The Institute of Chartered Accountants in Australia

3 February 2012

Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
Department of the Treasury
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Dear Sir/Madam,

Proposals paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia

The Institute of Chartered Accountants in Australia (the Institute) is pleased to have the opportunity to put forward our comments on the above paper: *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* (the proposals paper).

The Institute is the professional body for Chartered Accountants in Australia and around the world. Established by Royal Charter in 1928, we have a long tradition as a leading voice of professional accountants.

Our 70,000 members serve the public interest through their obligation to uphold high standards of service within many facets of the economy; in public practice and commerce, and sectors including government, not-for-profit and academia. The Institute has a significant number of members operating as practitioners in the insolvency field. Over recent years we have regularly made submissions on reforms that impact the regulatory framework in relation to insolvency practitioners.

We have reviewed the recommendations in the proposals paper from the perspective of whether or not they are likely to achieve the government's desired policy outcomes. In respect of practitioner discipline, we believe that the intended policy outcome of the reforms is for a fair, timely, effective and transparent process for resolving disciplinary matters, and through that, an improvement in practitioner behaviours.

In our view, we do not believe that these reforms provide the ability for the Australian Securities and Investments Commission (ASIC) to conduct their investigations in a more timely manner. As we note below, the reforms also do not address the use of enforceable undertakings (EUs) when resolving disciplinary matters. EUs may often not provide adequate transparency around the resolution of the matter and any conditions applied.

Also, in our view the presence of ASIC as a member of the proposed committee presents a perceived conflict of interest given they have the capacity to refer matters to the committee. The over-riding concern, therefore, is that these aspects of the reforms will not result in a fairer, and more timely and transparent process for the resolution of disciplinary matters.

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We have provided more detailed commentary on specific proposals in the attached appendix. As Treasury will be aware, the Institute has been a strong supporter of many proposed reforms that we believe will improve the regulatory framework for insolvency practitioners. The comments in the attached document focus only on those proposals that we consider require further policy analysis or clarification.

If you would like to discuss any aspect of this submission, please contact Ms Karen McWilliams on 02 9290 5754.

Yours sincerely

Lee White FCA
Chief Executive Officer
The Institute of Chartered Accountants in Australia

Appendix

Chapter 2 – standards of entry into the insolvency profession

Para 26(a) – Qualifications
We note the removal of the preference of accounting over legal studies. Whilst we understand the rationale behind this change, we question whether one year's study in accounting is sufficient for the liquidator to perform their work to the required and expected high standard. Further, would a registered liquidator, who is also a lawyer, be able to provide their own legal advice on an administration?

The introduction of the requirement that the applicants should undertake a prescribed level of formal tertiary studies in insolvency administration is welcomed. However, we consider that the level being described as 'at least equivalent to that current provided under the Insolvency Practitioners Association (IPA) insolvency education program' is insufficient detail. We recommend that the required basic content of such courses is specified. We consider that there should be a form of accreditation for such courses in the future and list of acceptable courses maintained by ASIC and available on their website.

Chapter 3 – registration of insolvency practitioners

Para 39 – classes of practitioner
We note the proposal to have two classes of restricted registrations, that of receiver only and that of receiver and receiver and manager. The Senate Inquiry specifically excluded receivers from its terms of reference, despite our initial submission recommending their inclusion. Further, the decisions of receivers often involve asset realisations and fees, which can have significant implications for stakeholders involved in any subsequent forms of administration. Therefore, we consider that receivers should be equally as qualified as an unrestricted liquidator, although their experience may differ.

Para 44 - Composition of committee
The committee for corporate insolvency is to be composed of three members, one from the regulator, one from the Insolvency Practitioners Association (IPA) and one from a pool determined by the minister. We recommend that all committee members are appointees of the Minister.

The proposals paper does not indicate any differences between the committee to be convened to consider registrations and that for disciplinary purposes. The Australian Securities and Investments Commission (ASIC) has the role of regulator and therefore we do not consider it appropriate for ASIC to also sit on the committee. This is a concern in relation to the disciplinary role of the committee as it represents a conflict of interest for the regulator to refer practitioners to the committee and sit on the committee (acting as prosecutor and judge). The IPA is also able to refer matters to the committee, which also creates a conflict of interest. We consider that it is critical for the committee to be independent in order for practitioners to receive natural justice in the process.

