CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

6 July 2015

Business Set-up, Transfer and Closure
Productivity Commission
GPO Box 1428
Canberra ACT 2601

Submitted by email: business.inquiry@pc.gov.au

Dear Commissioners

Business Set-up. Transfer and Closure Draft Report

Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) welcomes the opportunity to provide a submission on the Productivity Commission's Draft Report on Business Set-up, Transfer and Closure (Draft Report). Appendix B includes more information about Chartered Accountants ANZ.

We congratulate the Commission on the breadth of issues and depth of detail collated in order to prepare the draft report of May 2015. Chartered Accountants Australia and New Zealand is pleased to provide comment on aspects of the report which are of relevance to our areas of expertise and support the opportunity to strengthen the Australian business environment. We appreciate the provision of a short extension to July 6 to submit our comments.

Key Points

- We support the key objective that Governments' role in business closure or transfer should be limited to assisting clear, straightforward and timely process. We believe this objective should apply whether or not there is financial failure.
- In relation to businesses where there are deeper problems we recognize that there are constant challenges to balance deliberate malfeasance with efficient process, and to balance the need to protect stakeholders with the need to regenerate value. Our overarching view is that process should be kept to a minimum to support economic activity and innovation, but with strong and enforced provisions for identifying and disciplining those attempting to manipulate the process.
- Within this overall framework, we are providing comments in relation to the insolvency sections of the report in the Appendix to this letter

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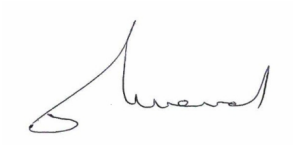
- There are references in the earlier sections of the draft report to taxation of business entities. We have recently lodged a submission on the Tax Discussion Paper which touches upon this topic. Our preference is that such tax matters be dealt with as part of the tax reform process.

- In relation to the taxation of crypto-currencies such as Bitcoin, our paper *Digital Currencies: Where to From Here?* explored different tax treatments and implications in major jurisdictions. We enclose a copy of this paper.

Should you have any questions or comments on the matters raised in this letter, please contact Liz Stamford on 02 8078-5426 or Geraldine Magarey on 02 9290-5597.\

Yours sincerely



Rob Ward FCA AM
Head of Leadership and Advocacy

APPENDIX A

Chapter 13: Personal Insolvency

We support streamlining of personal and corporate insolvency regimes where appropriate and agree that running two separate regulators does not support the objective of simple consistent and streamlined process.

We note however that there are a considerable number of different factors relating to a large corporate insolvency and a personal bankruptcy and there are reasons why different regulations should apply in different circumstances. We support the view that these different factors are not mainly due to whether the solvency relates to a corporate or personal situation but more due to whether the insolvency relates to a large or small entity.

In relation to the recommendations and information requests for personal insolvency, we make the following points:

- There are situations where it is appropriate for a bankrupt to continue as a company director. This provision is currently allowed for through application to the courts. This process works appropriately and we do not believe that the current position requires amendment. The circumstances when it is appropriate are situation specific. Drafting regulations to suit such situations would potentially be complicated and we do not believe the number of circumstances or the cost of the current process justifies the need for additional regulation.

- We support further exploration of the option to allow individuals to be discharged from bankruptcy after one year with appropriate safeguards. Safeguards would relate to such matters as contributions, conduct and previous history. We note that there are precedents for setting criteria for early discharge and we recommend these be used as a starting point for efficiency and streamlining.

Chapter 14 and 15: Corporate Insolvency

We support the Commission's view that the role of the insolvency system should be to encourage economic activity through the productive use of assets.

In relation to the recommendations and information requests for corporate insolvency, we make the following points:

Paragraph 15.1

- We do not support the view that a voluntary administration should only be available when the company is solvent. However we believe there is a broader point in relation to the "test" for administration. We consider it more relevant to consider the viability of the business rather than a solvency test. If there is a possibility of a viable business, administration is an appropriate route whether or not the entity is technically solvent.

- If the proposal to move to a viability test is not accepted, then we believe the current process should remain. In this situation, there are some changes which can be made to make the process more efficient and streamlined, for example by allowing more flexibility for meeting periods if a deed of company arrangement is not possible. We do not believe that restricting administrations only to when the company is solvent is the right tool to encourage earlier use of voluntary administration as an option.

Paragraphs 15.2 and 15.3

- We support the introduction of "safe harbour" provisions. We also support the need for safeguards for the provisions. The regulations around "registered advisers" will be important, as this will be a safeguard against misuse. For pre-insolvency activity, it is important that the advisor involved is appropriately qualified, experienced and independent.

- We have concerns about the requirement to notify ASIC and the ASX as publicity around the arrangements may influence stakeholder behaviour which would run counter to the objective of a period to restructure a viable business.

- We note the Commission's request for information on other safeguards. Legislating for specific matters, such as time periods, runs the risk of generating process for limited gain. The involvement of an appropriately qualified practitioner together with investigatory and referral powers, supported by appropriate disciplinary powers against miscreant directors, are the most effective safeguards.

- We note that there are barriers other than insolvent trading provisions which have the potential to prevent directors taking advantage of restructuring options. These barriers include personal liability under other laws such as health and safety or tax, and potentially onerous terms for possible funding. While we support the safe harbour provisions, we recommend that there should be further debate on the wider range of matters which are preventing the use of voluntary administration arrangements.

Paragraph 15.4

- We support the introduction of "ipso facto" clauses as proposed and agree that this is an important element in the balance of rights and obligations between encouraging viable businesses to continue and protecting creditors from dishonest application of the process. The use of similar clauses to protect revenue streams as well as defer creditor action would be useful.

- The continuation of the right of court involvement is appropriate. We are concerned that the use of an insolvency panel in place of the court involvement could merely increase "red tape" around process which would not be justified by improved outcomes.

Paragraph 15.5

- We support the proposals to introduce reduced process regulation for small insolvency situations and agree that $250,000 is an appropriate threshold. However we suggest that such reduced processes should also be considered across the board, so that the whole process is simpler with relatively few additional requirements for large or complex situations, rather than complicated regulation with exemptions for smaller proceedings. This would apply, for example, to processes around advertising and lodgements which generally have not provided value.

- Although there are grounds for differentiating processes, we do not support any proposals for differentiating the qualifications or experience requirements for insolvency practitioners. To undertake even a simple insolvency proceeding appropriately, a practitioner should have qualifications and knowledge of the regime as a whole.

Paragraph 15.6

- We have serious concerns about extending a receiver's obligations to unsecured creditors. The requirement to obtain a vote from all creditors for example extends a receiver's duties to identify and verify all creditors, and also could place an unnecessary fetter on their powers.

- The main areas that require review in relation to receiverships relate to the responsibilities to report to liquidators, and the obligations to finalise the receivership without needlessly prolonging it due to, for example, possible outstanding Retention of Title, or warranty claims.

Paragraph 15.7

- We agree that the Fair Entitlements Scheme operates well and should continue.

Paragraph 15.8

- We support the proposals for a Director Identity Number and recommend that this be considered as part of a whole of government approach to identity authentication.

- We support bringing trusts, including managed investment schemes into the insolvency legislation. Currently any insolvency process for schemes needs to be undertaken completely through the courts. Taking all necessary matters through the courts is not the most efficient approach.

APPENDIX B

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is a professional body comprised of over 100,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members of Chartered Accountants Australia and New Zealand are known for professional integrity, principled judgment, financial discipline and a forward-looking approach to business. We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants. Our global network also includes the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.