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Manager,
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Via Email: insolvency@treasury.gov.au

Dear Sirs,

Exposure Draft : Insolvency Law Reform Bill 2014

We have coordinated meetings with the undersigned Registered Trustees to facilitate a discussions on the Exposure Draft of the *Insolvency Law Reform Bill* 2014 (**Bill**).

The purpose of this letter is to comment on the personal insolvency provisions of the Bill and, in particular, Schedule 1 (Parts 1, 2 and 3) of the Bill.

We **attach**[1] a table of specific comments.

We make the following general comments:-

1. The object of the Schedule purports to be to regulate the administration of a regulated debtor's estate but, in effect, provides for the over-regulation of Trustees in their administration of bankrupt estates.

2. It is difficult to provide detailed comments in respect of the Bill in circumstances where we have not had the advantage of considering the draft Insolvency Practice Rules.

3. A major concern is the lack of separation of powers and possible conflict by the Inspector-General in the prosecution of alleged breaches by a Trustee. The Inspector-General may be the party alleging the breach, has a delegate on the committee considering the breach and then is the party imposing the sanction. Natural justice dictates that the party alleging the breach must not participate in the prosecution of the breach.

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4. A further concern is that, contrary to the expected cost savings referred to in the Background to the Insolvency Practice Rules, the Bill will increase the costs of administration.

As we have not had the benefit of considering the Insolvency Practice Rules, the submissions are not to be considered exhaustive but serve to provide our initial comments on the Bill.

Yours faithfully

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[1] Submissions

ED Reference	Comment
5-5	The definition of "*end of an administration*" requires clarification. Administrations under the *Bankruptcy Act* 1966 (**Act**) have two points of finalisation, one from the debtor's perspective and one from the Trustee's perspective. In a Part X administration the administration ends once the terms of the PIA have been effected. In a bankruptcy or administration under Part XI the bankrupt is released from bankruptcy on the appointed date. However the administration does not come to an end until the Trustee has finalised the administration which may be some time later depending on what are the outstanding issues. The discharge provisions of Section 149 are not imported into Part XI matters. Other than the annulment provisions of Sections 252A and 252B, the only finalisation in Part XI is by the Trustee.
15-1	What recourse does a Trustee have to rectify incorrect information or challenge the inclusion of certain information on the register?
20-10	This provision refers to the Inspector – General (**IG**). If the IG does not intend to act alone, the definitions [5-5] should define the IG to include a delegate or authorised person. Refer Section 5 of Act. Further, what recourse does a Trustee have in the event that the Trustee considers that the appointee may have a conflict of interest or bias against Trustee? This concern is relevant to appointees to all committees in the Schedule.
20-10, 20-15	The inconsistency between the words "may" and "must" in these divisions (also repeated in other provisions) is confusing. Under 20-15, the IG must refer an application for registration to a committee convened under 20 – 10 but under 20 – 10 may convene a committee. It should be "must" in 20-10 if the application is properly made.
20-15(2), 20-20(2) and(3)	The time within which the IG and a committee are to consider an application is too long. Under the current provisions, it could take up to 10 months for an application to be considered and dealt with. Under 20 – 15 (2) and 20 – 20 (3) the respective periods should be reduced to 20 business days. Further, there is no time prescribed between when the committee considers an application and when the committee is required to interview the applicant.
20-20 (5)	This provision is inconsistent with the objectives of the Schedule [1-1] and must be removed. The discretion afforded to a committee to decide if an applicant should be registered, even if he/she does not meet all of the criteria in 20-20(4)(a) or(i) is inconsistent with the objectives set out in the Schedule that is, to ensure that Trustees have the necessary qualifications. An applicant is either qualified or not qualified. Further, any exemption may trigger a show – cause notice under 40-40.
20-20 (4)	The provisions in subdivision (b) require clarification. It is imperative that the Insolvency Practice Rules (**IPR**) clearly articulate what is "*adequate and appropriate*".

	The provisions in subdivisions (e) and (f) are impractical. There must be exemptions for a Trustee who has had their registration cancelled for a reasonable cause such as ill-health or volunteer work overseas.
20-25	When – there is no time prescribed within which the committee is required to provide a report to the IG. The omission to include a time frame is a consistent omission throughout the Schedule.
20-30	When – there is no time prescribed within which the IG must register the applicant once the provisions of 20 – 30(1) are satisfied.
20-50	The time within which the IG must refer an application is too long. The period must be reduced to 20 business days.
20-40	It is imperative that the IPR clearly articulate what is a condition *"of a prescribed kind"*.
20-45, 20-50	Refer comments in respect of divisions 20-10 and 20-15 above.
20-55	There is no time prescribed between when the committee considers an application and when the committee is required to interview the applicant
20-60	When –there is no time prescribed within the committee must provide a report to the IG
20-65	The provision requires clarification and, in particular, regarding who can vary the condition, the timing of any amendments and when they takes effect from.
20-70	The penalty of 20% is too high and is unreasonably onerous. Further, if the renewal fee is to be paid one month prior to the registration ceasing, the IG must notify the Trustee at least two months prior to the registration ceasing.
20-75	When – there is no time prescribed within the IG must renew the registration.
25-1	It is imperative that the IPRs clearly articulate what are the *"specified classes of registered trustees (our emphasis)"*.
30-1 (1)	The IG must notify a Trustee at least 20 business days before the end of return year and the annual trustee return falling due
35-5	The provision is unreasonably onerous. An obligation to notify within 5 business days of when the Trustee could reasonably be expected to be aware is unreasonable, especially where penalties apply. The time must be extended to 10 business days.
40-25, 40-30	Subdivisions (1)(e) are unworkable. There must be an exception if an order to repay remuneration is under review or appeal.
40-40	It is imperative that the IPRs set out clearly the standards prescribed for subsection (4). The Trustee must be given opportunity to rectify the breaches within 20 business days.
40-55	When – there is no time prescribed within which the committee must make its decision. It is unfair and unreasonable to impose a condition on all Trustees to the effect that they cannot allow the Trustee to work within the profession for a period of 10 years.
40-60	When – there is no time prescribed within which the committee must provide the report.
40-65	When – there is no time prescribed within which the IG must give effect to