We do not have any concerns for ASIC to be represented on the committee that reviews applications for registration. However, we note that ASIC is responsible for a broad range of areas and there should be greater clarity around the area such a delegate would be selected from and their expertise. We note that members of both the Institute and the IPA could be considered. It may also be appropriate to use members of the Companies Auditors and Liquidators Disciplinary Board (CALDB) on the committee given their experience and expertise in this space. The paper does not provide any indications as to how will the Minister's pool be determined. Will it be in a similar way to existing CALDB, with nominations from prescribed accounting bodies and other stakeholders?

Further, the proposals paper does not provide any information on where will be committee sit within the regulatory environment? There is also no indication on how it will be funded, what will govern it and where the hearings are to take place. The answers to these questions will also have an impact on the independence and perceived independence of the committee.

We therefore strongly propose that the composition of the committee for the purposes of disciplinary matters is reviewed and is potentially different from the committee responsible for reviewing applications for registration and interviewing applicants.

Para 42 - Application and registration fees
There are currently quite significant differences between application and registration fees for personal trustees and corporate insolvency practitioners. The proposals paper indicates fees will be payable for applications, registration and re-registration but does not indicate the level of these fees.

We consider that it is appropriate for the registration fee for corporate insolvency liquidators to be increased to reflect any approved amendments to the registration process. However, we consider the personal insolvency fee to be certainly adequate and would not expect that to increase. We would also expect any revised corporate insolvency registration fee not to exceed the existing personal insolvency fee, particularly if a fee is associated with the registration renewal beyond a basic administration fee. Further indication of what costs such fees are intended to cover should be provided, such that changes to the fee can be directly linked to changes in the regulator's related costs.

We also recommend Treasury look at the current fee for the Registered Company Auditor (RCA) registration process as a comparison. We note that the registrations of insolvency practitioners and company auditors have similarities from the perspectives of quality and process.

Chapter 4 – remuneration framework for insolvency practitioners

Para 61 – Minimum fees
We support the alignment of the minimum fee in both corporate and personal insolvency. However, we recommend further investigation is carried out to determine whether the current proposed level of $5,500 including GST is appropriate. We consider that the current proposed level is too low given the minimum level of work involved for even simple corporate insolvencies.

Para 64 - Fee caps
We do not consider that changes to the current system are needed. However, if any change is introduced to seek subsequent approvals, we consider that such a change should not involve additional costs to creditors of the process. We support the continued disclosure by insolvency practitioners of sufficient details of their remuneration to creditors together with the provision and enhancements of guidance issued by ASIC for use by creditors.

Para 73 - 79– Cost assessment in corporate insolvency
Whilst we support providing creditors with more avenues for challenging fees, we note that an unsuccessful application to court could result in additional costs for creditors. We consider it important that creditors seek appropriate advice and guidance, from suitable experts before applying to court. Further, we do not consider it appropriate for the regulator to instigate their own review rather that the Courts are the appropriate forum for these issues to be handled.

Chapter 5 – communication and monitoring

Para 87 – Committees of inspection
We note the differences in the role of committees of inspection (COI) between the existing ASIC information and the proposed rules. The COI currently assists the liquidator and approves fees on behalf of creditors. The proposals are for the COI to have an advisory and supervisory role. We support the proposed functions outlined in paragraph 87 but have concerns that expressly stating the COI role as advisory and supervisory may have unintended consequences. This overarching statement could result in the COI going beyond the functions listed and overstepping their authority.

Para 97 – ad hoc requests for information
Whilst we support the creation of rules to prevent nuisance or vexatious requests, we note that there is little detail in the paper of such rules. We consider the details of the rules to be very relevant in the context of whether the proposals will achieve the intended policy outcomes.

Chapter 6 – funds handling and records keeping

Reporting by practitioners to regulator
We recommend that Treasury look to implement its own Standard Business Reporting (SBR) program for accounts reporting by registered liquidators. We consider that this would improve the reliability and usefulness of reporting on the insolvency industry.

Para 115 – funds handling
We support the proposal to enable combined accounts to be kept in corporate insolvency as currently permitted in personal insolvency. However, we note that there is no information on how the interest would be split in such scenarios. We note in the personal insolvency regime, all interest is remitted to the Insolvency and Trustee Service Australia (ITSA) annually as an 'interest charge'.

Chapter 7 – insurance requirements

Para 133 - Insurance
As noted in the options paper, there is only limited evidence of insurance lapses, which we considered indicates that the current penalties are sufficient. The increase in the penalties from $550 to $110,000 seems excessive given the incidence is currently so low. We consider the existing penalties to be reasonable in relation to those for other professionals registered with ASIC? Further, it may be difficult or judgemental for ASIC to determine whether reasonable steps have been taken to obtain insurance.

