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Mr Terence Kouts
Senior Manager
Corporations
Australian Securities and Investments Commission
Level 5, 100 Market St
Sydney NSW 2000
By email: 444GA.Submissions@asic.gov.au

Dear Mr Kouts

**Consultation Paper 326 Chapter 6 relief for share transfers using s444GA of the Corporations Act**

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by, and operating in the interests of, its members. These are primarily individual and retail investors and self-managed superannuation fund (SMSF) trustees.

ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

Where retail shareholders' investments fail, there is often a suggestion that they have either been misled as to the risks and prospects of the company, or other conflicted parties (whether or not they are "related parties") have taken advantage of the equity holders to their own benefit.

ASA finds itself in broad agreement with the matters raised in CP 326 and raises our specific concerns pertaining to certain sections of the proposed regulatory changes below:

**B1Q1** Do you agree that ASIC should require an IER to be prepared in accordance with RG 111 and that the IER and explanatory materials should be provided to shareholders before the hearing? If not, why not?

ASA agrees that an Independent Expert Report (IER) should be prepared in accordance with RG 111 and that the IER and explanatory materials should be provided to shareholders before the hearing.

However, ASA finds that there is no stipulation of the period prior to the hearing that the documents will need to be issued. As retail shareholder representatives, we are aware shareholders require a reasonable period of time to the read any complex and detailed report, and potentially seek advice on the document and the potential liquidation of their shareholdings.

Therefore, ASA suggests disclosures require a standard 28-day period prior to the hearing. This will ensure that shareholders can read, understand and seek relevant advice regarding the proposal.

**B1Q2** Are there situations where you consider the IER might be unnecessary? If so, please outline the circumstances?

The only situation where ASA could consider an IER might be unnecessary is where it is clear that the creditors will be receiving a small proportion of what is owed such as 10 cents in the dollar.

**B1Q3** Do you consider that the administrator's report to creditors could be used instead of an IER? If so, on what basis? If not, why not?

ASA considers the administrator's duties require a solution that favours creditors in the event of a company's liquidation. Shareholders rank behind credit providers on wind-up. This arrangement is covered in ASIC's insolvency guide[1] and laid out in the Australian Restructuring Insolvency and Turnarounds Association's explanations around administrator duties to shareholders[2].

Considering both of these guiding documents, ASA finds that shareholder rights are only guaranteed consistently when independent assessment can confirm that administrator duties are not overly favouring creditors over shareholder interests. There are circumstances where a particular restructure will only satisfy moneys owed to creditors whereas an alternative will provide a surplus which is also available in part to equity holders. While CPS 326 provides clear legal guidance from courts with regard to not finding prejudice against shareholders when shares in a company lack any significant value, ASA has found that retail shareholders do not trust findings coming from administrators. These shareholders are likely to question these findings creating additional administrative burdens and costs on legal and regulatory machinery that can distract from the execution of duties that can benefit shareholders on an overall basis.

ASA believes that an IER will provide a strong buffer from such action by creating a legal and regulatory certified document from an independent resource that shareholders can use to allay their concerns and mistrust of a system that they believe is set up to disadvantage them.

**B2Q1** Do you agree with our proposal that an IER should only be prepared on a liquidation basis? If not, why not?

ASA is not satisfied that an IER should only be prepared on a liquidation basis. While ASA is cognisant of the additional burdens that can arise with the demand of an IER on a going concern basis, there is often a significant difference in value for any business when measured on a liquidation basis compares to a going concern basis.

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[1] https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-shareholders/insolvency-a-guide-for-shareholders/

[2] https://www.arita.com.au/ARITA/Insolvency_help/Insolvency_explained/Insolvency_and_shareholders.aspx

An IER prepared on a going concern basis that covers the lack of value in any shareholdings within the company will be of immense value in ensuring that shareholders do not harbour the misapprehension that they are being sidelined in favour of creditors by the administrator or the independent experts. We note companies entering into administration, have often outlined a much rosier future and potential value and downplayed risks to continuing.

