TO: INSOLVENCY WORKING GROUP

ON: REPORT NO. 1 DATED 27 JULY 2016

7 OCTOBER 2016

INTRODUCTION

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ABOUT CHAPMAN TRIPP

3 Chapman Tripp has a strong national practice in restructuring and insolvency law. We routinely act for banks, liquidators, receivers, administrators, and counterparties in issues around appointment and insolvency procedure, sales of assets, disputes on the validity and priority of security interests and the application of the Personal Property and Securities Act, voidable transactions and other liquidation recovery actions, actions against directors and others for breach of duty and the large variety of other issues that arise on complex receiverships, liquidations and voluntary administrations.

4 The report of the Working Group is of direct interest to us as active legal practitioners in the field and to our clients.

5 Our partner, Michael Arthur, is a member of the working Group in his personal capacity.

6 We confirm that, on behalf of Chapman Tripp, we agree with and support overall the recommendations of the Working Group.

7 This submission makes brief general observations on issues arising from the recommended regulatory model for insolvency practitioners and the three suggested additional measures intended to address certain aspects of the voluntary liquidation process.

PROPOSED REGULATORY MODEL

8 We agree that New Zealand insolvency practitioners should be regulated. We regularly encounter examples of, at one end of the spectrum, companies that have been wound up by "friendly" liquidators and, at the other, over-zealous recovery action.

9 Regulation should establish appropriate competence and fitness thresholds for entry, and ethical and practice standards to assure the proper performance of insolvency practitioners' powers and duties. It will also require the establishment of monitoring and disciplinary bodies, and the accretion and development of precedent and guidance. As other professional regulatory bodies demonstrate, overseeing a profession requires a substantial commitment of time and resource.

10 We agree that co-regulation (Option C) and Government licensing (Option D) are the most desirable alternative models, for the reasons the Working Group gives.

11 We also agree that co-regulation is preferable to Government licensing because it brings relevant market experience and expertise to bear.

12 In our view a co-regulation model provides a productive balance between, on the one hand, a professional regulator's responsibility and license to promote high standards in a collegial way which harnesses practitioners' own expertise and, on the other, independent monitoring by a statutory body of the regulator's functions.

13 We are cautious, however, about the potential risks of having multiple accredited regulators.

14 First, having multiple accredited regulators may confuse the public and perhaps even market participants. New Zealand has approximately 100 insolvency practitioners – a number which can be readily accommodated under the auspices of a single body.

15 Second, there is a risk, despite oversight by a statutory body, of differences in the application of registration and disciplinary standards. Indeed, the statutory body ought ideally to be focused on governance and not operational matters, such as reconciling different interpretations of detailed professional standards. Even the perception of any such differences is a risk which could lead to 'forum shopping', and undermine public confidence in the regulatory system. That is especially so in a context where professional regulators' disciplinary functions are increasingly the subject of judicial scrutiny.

16 We do not see these as necessarily decisive reasons for appointing a single co-regulator (which would avoid such issues), but rather as issues which should be carefully thought through and addressed in the design of any co-regulatory system.

VOLUNTARY LIQUIDATIONS

17 We agree that the phoenix company provisions (ss 386A-386F) in the Companies Act 1993 (the *Act*) do not provide a complete answer to public concern at the prospect of directors – particularly of closely-held companies – arranging for a friendly liquidator to assist in hiving off assets to a new corporate vehicle with identical or similar management and ownership.

18 In our view, as observed by the Working Group, such concerns should not be overstated, as the risk of unpaid debts is inherent in an economy which encourages investment, innovation and risk-taking. We also agree that, to a significant extent, such concerns should be addressed by a compulsory licensing regime.

19 The Working Group has proposed, in addition to insolvency practitioner licencing, three measures to ameliorate possible harm arising from aspects of the voluntary liquidation process.

20 As to these, in our view:

- Measure 1 appears a sensible expedient to close a loop-hole permitting a director or shareholder to take control of a liquidation process even after a creditor has filed a liquidation application. Nonetheless, there may be situations where it is appropriate for shareholders to appoint liquidators before the liquidation application is determined. In particular, it can take time for a creditor's application to be determined by the High Court. Consideration should accordingly be given to:
  - speeding up the process for Court determination if the only issue is the identity of the liquidator; and/or
  - facilitating interaction between directors/shareholders and creditors, for instance by requiring a director/shareholder to call a creditors' meeting to appoint a liquidator if agreement as to the liquidator's identity cannot be reached with the applicant creditor.

- Measure 2, whilst pragmatic, may be overbroad. Avoiding all extraordinary transfers of assets after the filing and service of a liquidation application will have wider ramifications for commercial practice. For instance, new warranties and indemnities will likely need to be inserted into commercial sale and purchase agreements – but their reliability would be doubtful in the event they needed to be called upon. Selling assets after a liquidation application, but before liquidation has been ordered, will also produce the best outcome in some circumstances. It may be that the best course is to limit the scope of Measure 2 to sales to related or associated parties (for instance as defined in s 298(1) and (2) of the Act).

- Measure 3's time has come. A unique Director Identification Number (*DIN*) has been proposed in Australia, but is easier to implement in New Zealand, with its smaller director pool. In our view, a unique DIN will allow more reliable tracing of directors than is presently available through name and address searches and, hence, greater accountability. It will accordingly likely have benefits and implications beyond the insolvency regime, including for director appointments and the enforcement of banning orders.