Para 138 – practitioner returns
We note that the proposal is for an annual fee to be payable by registered liquidators for corporate insolvencies. In personal insolvency, the fee is paid from the assets of the estate and is based on a percentage of those assets in addition to the interest charge noted above under chapter 6. For corporate insolvency, the proposal is for the fee to be based on the number and type of administrations handled. However the proposals paper does not provide any detail regarding how such a fee would be paid, would this be from the liquidators own funds and what would such monies be used to fund? If the fees are to come from the liquidators own funds, then this additional cost is likely to be recovered in the long term by liquidators through increased fees on administrations. This will increase the core cost of administrations, impacting the minimum fee (refer paragraph 61 - Chapter 4).

Chapter 8 – discipline and deregistration

As noted in the covering letter, we do not consider that the proposals in this paper will achieve the intended outcomes of fair, timely, transparent and effective handling and resolution of disciplinary matters. There are no proposals which will assist ASIC in investigating complaints faster and referring matters to the committee on a timely basis. The committee composition, as noted earlier, creates a conflict of interest and the committee could be perceived as not being independent to a practitioner.

Para 140 - Natural justice
Paragraph 140 refers to practitioners being treated fairly and afforded natural justice. There is no specific definition of how this will be achieved. We recommend that details of this are specifically outlined in the proposals, such as for committee hearings that the practitioner should have the right to legal counsel, the right to access the regulator's evidence, the right to call/question witnesses and the right to notice of the complaint.

Further paragraph 165, enables the Committee to dispense with a hearing and determine a matter on the papers with the consent of the practitioner. This is not in the interests of natural justice.

Use of enforceable undertakings
In our submissions on the options paper and to the Senate Inquiry, we expressed concerns regarding the use of enforceable undertakings (EU) in the disciplinary process. The proposal paper has not addressed the use of the EU as a means of resolving disciplinary matters. We consider that it is important that the use of EUs is included as part of the reforms. As we note below, the main concern surrounding EUs is the lack of transparency around the process.

ASIC can currently deal with a breach of the law by a registered auditor or liquidator in one of the following three methods under the ASIC Act and Corporations Act.

1. refer the matter to the Companies Auditors and Liquidators Disciplinary Board (CALDB)
2. an enforceable undertaking (EU)
3. court action – either criminal or civil

Under methods one and three, the practitioner being investigated receives natural justice, transparency and accountability in the context of well-tested legal principles applied by experts.

The CALDB directly notifies the Institute, pursuant to s.1296 (1B) of the Corps Act, of their decision and the reasons for the decision. This can be used by the Institute in its own disciplinary procedures. Likewise, once court action is completed, the Institute can use the judgement where appropriate to found a disciplinary hearing when it becomes a matter of public record. Further, we note that the proposed committee hearing process will provide the same level of natural justice for the practitioner (assuming the appropriate composition of the committee as noted earlier) and transparency of the findings to the Institute (assuming the committee will be required to communicate its findings to the Institute).

An EU provides no detailed description of the evidence which has been tested. Typically ASIC expresses its concerns about the accountant in the EU and the accountant does not admit or disagree with the concerns. This is in contrast to a court of law or a tribunal (CALDB) where ASIC evidence is tested. Nor does an EU only arise from investigations where the professional typically admits guilt or breach of law.

However, there is a lack of transparency and accountability in the EU process and members have expressed some concerns in this process. The EUs do not contain a full description (or a copy) of the evidence ASIC relied upon. As an EU does not usually provide any admittance of guilt or breach by the member, the EU, in the absence of the actual evidence relied upon, cannot be used by the Institute to subsequently discipline their members.

Para 141 - Direct action by regulator

There are now a number of grounds whereby the regulator can suspend or de-register a practitioner directly, without referral to a committee. We raised concern in our response to the options paper that the direct action should not prevent the practitioner being afforded natural justice. We note that whilst the majority of the grounds listed as examples are clear, some may simply be a matter of mis-communication. This also applies to the registration conditions referred to in paragraph 144. Further, we question whether ASIC has the existing capacity and expertise to perform this role appropriately.

