph 11.32 reference is made to Proposal 21(b) concerning disgorged creditor-defeating dispositions being paid to the Commonwealth in circumstances where the original company was set up to facilitate a fraud. This reference is in footnote 39, where it notes Anderson's typology of Illegal Phoenix and the associated policy aim of "ensur[ing] the stripping of all gains from the illegal activity from the controller." The Major Accounting Bodies suggest the Commission consider this discussion as a possible springboard for exploring current judicial development, and extra-judicial commentary, on other ancillary measures to address the wrongdoing of corporations where the abuse of limited liability is a prominent feature.

PROPOSAL 22

The Major Accounting Bodies agree with this proposal as a necessary counter-measure to Proposal 21 with each of (a) through (c) providing procedural certainty and protection of individuals and companies whose actions may in fact be valid.

PROPOSAL 23

The Major Accounting Bodies have, supported the introduction of a director identification number (DIN) across a series of inquiries and law reform proposals. We agree with this proposal as a necessary counter-measure to Proposal 21 with each of (a) through (c) providing procedural certainty and protection of individuals and companies whose actions may in fact be valid. We understand that Parliament is currently considering the Treasury Laws Amendment (Registries modernisation and other measures) Bill 2019 and strongly urge prompt and effective progress on this matter through amendment to the Corporations Act.

QUESTION J
Should there be an express statutory power to disqualify insolvency and reconstruction advisors who are found to have contravened the creditor-defeating disposition provisions?

CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

Chartered Accountants
Australia and New Zealand
33 Erskine Street, Sydney, NSW 2000
P: +61 2 9290 1344
W: charteredaccountantsanz.com
ABN 50 084 642 571

CPA AUSTRALIA

CPA Australia
Level 20, 28 Freshwater Place,
Southbank Victoria 3006
P: 1300 73 73 73
W: cpaaustralia.com.au
ABN 64 008 392 452

The Major Accounting Bodies acknowledge the far-reaching deleterious effect of 'professional' advisors who encourage and facilitate illegal phoenix activity, though at this juncture do not believe the specific disqualification suggested in this question is warranted. We do not dismiss the possibility for this more forthright measure at some future point in time but believe a number of actions currently underway should be allowed to evolve. These include:

- The Commission, in paragraph 11.20, makes the highly valid observation concerning the capacity for properly crafted legislative prohibitions to influence behavioural norms around acceptable business conduct. The Major Accounting Bodies fully acknowledge it is incumbent on them to address both the technical and ethical aspects of both the mischief of illegal phoenixing and the regulatory response, ensuring that our members are aware of both aspects. The addressing of these activities has been, and will increasingly be, a theme spanning a range of critical interactions with our public practitioner members, who are, often a first point of professional advice when clients experience financial difficulty. This includes broader educative engagement with members to increase their awareness of early warning signs of insolvency and identifying trustworthy pre-insolvency advisers for their clients.

- Paragraph 11.40 highlights the difficulty in identifying who it is that might be giving illegal phoenixing advice and paragraph 11.41, under the second dot point, canvasses the idea of a prohibition on the provision of insolvency advice without a licence. The Major Accounting Bodies believe the matters raised here require a substantial degree of cautious consideration, being mindful of the potential impact on the cost and efficient supply of professional advice. First, as is acknowledged by the Commission, persons providing these types of ethically questionable advice or encourage illegal behaviour, often operate outside of the membership of professional bodies which function within Australia's co-regulatory environment. Higher degrees of oversight, either by the bodies themselves or by a regulator, potentially adds to the regulatory burden on practitioners who already act within the letter and spirit of the law. Secondly, the character of what is valid, as opposed to illegal, pre-insolvency advice is potentially extremely difficult, if not impossible, to clearly define. As such, we caution against any outcome that would undermine the important role currently played by public practitioner accountants in providing advice that allows clients in potential financial difficulty to assess their risks and needs, prior to referral to a registered liquidator.

- Under the third dot point in paragraph 11.42, views are sought on establishing a separate administrative scheme administered by ASIC. This again is a matter requiring cautious consideration. The current oversight of registered company liquidators is governed by a lengthy and complex set of rules contained in the Insolvency Practice Rules (Corporations) 2016. Any development in establishing a separate administrative scheme will need to be assessed against the potential impact on the ill to which a remedy is being sought, along with the associated cost, particularly given the user-pays, cost recovery mechanism applied by ASIC.

- The prohibition and associated penalties contained in proposed s 588GAC will be significant reforms whose influences of behaviours will need to be observed over a period of time. As to possible accompanying measures around an expressed disqualification power, we believe an understanding of interactions with potentially relevant existing statutory measures need to be developed in parallel, including scope within s 598 (Orders against persons concerned with a corporation) for subsection 4 to be expanded from the current aspects of compensation and disgorgement to include disqualification. Further, in relation to the matters raised in paragraph 11.42 concerning current disqualification measures which, though powerful, are narrowly applied to directors, thus excluding advisors who are the perpetrators of illegal phoenixing. Here we suggest it is worth examining the possibility of greater utilisation of the s 9 definitions of shadow and de facto director as a basis for expanding the reach of the existing disqualification provisions to include pre-insolvency advisers.

- The threshold between pre-insolvency advice giving rise to a creditor-defeating disposition and the provision of valid restructure or business rescue advice to companies facing financial and operating challenges may, on its face, seem clear cut. The matters dealt with in paragraphs 11.40 through 11.42 run, in our view, the risk of conflating wider aspects of insolvency practice with the narrow evil of illegal phoenixing. What falls within the ambit of legitimate advice in the 'twilight' period between financial and operating stress and actual corporate collapse, and how in turn its provision should be regulated, might become apparent from the foreshadowed review (s 588HA) of the s 588GA insolvent trading safe harbour. The Commission will no doubt be apprised of the outcomes of this review. The Major Accounting Bodies encourage the wider constituency of interest in effective development and application of corporate insolvency law to be engaged in the review process where possible.

If you require further information on our views expressed in this submission, please contact either [redacted] or [redacted]

Yours faithfully

[redacted]

Simon Grant FCA
Group Executive – Advocacy,
Professional Standing and International Development
Chartered Accountants Australia and New Zealand

[redacted]

Dr. Gary Pflugrath CPA
Executive General Manager – Policy and Advocacy
CPA Australia