

The Manager  
Corporations and Schemes Unit  
Financial System and Services Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

10 December 2014

**By email: [insolvency@treasury.gov.au](mailto:insolvency@treasury.gov.au)**

Dear Sir/Madam

#### **Insolvency Law Reform Bill 2014**

This submission is made in response to Insolvency Law Reform Bill 2014 ('the Bill') released by the Treasury on 7 November 2014.

#### ***Introduction***

KordaMentha has made several submissions to the government and relevant authorities regarding the external administration and insolvency regime in Australia and the associated obligations. Our observations expressed in this submission reflect our extensive experience in working on complex and large restructurings and insolvencies in the Australian market.

Our submission will address the personal insolvency and corporate insolvency components separately.

We note that the Bill is extremely lengthy and at times, unnecessarily prescriptive. An example is requiring receipts be obtained (just ridiculous). At a time when the Federal Government is aiming to reduce red tape, we do not consider that this Bill has been drafted with that intention in mind. It should be reviewed again in its totality to reduce red tape.

#### ***Submission by the Australian Restructuring, Insolvency and Turnaround Association***

We have had the opportunity to review the submission prepared by the Australian Restructuring, Insolvency and Turnaround Association ('ARITA') and where it is not inconsistent with our submission, we support ARITA's submission. We note that ARITA's submission identified a number of inconsistencies and problems within the Bill, which we would have presumed would have been identified and fixed by now.

#### ***Personal insolvency***

##### *Schedule 1 Part 1*

Section 20-10 says the Inspector-General may convene a committee to consider an application for registration.

- The timeframe for the application process is very lengthy – an application must be referred to the committee within 3 months of being received. We consider this period of time to be too

long. There is no timeframe in which the interview must be held. There is also no timeframe for when the exam must be sat if an exam is required.

Section 20-30 – are the conditions set out on the certificate of registration? If so, if the conditions are removed or varied, should the certificate of registration be re-issued in Subdivision C of Schedule 1 Part 1?

Section 30-1 – annual trustee return to be lodged within 1 month of end of year

- We consider that the timeframe of 25 business days, as for an external administrator, would be more appropriate.

Section 60-10 – remuneration determination – creditors or committee of inspection

- This is not clear as to whether a resolution needs to be put to the creditors prior to taking it to a committee of inspection. This section requires further clarification.

Section 65-10 – monies must be banked within 5 days after receipt

- We suggest this should be five business days as this timeframe would be inadequate at some times of the year, such as when there are four non-business days in a row being a weekend and two public holidays.

Section 65-35(2) – trustee must, wherever practicable, obtain a receipt for a payment made out of the administration account

- We consider this is unnecessarily prescriptive. Whilst this can be done, it will add additional costs to an administration, whilst adding very little value. Further, often payment is confirmed by the running balance on the next invoice or on a statement, if provided.
- We suggest that 'must, wherever practicable' be changed to 'may, if considered necessary by the trustee' so that a trustee is only obligated to obtain a receipt where there is a concern

Section 70-5 – annual administration return for personal insolvency to be lodged with 25 days of end of year

- We suggest that this should be 25 business day of end of year

Section 70-75 – Inspector General must notify trustee before giving a direction under section 70-70

- This section should specify the minimum notice period.

#### *Insolvency Practice Rules*

Section 2.7.1 – item 41 – the requirement for administration funds to be in an interest bearing account often means that higher bank fees are incurred, whilst earning minimal interest as banks often do not offer reasonable rates of interest until a sizeable balance of funds are held in the account. However, banks often offer lower bank fees and no interest which would be suitable in a number of cases.

For example, Westpac Banking Limited offers an Everyday bank account, which has a monthly fee of \$5.00 and no interest earned on the balance of funds. It does not offer a transactional account with interest paid on the balance of funds. It does offer savings accounts where interest is earned but a transaction or savings account is also required. Any funds held in the transaction account would not comply with this requirement.

Whilst we consider this requirement unnecessarily prescriptive, if it is to remain, we suggest that only funds in excess of a certain amount, such as \$1,000, have to be held in an interest bearing account. This will provide sufficient flexibility to ensure that the net cost is minimised.

