Insolvency Practitioners
Association of Australia
ABN 28 002 472 362

National Office
37 York Street
GPO Box 3921
Sydney NSW 2001

P (02) 9290 5700
F (02) 9290 2820
www.ipaa.com.au

Mr John Kluver
Executive Director
CAMAC
GPO Box 3967
Sydney NSW 2001

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Dear Mr Kluver

Long-tail personal injury claims

We refer to the request for submissions made by the Corporations and Markets Advisory Committee ("the Committee") in respect of a proposal to strengthen protection for future unascertainable personal injury claimants where the solvency of the responsible company may be in question.

As you know, the IPAA is the leading professional organisation within Australia for specialists practising in corporate and personal insolvency. As such, we have a keen interest in ensuring that any amendments to insolvency legislation not only achieve their objectives but are also simple and cost-effective to implement and clear cut in their interpretation. The IPAA appreciates the opportunity to comment on this matter.

The IPAA is supportive of an insolvency regime which properly recognises the claims of a company's creditors and provides for a system to deal fairly and effectively with those claims and disburse available funds amongst those creditors. However, in establishing a process to recognise future unascertained personal injury creditors where a mass future claim is afoot, the IPAA raises the following points:

- The process needs to be very clearly set down in the Corporations Act so that where external administrators follow this process, there will not be the potential for future claimants to make a claim against the external administrator personally;

  In particular, careful consideration will need to be given to the nature and extent of the inquiries which are to be required of the external administrator to ascertain whether a mass future claim situation exists; the extent to which the external administrator can, or should, rely on independent (eg expert) assessment of the likelihood and extent of such claims; and difficulties which will confront external administrators in situations where there are limited funds available or, over the course of the administration, new or further scientific evidence emerges which suggests, or more strongly suggests, the likelihood of mass future claims. Regard should be had to the consideration that often an external administrator will have limited information about the company (and potential claims) and limited funds to conduct the administration and investigate claims, let alone pay creditors;

- A clear and simple test for "mass future claim" must be devised. At the very least, phrases such as "unusually high number", "strong likelihood", "similar industry" and "threshold level of information" need to be very clearly defined so there is no ambiguity about when the provisions will apply;

  If the question whether a mass future claim is 'afoot' is to be determined not only by reference to claims that have been made against the company under external administration but also against other companies in a similar industry etc, it must be borne in mind that the external administrator may not have access to information regarding those other companies. Existing powers of examination of third parties (eg section 596B) may not be wide enough to permit the external administrator to access such information; and in any event, the external administrator may simply not be put on notice of the possibility that other companies may have information regarding claims against them which could suggest the existence of a mass future claim against the company under external administration.

  One solution might be that the provisions only apply to companies which have sold/produced a specific product or operated in a specific industry which is prescribed by regulation the government (eg supply of asbestos products) rather than have external administrators of individual companies potentially spend very significant funds trying to determine whether the company is subject to a mass future claim situation;

- The process needs to be such that it can be completed in a reasonable time period so that current creditors are not unduly prejudiced by substantial delays. The process must also be capable of being conducted in a cost-effective manner;

- There needs to be consideration of what the position is if actual future claims exceed what was estimated and the fund set aside for the purpose of meeting these claims runs out. The estimation of a fund to be set aside can be a very costly process requiring much expert evidence, and the US experience seems to suggest that estimates are often insufficient (see the Conclusion in re Federal-Mogul Global Inc 2005; The Official Committee of Asbestos Claimants and Eric D Green, as the legal representative for future asbestos claimants v Asbestos Property Damage Committee (Civil Action No 05-59))

- The scope for Court involvement in the process needs to be clearly articulated. This will include not only considering whether the existing ability of external administrators to seek directions is sufficient, but also whether court approval should be required for arrangements regarding mass future claims or decisions to make no provision for such claims; and if so, who, if anyone, should be required to be joined to any application as a contradictor

- Consideration should be given to whether it is appropriate to apply the mass future claim provisions in an administration/DOCA situation where the purpose of the DOCA is to facilitate the company's continuation in existence in a more viable financial state. In such a case, the purpose of the DOCA, if achieved, should mean that if and when the future claims arise, there will remain a solvent entity available to meet them, whereas having to make provision for such claims as part of the DOCA may mean that a rescue is impossible to achieve. At the least, it should be permissible to structure a DOCA so that it may bind "future mass claims" or exclude them. If future claimants are to be bound by a DOCA, there is a question of to whom notice is to be given of any meeting to consider a proposal and whether they should have any rights to set-aside the DOCA and, if so, when and how;

- It should be made clear whether external administrators are to play any role in investigating possible offences by directors against the proposed new anti-avoidance provisions, or whether this is more appropriately undertaken by ASIC.

  The proposed anti-avoidance provision is directed not just to persons entering into proscribed transactions but also anyone who is a "party to the transaction or arrangement". Any such provision should not be such as would deter directors or their advisers from considering or implementing lawful and commercially justifiable attempts to restructure financially distressed companies or place them in a position of unreasonable potential exposure when doing so.

- The submission focuses on external administrators of insolvent corporations. The issue however is just as pertinent in members voluntary liquidations ("MVLs") of solvent companies and perhaps more so because generally in an MVL, the liquidator undertakes no investigations into the company's past activities. If this is not addressed, the risk of unwittingly being exposed to personal liability may render the provision of services for straightforward voluntary liquidations uneconomic. A consequence of this is that otherwise redundant companies will remain registered for no purpose other than to "be there" should claims arise in the future albeit such companies may have long since disposed of the relevant business and all tangible assets.

  Any legislative reform in this area should ensure that in the circumstances of a MVL, the liquidator is entitled to rely upon the disclosures in the Declaration of Solvency (Form 520) executed by the directors. Consideration could be given to amending the form of the Declaration of Solvency to specifically require the directors to disclose whether the company is the subject of "mass future claims". In cases of wholly owned entities, companies should be able to irrevocably assign any liability associated with mass future claims to the parent company enabling the dormant subsidiary to be wound up.

Should you wish to discuss any aspect of this submission, please do not hesitate to contact Ms Kim Arnold, our Technical Director, on 02 4268 3656.

Yours sincerely

J Melluish
President