We recommend that this process, if adopted, includes notification from the regulator to the practitioner, in writing, of the intent and provides the practitioner with a reasonable time period, from the date of receiving the notification, to respond or rectify. There should also be the opportunity for the practitioner to apply for the matter to be heard by a committee, rather than the direct action. This could be via an application to court to avoid its mis-use. Further, the specific outcome of the direct action should be clear. For example, if the other regulator suspends the practitioner then this regulator should only be able to also suspend, not de-register.

We also recommend that there are appropriate checks in place on the regulator when taking direct action, such as oversight or audit of the process. There should also be an independent review process within ASIC to enable the practitioner to appeal the decision, prior to referral to the Administrative Appeals Tribunal (AAT). We note that matters referred to the AAT often take over a year to be heard and therefore this is a significant time for a practitioner wrongly suspended or de-registered. Further, when appealing to the AAT, the practitioner is responsible for their own legal costs, and these can be substantive. We also note that the Australian Prudential Regulatory Authority (APRA) had similar powers for direct action some time ago. This process incorporated an appeals option followed by a second independent review. However, the law was later changed to remove APRA's power to take direct action.

Para 148 - Use of committee for disciplinary
We did not support the transfer of responsibility for disciplining corporate insolvency practitioners from the CALDB to a committee. However, we note in the proposals paper that Treasury has proposed for this to occur and to use the personal insolvency framework as a basis for the committee. This transfer does not appear to be supported by evidence indicating concerns in how the CALDB has handled cases from stakeholders but instead to align the personal and corporate regimes. Paragraph 148 indicates that these reforms will facilitate swifter handling of disciplinary matters, however as noted earlier it is not apparent how this will be achieved. Further, we still consider that the corporate insolvency framework should be developed separately rather than using the personal bankruptcy one.

Para 150 – show cause notice
We note the proposal for a show cause notice to be issued for corporate insolvency as exists in personal bankruptcy. However, we note that there are many more liquidators than trustees, more corporate insolvencies than bankruptcies and more creditors involved. Therefore, there will be more complaints which require investigation. Further those complaints are likely to be more complex to investigate than for personal bankruptcies. A breach of duties is complex and it will take time to gather the necessary evidence. Therefore, this will not necessarily result in faster referrals to the committee. Particularly, as noted earlier, there are no proposals that will assist ASIC in investigating matters more quickly.

Para 152 - Co-regulatory environment
The Institute continues to be a strong supporter of a co-regulatory environment which recognises the range of powers and responsibilities that each contributor to that environment can bring. Against that backdrop, we do have some reservations regarding the proposal in paragraph 152 that 'prescribed legal or accounting professional bodies or the IPA would also have standing to refer their members to a Committee on the same basis.' As noted earlier, this proposal combined with the committee composition poses a conflict of interest for the IPA. This may also conflict with statute or common law and therefore specific legislation would be needed to specify which laws should be applied in the first instance. The Institute, and the other accounting bodies, do not have the same powers as the regulator to investigate complaints and call witnesses etc. Further, they do not have the same protection as the regulator in relation to confidentiality, privacy laws and defamation. Therefore, this may present some significant risks to the Institute. Further, an unintended consequence of such a proposal is that it would limit the existing disciplinary powers of the Institute.

We recommend instead that the Institute and other prescribed bodies, including the IPA, be given the discretion to refer matters that may come to their attention to the regulator for further investigation. This would enable the relevant regulator to investigate the complaints and refer the matter to the committee if appropriate. This would avoid the issues noted above arising. Further, the Institute and other prescribed bodies should be able to inform the media and general public that the matter has been referred to the regulator. This would enable them to appropriately address concerns from the public. This method would also avoid conflict with the prescribed bodies own disciplinary powers. To support these powers, we recommend that, as part of the referral process, the regulator is formally required to report back to the referring body following their investigation to advise whether the matter is:

a) being referred to the committee;
b) being referred to the court or;
c) has no basis for further referral;

and the evidence to support the regulators decision and the outcome from any further referral to court or committee. This would enable the prescribed body to determine whether the matter should be subject to their own disciplinary process. The Institute would welcome the opportunity to consult further on protocols surrounding this process.

Further paragraph 174 also gives certain prescribed bodies the standing to apply to Court for a review of a practitioner's conduct. We refer to our comments above in relation to referral to the committee as we have the same significant concerns regarding this proposal.

Para 162 – 166 - Transparency of outcomes
We note that currently the CALDB must notify the prescribed accounting bodies directly of their decision and provide clear evidence. This requirement is specifically referred to in the *Corporations Act*. The proposals do not provide for this communication to the accounting bodies or to issue a media release. This is important for transparency in the process and also to enable appropriate action to be subsequently taken by the accounting

bodies. We recommend that paragraph 166 is amended to specifically require the committee to notify the relevant professional bodies of their decisions and reasons.