## **Corporate insolvency**

### *Schedule 2 Part 1*

#### Section 60-10(1) – Remuneration determination

- This is not clear as to whether a resolution needs to be put to the creditors prior to taking it to a committee of inspection or whether it needs to be put to the creditors or a committee of inspection prior to making an application to court.

#### Section 60-10(2) – Remuneration determination for members' voluntary winding up

- This is not clear as to whether a resolution needs to be put to the company prior to making an application to court.

#### Section 65-10 – monies must be banked within 5 days after receipt

- We suggest this should be five business days as this timeframe would be inadequate at some times of the year, such as when there are four non-business days in a row being a weekend and two public holidays.

#### Section 65-35(2) – external administrator must, wherever practicable, obtain a receipt for a payment made out of the administration account

- We consider this is unnecessarily prescriptive. Whilst this can be done, it will add additional costs to an administration, whilst adding very little value. Further, often payment is confirmed by the running balance on the next invoice or on a statement, if provided.
- We suggest that 'must, wherever practicable' be changed to 'may, if considered necessary by the external administrator' so that an external administrator is only obligated to obtain a receipt where there is a concern

#### Section 65-40 and section 65-45 – the securities listed are different to those listed for personal insolvency at the corresponding sections.

#### Section 70-5 – annual administration return – must be lodged within three months after the end of the financial year, instead of every six months.

- Whilst this has the benefit of only lodging a return once a year for each administration, we are concerned about the concentration of workload during these three months in what is already a busy period.
- The current requirement of lodging a return every six months, determined by the anniversary date, means that this workload is more evenly spread throughout the year
- In this three month period, we will also be attending to quarterly BAS returns, three months of monthly BAS returns, PAYG payment summaries and annual returns, payroll tax annual returns and workers compensation annual returns. Accordingly, we are concerned that this requirement will add a considerable cost to our business.
- The Bill should be amended to lodge within 3 months of the annual anniversary date.

Schedule 1 in relation to personal insolvency at Section 65-32(2)(b) requires bank reconciliations to be performed every 25 business days. There is no corresponding section for corporate insolvency.

### *Insolvency Practice Rules*

In the Insolvency Practice Rules for personal insolvency at Section 2.7.1 – item 41, there is a requirement for administration funds to be held in an interest bearing account. There is not a reciprocal one for corporate insolvency, which we consider to be the correct approach as an interest bearing account often means that higher bank fees are incurred, whilst earning minimal interest as banks often do not offer reasonable rates of interest until a sizeable balance of funds are held in the account. However, if a requirement was added for corporate insolvency for funds to



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be held in an interest bearing account, we consider that it is often more suitable to hold the funds in a non-interest bearing account up to a certain balance of funds as banks often offer lower bank fees and no interest accounts which would be suitable in a number of cases.

For example, Westpac Banking Limited offers a Business One Low Plan Account, which has a monthly fee of \$8.50 and no interest earned on the balance of funds. It also offers a Business One High Plan Account, which has a monthly fee of \$18.00 and no interest on funds below \$2,000 and 1% on funds below \$20,000. This fee and interest structure is typical of the accounts offered. In the table below are the costs incurred and the interest earned on the different accounts for various balances of funds. Interest earned is not greater than the fees incurred until a balance of \$21,600 is held. A non-interest bearing account is less costly to an external administration up to a balance of \$11,600 based on this fee and interest structure.

Balance of funds held	Bank fees – One Low Plan account per annum	Bank fees – One High Plan account per annum	Interest – One High Plan account per annum	Net bank fees – One High Plan per annum	Preferred account
\$2,000	(\$102)	(\$216)	0	(\$180)	Low Plan
\$5,000	(\$102)	(\$216)	\$50	(\$166)	Low Plan
\$10,000	(\$102)	(\$216)	\$100	(\$116)	Low Plan
\$20,000	(\$102)	(\$216)	\$200	(\$16)	High Plan

If a comparable item was introduced to corporate insolvency, which we don't believe the bill should be so prescriptive, then we suggest that only funds in excess of \$10,000 have to be held in an interest bearing account. This will provide sufficient flexibility to ensure that the net cost is minimised.

If you would like further information, please contact Ms Trudi Shepard of my office on 03 8623 3353 or by email at [tshepard@kordamentha.com](mailto:tshepard@kordamentha.com).

Yours sincerely

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Partner