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*via email: insolvency@treasury.gov.au*

27 February 2013

Dear Sir

**Submissions on Exposure-Draft – Insolvency Law Reform Bill 2013**
**Insolvency reforms to benefit business**

Thank you for the opportunity to comment upon the draft Insolvency Law Reform Bill 2013 (the Bill) as it amends the personal and corporate insolvency laws in order to implement the reform package the government has outlined in the government's proposal paper which is to modernise and harmonise the regulatory framework applying to insolvency practitioners in Australia.

We further note that the Bill seeks to align the regulation of personal insolvency with corporate insolvency which in the opinion of Deloitte is an appropriate objective.

In preparing our submission, it should be noted that it is only based upon the Exposure Draft released as a consequence of the Regulations not accompanying the Exposure Draft. The opinions and comments expressed must be taken in the context of not being able to review the matters which are intended to be included in the regulations to the Bill. Accordingly, our comments are subject to this qualification as it is apparent that many important matters are intended to be addressed in the regulations to the Bill.

The Bill proposes additional requirements on External Administrators, however if this additional work cannot be paid for from the assets of the company then this must be clear together with how section 545 of the Corporations Act 2001 applies should be dealt with.

We would also note from our review of the Exposure Draft that there are some unintended consequences in the drafting of the Bill which we believe need to be considered and amended.

In preparing our response to the Exposure Draft we have included our comments by reference to the particular section of the Exposure Draft. Our comments are detailed in the various schedules attached to this letter.

Finally, thank you for the opportunity to provide comments on the Exposure Draft and we would welcome any opportunity to provide further information or to provide clarification on any of our comments.

Accordingly if you wish to seek any clarification, please do not hesitate to contact the writer.

Yours faithfully

**DELOITTE TOUCHE TOHMATSU**

J L Greig

Partner Restructuring Services – National Insolvency Leader

| | Section | Exposure Draft Reference | Comment |
|---|---|---|---|
| **Part 2 Registering and disciplining practitioners** | | | |
| **Division 8 – Registering liquidators** | | | |
| 1.1 | ASIC may convene a committee to consider | 8-15 (2)(b) | Consideration should be given to providing protection to the registered liquidator chosen by the Insolvency Practitioners Association of Australia to be on the committee from litigation or other proceedings. This may be in the form of an indemnity |
| 1.2 | ASIC must refer applications to a committee | 8-20 (2) | The time period specified for the convening of the committee is 6 months which would be too long in these circumstances. Consideration should be given to reducing the period to 2 months. Any delay in matters of this nature should be reduced to the absolute minimum. |
| 1.3 | Application to vary conditions of registration | 8-45 (1) | We support the concept that a person's registration may be subject to conditionality. We believe in the modern practice there will be persons who will apply for a limited registration due to specialisation. This particularly applies in receivership work where an applicant may practice. It is now quite common in the larger practices for persons to specialise in different types of appointments. |
| 1.4 | ASIC must refer applications to a committee | 8-55 (2) | Again the period of 6 months for the convening of the committee is too long when one considers that a person may not be able to practice as a registered liquidator for this period. It will also unnecessarily delay new persons who are made Partner and therefore seek registration. We believe a period of 2 months should be considered. |
| 1.5 | False representation that person is a registered liquidator | 8-85 | We support this amendment where it is an offence that a person makes a false representation as to their registration as a liquidator. |
| **Division 10 – Insurance** | | | |
| 1.6 | Registered liquidators to maintain insurance | 10-5 (1)&(2) | The requirement for liquidators to maintain appropriate and adequate professional indemnity insurance and appropriate fidelity insurance is of course necessary however paragraph 2 is very broad where ASIC may, by legislative instrument determine what constitutes adequate appropriate professional indemnity insurance. We are concerned about the breadth of the wording and also if at any future time when insurance may be more difficult to obtain. In our opinion, greater guidance should be given. We appreciate this may be specified in the regulations to be drafted. |
| **Division 12 – Annual liquidator returns** | | | |
| 1.7 | Annual liquidator returns | 12-5 (1)&(3) | This section requires a liquidator to include in his annual liquidator return evidence that he has appropriate professional indemnity and fidelity insurance. The issue we wish to raise is that many aspects of these policies including the policy are confidential and cover may be breached if the policy is provided to a third party. Consideration should be given as to what evidence is required, for example a letter from a broker evidencing the levels of cover may be more appropriate rather than the full policy being required to be provided. In addition consideration should be given to extending the lodgement deadline to 45 days. |
| **Division 14 – Notice requirements** | | | |
| 1.8 | Notice of significant events | 14-5 (1)(i) | This particular section refers to the need of a liquidator if he becomes aware of information included in his annual return that is inaccurate or becomes inaccurate to lodge a notice with ASIC to that effect. Failure to do so results in an offence. We consider that this provision is too wide as there may be a very minor detail that is wrong in the return and if the liquidator fails to recognise this for whatever reason he has committed an offence. We believe the implication of this provision is too wide. For example would a change of address not notified be an offence. |