We are particularly concerned at the proposal in paragraph 162 which indicates that if a committee imposes conditions which require entering into an undertaking, the undertaking itself need not be made public. This is a lack of transparency in the process. Paragraph 169 includes a requirement for the practitioner to publicise the decision. This needs to have appropriate controls around it to ensure the publication fairly represents the outcomes of the committee.

Para 163 – 171 – committees, general rules
We note the policy outcome for swifter handling of disciplinary matters and that procedures for the committee would be based on the existing personal insolvency regime. The proposals paper does not indicate if this would result in the corporate insolvency committee adopting the same time frames to deal with disciplinary matters as specified for insolvency, 60 days. If this is the intention, would the committee then only deal with certain types of complaint/misconduct, which can be handled in that timeframe with ASIC referring more complex matters to the Court? We consider that this requires further clarification, with specific consideration given to the more complex nature of some corporate liquidator complaints.

Chapter 10 – regulator powers

Para 198 - Improve surveillance of liquidators
We support the extension of the powers of the regulator to enable them to proactively conduct reviews of practices and individual administrations without suspicion of a breach. However, we note that there are no proposals to indicate that the regulator should use these new powers nor how they should be used. As noted in our submissions on the options paper and to the Senate Inquiry, we recommended that ASIC conduct a regular inspection program of registered liquidators. We recommended that ASIC assess the Inspector-General's program for suitability and adaptability to the corporate insolvency profession. The Institute could also provide guidance to ASIC in this regard.

Ombudsman
The options paper included a suggestion regarding the creation of an ombudsman to handle dispute resolution cases. We note that the proposals paper has not further considered this concept. We support the establishment of an external dispute resolution scheme. We note that the Institute has recently created a national mediation service to deal with appropriate commercial or legal disputes between an Institute member and another person, such as the member's client. This service is voluntary and confidential. In the Institute's experience our mediation service provides a cheaper, faster and more flexible way to find a solution to a dispute, compared to litigation.

Chapter 11 – small business

Para 214 - One stop shop for small business
We note that the proposals paper includes reforms to remove any legal impediments to the adoption of a one stop shop approach for dealing with complaints regarding interconnected administrations. We raised the issue of the separate duties of ASIC and the NSW Office of Fair Trading (OFT) (and other relevant state regulators) in our submissions on the options paper and to the Senate Inquiry. A liquidator registered by ASIC may be involved in external administration of both companies and co-operatives (such as clubs).

However, we note that whilst complaints against the liquidator relating to company administrations are dealt with by ASIC, those made relating to co-operative administrations were referred to the relevant state body. Since those earlier submissions, the government has announced the establishment of the Australian Charities and Not-for-profits Commission (ACNC). We recommend that when the ACNC is fully established as the regulator for not for profit entities, that it is included in the legislation as a third regulator and that all three bodies must share knowledge of complaints against particular liquidators/trustees. Until that time, it would be appropriate to require the relevant state regulator to inform ASIC and ITSA of complaints made to them about registered liquidators or trustees.

ASIC is responsible for the registration of liquidators and has the skills and experience to investigate these complex matters. The responsibility should be determined by reference to the regulator responsible for registering those professionals, rather than the nature of the administration. Therefore, we recommend that ASIC's role is expanded to deal with all complaints (with the exception of fee disputes) against registered liquidators, regardless of whether the complaint relates to work performed on a company, co-operative or other type of body. This would also avoid any duplication of work by government bodies, where a registered liquidator is investigated both by ASIC and the ACNC.

Para 219 – Assetless Administration Fund
We note the proposals to expand the application of the assetless administration fund to deter phoenix behaviour. However, there is no indication from the proposals paper as to whether the fund is to be increased to cover such an expansion or whether this is a reprioritisation of the existing fund resources. We would welcome further clarification on this matter.

Chapter 12 – 2010 corporate insolvency reforms

Para 266 – publication of external notices
We welcome the creation of a single website for the publication of administration notices. The proposals paper does not provide any indication of the timeframe for the creation of this website. We note that such a website exists in the personal insolvency regime and we recommend that Treasury consider whether this website could be adapted for use in corporate insolvency in a short time frame. A single website would reduce the costs for small business insolvencies and would provide a single source of information for stakeholders.