	the committee's decision.
40-80	The time within which to refer an application is too long. The time must be reduced to 20 business days.
40-75, 40-80	Refer comments in respect of divisions 20- 10 and 20-15 above.
40-85	There is no time prescribed between when the committee considers an application and when the committee is required to interview the applicant.
40-90	When – there is no time prescribed within which the committee must provide the report.
40-95	When – there is no time prescribed within which the committee must give its decision.
50-5	Refer to comments in division 20-10 regarding appointees to committees. Further, it is imperative that there is full disclosure in selecting a member for the committee as to the relationship between the proposed committee member and the Trustee to ensure that there is no conflict or bias, perceived or otherwise
50-10	While it is recognised that the members of the committee should have appropriate qualifications, business, economics and accounting qualifications are not necessarily relevant. It is imperative that a member of the committee has a good practical and working knowledge of insolvency and a clear understanding of the public policies surrounding bankruptcy.
50-25	The decision process of a committee must be clarified. Is a decision reached by a majority or must it be unanimous?
60-20	The provision is unreasonable and impractical. The prohibition on a Trustee from employing family members could put a number of small practices at a significant disadvantage. While it is recognised that there is a need for transparency, rather than seek the approval of creditors to allow a related entity to be employed by a Trustee in circumstances where a meeting of creditors might not be convened for some time, it is both reasonable and practical, for a Trustee to report to creditors in his/her first notification to creditors and identify the names of all related entities together with their qualifications and deal with any objections that might be raised.
60-25	The words "giving up" must be clarified. There are numerous circumstances in bankruptcies where there are no funds in the bankrupt estate but the bankrupt is in a position to put a proposal to creditors pursuant to Section 73 of the Act. This often entails the Trustee agreeing to reduce his/her remuneration to enable a return to creditors. This is a commercial situation where all parties stand to benefit, the alternative being that the creditors or the Trustee received nothing for the period of the bankruptcy. Similarly, there are a number of situations where Trustees and solicitors (who have agreed to act on a speculative basis) have agreed to apportion recoveries between them. Again, there would be no recoveries if the solicitors were not prepared to act on a speculative basis. Does such an arrangement breach the provision of giving up remuneration? If so, the provision must be amended. Is sharing of profits in a partnership in which the Trustee is a partner "giving up" remuneration for the purposes of this provision?
60-26	This provision requires clarification and further consideration as it is unreasonable and unworkable.

	By way of an example, does this provision mean that if a Trustee uses an interstate office (related or otherwise) to assist the Trustee in respect of the administration of a bankrupt estate, that the Trustee may not pay that interstate office for its services from the bankrupt estate but must pay for such services from their own personal funds with the prospect of no reimbursement by the estate? It appears that creditors or COI may approve such costs, but if they do not, there is no right of appeal by the Trustee to IG. If so, this will necessarily increase the costs of Administration and does not reflect the commercial realities of administering a bankrupt estate in accordance with Section 19(1)(j) of the Act.
60-30(3), 60-35(3)	The Committee of Inspection (**COI**) should also have the authority to approve fees. The approval of creditors in respect of expenses is not generally required in a bankruptcy. Why is it required when there is a change in Trustee?
65-10	This provision is unreasonable and impractical. By way an example, what happens if money comes in on 27 December and the office is closed to 5 January? Further, the penalty is unreasonably onerous.
65-15	The penalty is unreasonably onerous. By way of an example, a Trustee is the trustee of the joint and several estates of a husband and wife. They receive a $60.00 cheque from a party they believe is for the wife only and bank it accordingly. They later discover that the cheque is in relation to the joint estate and correct the position by debiting from the wrong account and crediting to the right account. Two offences have occurred, both carrying a penalty of 50 penalty units each. The Trustee will be required to pay $17,000. In most instances this will be half the gross fees on the engagement. A second example is if the mistake is not discovered. The Trustee, as part of his/her checking, does not discover the error because it is not immediately obvious the received funds were for the bankrupt's joint estate. Again, a penalty of $8,500 will apply. The penalty is severe in its own right, but even more unjust where the Trustee may only receive the minimum fee of $5k but expend $20k performing his duties on the file.
65-20	The penalty of 20% per year is too high and is unreasonably onerous.
65-25	The provision is unreasonable and impractical. This provision could be triggered by transfers between joint and several estates and must be amended to include an exclusion clause to cover this possibility. The provision should also include the words "knowingly or recklessly" pay any money.
65-30	This provision is unreasonable and impractical. Why is the Trustee the only signing authority? There must be a provision for electronic funds transfer. There must further be provision for a party with Power of Attorney to sign cheques on behalf of a Trustee who is say on holiday or on sick leave.
65-32	This provision appears to relate only to the operation of a single bank account for more than one estate. Is it intended that this provision relates