| | Section | Exposure Draft Reference | Comment |
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| **Division 16 – Disciplinary and other action** | | | |
| 1.9 | Registered liquidator to remedy failure to lodge etc. documents | 16-10 (2) | This section requires a registered liquidator who has failed to lodge documents to remedy this situation within ten business days after the direction is given. Considerations should be given to extending this period due to holiday periods etc. and if through inadvertence a series of documents need to be lodged that may require a longer period. |
| 2.0 | Registered liquidator to correct inaccuracies | 16-15 (3)(a) | This amendment relates to the correction of inaccuracies, if ASIC suspects that information in any document is incomplete or inaccurate. The concern is that the inaccuracy may be a minor matter and if it could not be corrected within 10 business days for whatever reason, the registered liquidator may not be able to accept any further appointments. The error may relate to a series or all the documents lodged by a Liquidator. We consider this amendment to be harsh |
| 2.1 | Action initiated by industry body | 16-85 (2)(e) | This section refers to the referral by an industry body, if that industry reasonably suspects there are grounds for ASIC to take some form of action against a registered liquidator. Consideration needs to be given if a matter is referred to ASIC for ASIC be required to respond within a reasonable time frame. Further we consider that the definition of industry body should be limited to professional bodies. |
| **Division 18 – Committees under this Part** | | | |
| 2.2 | Minister appointing a person to a committee | 18-10 (3) | This amendment relates to the power that the Minister may in writing delegate the minister's power to select a person to a committee. The concern we seek to raise is that this may create a perception that the committee is not independent, due to the fact that the committee could consist of a representative from ASIC, a person chosen by the IPA and a person chosen by the minister via the power to delegate to ASIC. The perception could be that two of the three members of the committee are effectively from ASIC. |
| **Part 3 – General rules relating to external administrators** | | | |
| **Division 22 – Remuneration and other benefits received by external administrators** | | | |
| 2.3 | Matters to which the Court must have regard | 22-25 | This particular amendment refers to in determining remuneration that the court must have regard to whether the remuneration is 'reasonable'. We would suggest that the terminology match the Insolvency Practitioners Guide which refers to the words 'necessary and proper'. |
| 2.4 | External administrator must disclose employment etc. of related entities | 22-35 (1) | This section refers to the need for the external administrator to disclose the proposed employment of related parties i.e. his firm. We believe consideration needs to be given to amending this provision as it will not always be apparent at the beginning of the matter as to what services/expertise may need to be provided (i.e. taxation services, valuation services etc) which may be required as a matter of urgency in some circumstances (i.e. entering into a contract of sale, obtaining a workplace health and safety review etc. . At present if a related entity is engaged by the external administrator, i.e. taxation services then those fees are included as required by the IPA code in the remuneration approval which is sought from creditors. We believe this is a better approach to this matter. This approach would also avoid untimely delays in matters if the external administrator was required to disclose this to creditors and in effect seek their approval. |
| 2.5 | External administrator must not derive or confer profits etc. | 22-40 (1) | This section relates to the deriving of profits, directly or indirectly from a transaction, sale or purchase for or on account of the company. This amendment may have the unintended consequence of, for example not allowing a practitioner to charge out of pocket expenses because it could be considered he is deriving a profit, depending on how "profit" is interpreted. For example an external administrator may need to engage a taxation specialist from his firm at normal commercial hourly charge out rates for that type of service which obviously has a profit component implicit in the normal hourly charge out rate for those services. |
| 2.6 | External administrator must not accept extra benefits etc. | 22-45 (1) | This section relates to the fact that an external administrator must not make an arrangement for receiving or accepting a gift, remuneration, consideration etc. The unintended consequence in this amendment is that this may prevent an external administrator from receiving a director or creditor indemnity for his fees in a voluntary administration when there are no assets available for the administrator to be paid. |