There is a human tendency of loss aversion where we value loss (potential and actual) more than we value gain[3]. A going concern basis IER will provide indicative evidence to shareholders that liquidating the concern is the best option and there is no prejudice in this transaction.

As indicated in our response to the previous question, this would dissuade shareholders from reaching out to legal and regulatory authorities on a more consistent basis for a perceived prejudice that does not require addressing.

**B2Q2** Should an independent expert consider, when performing a liquidation valuation, potential recoveries from voidable transactions and other matters as a result of the administrator's investigations? If not, why not?

ASA agrees that an independent expert consider, when performing a liquidation valuation, potential recoveries from voidable transactions and other matters as a result of administrator's investigations. There may be timing issues or elements of wrongdoing that are highlighted and should be brought to shareholders attention.

While there may not be significant increase in value to shareholders, it will give a more transparent view of the proceedings and provides shareholders with assurance about the running of the company and the reasons that led to the company's insolvency.

**B2Q3** Do you consider that a 'going concern' valuation of the business is relevant or useful for a company in administration? If so, why?

While ASA understands that this can be hypothetical exercise, a going concern valuation of the business provides shareholders with a clear and transparent view of their perceived losses.

It puts into perspective that the shareholder is not being ignored in favour of the creditors when liquidation has been decided as the only possible way to administrate the company's affairs. The lack of such a report can foster shareholder views that they have been prejudiced even in where that is not the case. Retail shareholders will also benefit from an outlining of the reasons where a going concern valuation is meaningless.

[3] https://www.behavioraleconomics.com/resources/mini-encyclopedia-of-be/loss-aversion/

**B2Q4** If you agree with the previous question, should ASIC refuse relief where the going concern value shows the shares have some value?

ASA believes that this is a difficult issue to generalise without specifying the degree of value identified, and risk to capture that value. ASIC should refuse relief where the going concern value is clearly attainable and will need to be determine this on a case by case basis

ASIC may wish to request comment from a section of representative shareholders and creditors within a strictly limited period of time. This comment can then be used by ASIC to consider whether grant of relief is a possibility.

We also note the mention in CP 326 that in some cases appropriate valuation methodologies for specific assets may involve going concern valuation techniques, such as a discounted cash flow for an operating mine.

**B2Q5** Are there other factors that we should take into account when considering whether to grant relief?

ASA believes that there are various matters that can be considered in whether to grant relief. These would include the nature of the creditors, whether or not they are officers of the company and/or shareholders. The nature of the company's operations and the value that shareholders stand to gain if the company is not liquidated should also be taken into consideration.

A going concern report here would be of significant value as it may help ASIC to define a certain threshold for value below which relief may not be granted. The lack of a going concern basis report here would mean that this option is entirely ruled out.

In the absence of a going concern valuation, there may be information asymmetry where shareholders need reassurance an arrangement is not designed by opportunistic creditors to take over the company to exploit or take advantage of a short-term liquidity crisis. This is especially critical where the company disclosures have talked up asset values and the potential growth of those assets before the crisis, or when the creditors are also directors or executives of the company in question.

The above suggestions are required to maintain confidence in the sharemarket as a fair playing field.

**B3** If we proceed with Proposal B1, we propose that the IER should be prepared consistent with the principles in RG 112. In our view, this would preclude the administrator (or another member of the administrator's firm or party

ASA agrees in entirety with proposal B3. The interests of shareholders and creditors differ. While in some circumstances there will obviously be no chance of any return for equity holders, at other times there could be a surplus under the appropriate restructuring proposal. In the latter circumstances, the conflict of interest between credit and equity holders requires an IER prepared independently of the administrator.

If you have any questions about this submission, please do not hesitate to contact Fiona Balzer, Policy & Advocacy Manager on [redacted].

Yours sincerely,

John Cowling
Chief Executive Officer
Australian Shareholders' Association