	to all bank accounts? If so, this must be clarified. Further subsection (2) (a) (i) refers to money received by the Trustee from the "regulated debtor". Is it intended that this provision should relate to all funds received into the estate? If so, this must be clarified.
65-35 (2)	This provision is unworkable. It is impossible, in certain circumstances, to obtain a receipt for payment made out of an estate. By way of examples, the DTEI no longer issue receipts for motor vehicle searches. AFSA does not issue an invoice in respect of the Official Trustee's costs and expenses on the transfer of a file to a registered Trustee. In an increasing and electronic environment this will be an unnecessary cost in an administration.
65-40	The concept of securities must be clarified. For example, does it include certificates of title? Why must the security be deposited with the bank with which the estate account is held. Surely a deposited in any bank should suffice?
70-5	This provision must be clarified. Does the Annual administration return replace the current AER process? If not, it creates a considerable additional burden to the administration of the bankrupt estate. The provision states that the return should be lodged with the IG within 25 days after the end of the financial year. Presumably this should be business days which would then be within the same timeframe as the current AER process. Further, if both processes will be necessary (which will be onerous and unreasonable) 25 business days is insufficient to allow for both sets of returns. Also, is a Trustee able to charge the administration for the work associated with lodging the Annual return? These changes will be in line with the proposed amendments to the Corporations Act where a liquidator/receiver/administrator is allowed to charge time to an administration for lodging six monthly accounts.
70-10	Does "books" include electronic records, Trustee's correspondence and working papers? There must be exclusion for documents that are commercially sensitive and subject to privilege. There should be a definition of "reasonable excuse" to avoid disputes as to what can be classified as reasonable.
70-15	What is the priority of audit costs over fees?
70-35, 70-36	Refer to comments in respect of division 5-5 above regarding "*end of an administration*". The operation of these two sections must be clarified, especially 70-35(3) and 70-36(2)(c). Is creditor or COI approval required to return irrelevant books?
70-40, 70-45,70-50	What is the process for creditors and/or Trustees to deal with a request that is either unreasonably requested by the creditor or declined by the Trustee?
70-50 (3) (b) (ii)	What are the requirements under the IPRs by which it is envisaged that the creditors or a COI will have a right to replace or modify?

	What recourse/ right of reply does a Trustee have?
70-70	The time within which a Trustee is to respond to a direction by the IG is unreasonable, onerous and impractical. A Trustee is only given five business days to comply with a direction by the IG. There must be exclusions to allow for when a Trustee is on holiday, on sick leave or other appropriate circumstances.
75-40	The provision is impractical. Why is it only possible to deal with one proposal on each resolution? Creditors are critical about the amount of paperwork they receive from Trustees and this will simply add to the criticism.
80 – 55 and 80-60	Subdivision 3 must be removed. This will remove the potential for a major creditor to have overriding influence over other creditors on the COI.
90-10 (4)	Subdivision 4 should be at the discretion of the Court and should provide for creditors to be liable for costs in the event the application is frivolous. Subdivision 5 should be removed as it does no work – the Court will exercise its powers irrespective of the provision.
90-20	Subdivision 2 should be at the discretion of the Court and should provide for creditors to be liable for costs in the event that the application is successful.
90-35	Subdivision 2 is impractical and unworkable. Five business days notice of a meeting is unreasonable. In many bankruptcies the Australian Taxation Office (**ATO**) is the major creditor and the ATO is unable to act within that time frame. The ATO will be significantly disadvantaged unless the time is extended to 20 business days.
Part 3	The transitional provisions are unnecessarily complex. For example, administrations or consents provided prior to the introduction of the new legislation are partially dealt with under the old system and partially under the new system. There needs to be clarity as to how the pre-and post legislative amendments will be implemented.
IPR paragraphs 44,45	These proposals require clarification. It is proposed that interest is paid to creditors at a rate of 20% annually until the contravention has been rectified? What is the amount in respect of which 20% is payable? Why is it paid to the creditors (and not the Commonwealth)? What happens if the amount payable to creditors is all less than $25?
92	A Special Resolution is to have the same meaning as set out in Section 9 of the Corporations Act 2001. That definition refers to members, not creditors, and requires at least 75% in number voting on the resolution. There is no consideration given to the value of creditors' claims. The definition should be similar to the Act's definition regarding a specified minimum of both number and value of creditors voting. At least 50% in number and value is recommended. The current 75% in value gives a single large creditor too much influence.