| | Section | Exposure Draft Reference | Comment |
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| 2.7 | External administrator must not give up remuneration | 22-50 (1) | Our review of this section appears to give rise to an unintended consequence where the work in progress in a particular matter could be owed by a service company and/or the liquidator could be employed by a service company and therefore there may be an inadvertent breach of this section |
| **Division 24 – Funds handling** | | | |
| 2.8 | Opening, and paying money into, administration account | 24-10 91) | This section relates to the administration of bank accounts. There are a number of unintended consequences in the requirement to open a single bank account. Firstly, it may be necessary to open more than one bank account. Secondly, that bank account should only be opened once the external administrator has received funds, rather than opening a bank account when no funds have been received. |
| 2.9 | Handling of securities | 24-40 | This section relates to securities being deposited into an administration bank account. It is unclear as to what is meant by securities and in general terms banks will not deposit securities i.e. shares etc. and will only process cheques. We note that Section 92 of the Corporations Act 2001 does define securities, however it still includes, shares, debentures which could not be deposited into a bank account. |
| **Division 26 – Information** | | | |
| 3.0 | Annual administration return | 26-10 | This amendment refers to the need to lodge an Annual administration return within 25 business days after the end of the financial year. We believe one unintended consequence is that this will place serious time pressures on practitioners to do this within the period specified. This is due to the fact that all administrations will need to be balanced at the 30th of June of each year (since most Australian Companies balance at the 30th June each year) with all accounts reconciled and entries posted. Whilst this is a matter that normally occurs in a practice, to require this to be done within a 25 business day period may place unnecessary stresses on practitioners. We suggest that consideration be given to a longer period, such as 60 business days.<br><br>The requirement in bankruptcy is much less and a relatively smaller number of practitioners are affected by this. Nevertheless both requirements would have to be completed by practitioners.<br><br>There is also an additional concern that the information required in the annual administration return has not been specified and we would understand that this will be clarified in the regulations, however if the information required includes information that would need to be extracted from the actual administration files and not simply extracted directly from the practitioners administration accounting system then additional time will be required for this to be undertaken.<br><br>Also consideration should be given to including Receiverships for completeness.<br><br>Finally, the requirement to advise all creditors is onerous and of limited value as any creditor wishing to view the return can simply do so on the ASIC website. |
| 3.1 | Transfer of books to new administrator | 26-40 (6) | We would suggest that there be a statutory lien in order to preserve the rights that the former administrator has against the books and records, but this statutory lien should not prevent the new administrator obtaining the books and records. |
| 3.2 | Right of creditors to request information etc. from external administrator<br><br>Right of individual creditor to request information etc. from external administrator | 26-50<br><br>26-55 | In both of these sections the intention is for an external administrator upon the request of creditors to provide information. The unintended consequence may be that the administrator has already reported to creditors and there are no funds in the particular administration, yet the administrator is required to provide further reporting. We believe that there should be some provision for the cost of the administrator. |

