



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

23 January 2012

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PARKES ACT 2600

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Dear Mr Beale

***Exposure Draft: Corporations Amendment
(Similar Names) 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 (Similar Names) Bill 2012 (the 'similar names measure').

General comments

CSA notes that the similar names measure provides that a director of a failed company can be jointly and individually liable for the debts of a company that has a similar name to a pre-liquidation name of the failed company. In this respect, CSA acknowledges that the draft bill provides a focused attempt to target phoenix activity, where a failed company adopts the same or a similar name in order to try and create the impression that the newer, similarly named company is a continuation of the 'failed company'.

CSA notes, however, that the bill offers only a limited solution to phoenix activity, as an unscrupulous person who wishes to engage in phoenix activity will simply circumvent the practical imposition of the bill by starting a new company which does not have a similar name. Conversely, a person who wishes to engage in phoenix activity might also try to exploit any loopholes in the similar names measure. CSA is of the view that in order to avoid any confusion, the concept of the same or similar name must be tightly defined so as not to have the concept challenged before the courts.

CSA recommends that Treasury consider further measures which would target the broader forms of phoenix activity, so as to capture those activities which are undertaken when a same or similar name is not used for the new company.

With respect to the current draft bill, CSA notes that there is some uncertainty relating to the scope of s 596AJ(2) of the draft bill which states that a person is liable both: '(a) individually; and (b) jointly with the debtor company and anyone else who is liable under this section in relation to the same debt'. While CSA acknowledges that access to a company's assets may be desirable where a director has sought to escape creditors' claims by transferring assets, for example, by placing company assets in the name of a spouse, the proposed wording does not clarify the extent to which the newly formed company might be liable. CSA recognises that s 596AJ is entitled 'Personal liability of directors for the debts of certain companies', yet the section refers to a 'debtor company' and seemingly implicates the newly formed company as also being liable for the debts of the failed company. CSA believes that greater clarity needs to be provided in detailing the extent to which liability may attach to the newly formed company.

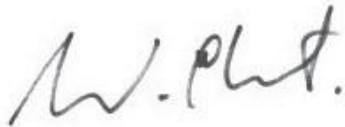
The Victorian Law Reform Commission (VLRC) in a report entitled *Curbing the Phoenix company: First Report on the law relating to directors and managers of insolvent corporations (1994)* recommended a system for the preservation of corporate assets to prevent the transfer of these assets in order to facilitate the establishment of a phoenix company. The VLRC envisaged that the process would operate in the same manner as a Mareva injunction and provide the courts with the ability to freeze the assets of a director which are assets on which the corporation has a just claim. CSA notes that an option such as this may provide a better method of targeting the assets of a director who has engaged in phoenix activity.

With respect to s 596AJ(1)(f), CSA similarly notes that the section currently imposes a personal liability to discharge the liability of a failed company, if 'the person is not exempt from this section in relation to the debt'. However, the section makes no reference to the manner in which a director may obtain an exemption, or the availability of exemptions as provided in ss 596AK-596AN of the draft bill.

CSA recommends that s 596AJ(1)(f) be amended to note the exemptions available in ss 596AK-596AN of the draft bill.

CSA would be more than happy to discuss this issue further with you.

Yours sincerely



WL te Kloot
PRESIDENT