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Our ref Insolvency Law Reform Bill - 2014 - KPMG response

By email

19 December 2014

Dear Michelle

Insolvency Law Reform Bill 2014 - KPMG Submission

KPMG appreciates the opportunity to comment on the Exposure Draft – Insolvency Law Reform Bill 2014. KPMG continues to support the stated aim of strengthening stakeholder confidence in the regime.

Some points raised in KPMG's submissions on the Insolvency Law Reform Bill 2013 and the February 2012 submission on the December 2011 proposals paper remain relevant to our submission on this Exposure Draft.

Whilst we understand and agree with the intent of the proposed amendments, we do consider that some proposed amendments require more information and clarity for an informed response to be made by the industry. As it stands, we consider that some proposed amendments may have an unintended impact of actually reducing the ability of a practitioner to efficiently and effectively progress and complete an insolvency appointment, potentially increasing costs and causing delays, in direct contrast to efficiency and cost gains being sought.

Given a number of KPMG's comments seek clarity or more information on important aspects of the proposals, it is recommended that a further consultation with industry is conducted before the Bill is finalised.

1. *Liquidator registration and discipline*

It is proposed that a committee (consisting of ASIC, a registered liquidator chosen by a prescribed body (ARITA) and a person appointed by the Minister) will be appointed to determine certain matters pertaining to the registration and variation of a liquidator's registration, and to the discipline of liquidators.

Whilst the proposed composition of the committee is clear, it is unclear as to how the process would appropriately deal with the following potential circumstances:

- Independence and conflicts of interest, where a committee member (that is an insolvency practitioner) may have had previous business, or non-business dealings with the liquidator, or even be in a position of direct competition to the liquidator's business, through geography, or the nature of the respective practices and clients;
- Required levels of experience of committee members and how members will be selected;
- The ability of a practitioner to object to a proposed committee member and how that objection would be dealt with; and
- The ability of a practitioner to appeal against a committee's decision, and how that appeal would be dealt with.

Recommendation 1: KPMG recommends that Treasury provide more detail in relation to how it anticipates each of these components will operate, followed by further consultation.

2. *Creditor Rights*

The proposed amendments introduce a number of additional creditor rights, not currently available under the existing regime.

2.1. Certain rights are being introduced to improve the ability and speed and to reduce costs to remove a liquidator from office and appoint an alternative liquidator.

Whilst we understand and agree with the intent of the proposed changes, we consider that these changes may have the unintended effect of facilitating 'opinion shopping', by a major creditor, or creditor group with sufficient voting power to effect such a change.

The result may be that the onus and cost of challenging such a change would fall to the liquidator, if they deemed such a change not to be in the best interests of all creditors, with such a challenge unlikely to occur should sufficient funding not be available. Such an outcome may not be in the best interests of all creditors.

2.2. Other proposed changes to creditor rights include the ability to make requests for information. Transparency and accountability is of paramount importance, however, again, an unintended consequence of these proposed changes may be to unnecessarily occupy the time of the liquidator and staff dealing with such requests, impacting the ability of the appointee to efficiently and cost effectively discharge their duties.

Such an outcome would be most critical at an early stage of an appointment, when all time and resources are necessarily focussed on understanding the business, gaining control, securing assets, and putting in place various processes and protocols to maximise the outcome of the appointment for the benefit of all stakeholders.

Recommendation 2: KPMG recommends that the amendments should provide the liquidator with a mechanism to deal constructively and efficiently with requests that the liquidator considers unreasonable and contrary to the best interests of all stakeholders. Such a mechanism may involve mediation by a third party, for example, ASIC or the committee referred to in the exposure draft.

3. Professional Indemnity Insurance

Our comments from our submission on the 2013 exposure draft around professional indemnity insurance remain relevant.

Recommendation 3: Importantly, should ASIC determine what constitutes adequate and appropriate professional indemnity and fidelity insurance by legislative instrument, KPMG recommends that such a determination should be made having regard to what the insurance markets would be willing to provide to practitioners and the costs of such insurance. Further, the provision of such insurances will materially differ from sole practitioners to international accounting practices, and those differences should be taken into account.

4. Unfunded Work

Some of the proposed amendments have the potential to require additional time and expense to be incurred by a liquidator in the conduct of their duties.

Based on the information provided, it is unclear as to how these suggested amendments will interact with the section 545 of the Corporations Act 2001.

Recommendation 4: KPMG recommends that Treasury provide more detail in relation to how it anticipates the proposals will interact with section 545, followed by further consultation.

Additional comments

We would be pleased to discuss any of these points further; should you have any questions please contact me on (08) 9263 4887 or Tom Seville, KPMG's Head of Regulation & Compliance on (03) 9288 5050.

Yours faithfully

Hayden White
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