| | Section | Exposure Draft Reference | Comment |
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| **Division 28 – Meetings** | | | |
| 3.3 | External administrator must convene meeting in certain circumstances | 28-15 | In respect to this section it is not clear whether this only applies to a liquidator. It does not make sense for this provision to apply to Voluntary Administrations where the law prescribes the first and second meetings which must be called by the voluntary administrator. |
| 3.4 | Creditors' resolution passed on casting vote of person presiding at meeting – court review | 28-42 | This section refers to the use of a casting vote which may be reviewed by the court. We would take the opportunity to make the suggestion that there should be set out guidance for the court as to how the external administrator should exercise the casting vote. |
| **Division 30 – Committees of inspection** | | | |
| 3.5 | Appointment and membership of committee inspection – company not in pooled group | 30-10 | The reference to a contributor should be excluded as in matters of insolvency the position of a contributor is not relevant. |
| 3.6 | Committees of inspection – procedures | 30-12 (1) | This section refers to a committee of inspection being able to determine its own procedures. In most insolvency matters, the conduct of the committee of inspection will be very much led or guided by the external administrator. The ability of the committee to determine its own procedures may create a number of difficulties in the smooth running of the committee, where perhaps committee members want to embark upon matters that are not relevant to the administration or matters which are relevant personally to them and no other creditor. |
| 3.7 | Committee of inspection may obtain specialist advice or assistance | 30-30 (1) | This amendment relates to the fact that a committee of inspection may seek such advice or assistance that the committee considers desirable. The unintended consequence of this section may be that significant costs are incurred by the committee which could, because these costs have priority put in jeopardy for example distribution to creditors or the ability of the liquidator to pay costs incurred in the administration.<br>It is also undesirable that the committee of inspection may obtain this advice without any consultation at all with the appointed external administrator. This provision may have serious undesired consequences which could put in jeopardy the outcome of the administration. We recommend that consultation with the external administrator should be required and finally if no agreement is reached the matter be referred to the court. |
| **Division 32 – Review of the external administration of a company** | | | |
| 3.8 | Appointment of reviewing liquidator by creditors etc. | 32-23 (1) | This amendment relates to the capacity of creditors to appoint a reviewing registered liquidator to undertake a review of the remuneration of the presently appointed external administrator. We are concerned about the capacity of these matters to be undertaken by creditors and significant costs being incurred which would jeopardise the ability of the company to pay a distribution to creditors when the matters being considered by creditors are in error or are not relevant. We believe these matters should be brought before a court or ASIC. |
| 3.9 | Review | 32-24 (4)(d) | In these circumstances the external administrator and trustee require certainty of remuneration to enable them to pay expenses and to manage the particular administration. There needs to be a definite period in which remuneration can be reviewed and after that period there is no further recourse |
| 4.0 | Removal by creditors | 32-35 (1) | This amendment relates to the potential for creditors to remove an external administrator by resolution. An unintended consequence is that no reference is made to a consent to act to be provided by the new external administrator or the fact that he must hand to the meeting a declaration of his Independence, Relevant Relations and Indemnities.<br>In addition consideration should be given to allowing the current external administrator to speak to the meeting in relation to his removal |

| | Section | Exposure Draft Reference | Comment |
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| **Part 4 – Other Matters** | | | |
| **Division 42 – Other matters** | | | |
| 4.1 | External administrator to have regard to directions given by creditors or contributories | 42-4 (1) | References made to contributories are not relevant |
| 4.3 | External administrator may assign right to sue under this Act | 42-10 | The right to assign the ability to sue as anticipated by this section may present difficulties in the personal insolvency area. Consideration should also be given as to whether the matter needs to be referred to the committee of creditors. This may arise in relation to matters regarding family law claims to which a trustee is a party under Section 79 of the Family Law Act. |
| 4.4 | | 497 | The liquidator is required to send to each creditor various information (including a report as to affairs) within 5 business days after their appointment. However the directors are only required to provide a report as to the company's affairs to the liquidator within 5 business days of Appointment. Time periods need to be reconsidered. |
| 4.5 | | 206BB (7)(b) | The section is flawed as if the administration is required to be finalised early and the director refuses to lodge a report as to affairs then no period of disqualification may apply, or the period could be dramatically reduced. |