3 February 2012

The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: insolvency@treasury.gov.au
Attention: Mr Aaron Jenkinson

Dear Mr Jenkinson

Proposals paper - A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia

Scope of IPA's submission

The Insolvency Practitioners Association (IPA) is the peak professional body representing company liquidators, trustees in bankruptcy, as well as lawyers, financiers academics and others practising in or otherwise interested in insolvency law and practice. We make this submission on the proposals paper based on the informed views of the IPA and its members. We have been significantly involved in the development of the reforms in the paper, in particular since the Senate Committee inquiry of 2010. For that reason, where we consider that the proposals are generally in accord with reform ideas we have been supporting, we make little or no comment in this submission. However, in relation to all the proposals, we reserve our position on points of detail until we see the drafting of the proposed laws.

This submission therefore highlights proposals with which we disagree, or about which we express some caution.

We address the proposals on a chapter-by-chapter basis in term of the chapters in the proposals paper. We also make the following introductory comments.

1 General issues

1.1 *Harmonisation*

We support the proposed steps towards harmonisation of the laws and processes of personal and corporate insolvency and further recommend that the proposed reforms be approached with a view to ensuring alignment where that is possible. This applies both to laws concerning the regulation of the profession, and to laws concerning insolvency processes – meetings, time limits, voting rights, dividends etc.

1.2 *Unfunded work*

The laws proposed will impose additional obligations on practitioners, as well as remove other obligations. These include the notification of creditors of the insolvency, the calling of meetings, the provision of information and so on. The IPA and its members accept that in

some cases work may be required to be done even if no funds are available. However, we consider that a general principle throughout these reforms should be that a practitioner is not required to attend to tasks if there are no funds from which they will be remunerated, or for which no security can be taken.

If the law is to require practitioners to undertake work for which they cannot be paid – and one example in the paper is the obligation to notify known creditors of the appointment – it should clearly say so. Section 545 of the Corporations Act could be used as a precedent for such law to be stated.

1.3 ***Natural justice***

The proposals focus on the regulation of practitioners and increased powers of the regulators for this purpose. Subject to any particular comments in the following, we wish to emphasise the need for natural justice to be accorded a practitioner in the drafting of these reforms. This is the case particularly in relation to the proposed powers of the regulators to take direct action in relation to certain breaches – including preventing practitioners taking new appointments - without reference to a discipline committee, formal investigation or court. That process involves the danger of the regulator acting as the prosecutor and the determiner of the outcome and of the penalty.

The need for natural justice is also important her both because of the importance and nature of the role and responsibilities required of an insolvency practitioner under the law and because the reputation and livelihood of the practitioner, and the rights of creditors and other stakeholders, are in issue.

We accept that regulatory action might be appropriate in particular cases, but it should not be taken lightly. The proper administration of insolvent companies and individuals requires a diverse and well qualified and resourced profession backed up by their firms and employees. The investment of that time, experience and capital should not be placed in jeopardy without due regard to proper and well understood processes which can only support the integrity of the regulatory outcome and its acceptance by other professionals and stakeholders.

1.4 ***Role of the IPA***

The IPA notes that the proposals paper offers it a more significant role in what the paper refers to as co-regulation of the profession. We appreciate the significance and importance of that role and it is one which the IPA welcomes.

However we stress the importance of achieving a clear and agreed understanding of the meaning of professional co-regulation, of the degree of co-regulation that is appropriate for the insolvency profession and the appropriate timeframe for reaching that state.

We consider that there are potential legal and resource ramifications arising from the proposed changes in the regulatory regime for the IPA and the profession more broadly. These arise, for example, in relation to IPA nominees sitting on all statutory registration and discipline committees; the proposal that the IPA itself be empowered to take proceedings against a member before a discipline committee, and before the court, in order to, for example, have that member's registration as a practitioner cancelled. There are also issues and risks for the IPA arising from the IPA being given access to confidential information of the regulators about member misconduct for IPA purposes.

We do not address these issues here but would appreciate the opportunity to discuss them with you in the context of these reforms. We would be concerned if the law were to proceed without IPA being more fully informed as to its role in the proposed co-regulatory regime, and how that fits in with IPA's own discipline processes and those of the existing regulators. IPA members would also have to examine whether the IPA Constitution permits or accommodates some of these proposed laws and whether it may need to be altered.

2 Chapter 2 — Standards of entry into the insolvency profession

The IPA generally supports these proposals although we note that they reduce the extent of undergraduate qualifications required. At the same time, the need for post-graduate level studies in insolvency is emphasised, with which we agree. These studies are to be at least equivalent to the IPA's Insolvency Education Program and these may complement and form part of the legal and accounting studies or may be in addition to it. We suggest that this post-graduate insolvency specific study must be in addition to the required undergraduate qualifications, and not be included in order to meet that initial undergraduate threshold requirement.

Some IPA members have expressed concerns at the increased emphasis on law at the expense of accounting but we consider that the inclusion of high standard post-graduate study can address this.

We confirm the intention that existing registered practitioners without university qualifications will continue to remain registered. The paper at paragraph 29.1 is unclear.

2.1 *Probation*

We do not agree with the proposal that practitioners may be registered subject to conditions placed upon their registration, if they do not, for example, fully meet the experience criteria. These practitioners would be regarded as being on "probation" – paragraph 33 of the proposals paper. While we accept the reasoning shown in the paper, we think that any person registered as a trustee or liquidator should have sufficient competence, experience and qualifications to practise without conditions. There are potential problems if the practitioner does not then satisfy the probation period and their administrations have to be transferred. The unfortunate impression may be given that the probation period is one that would allow a new practitioner to simply "learn on the job".

2.2 *Three years of full time study in commercial law and accounting*

The proposals paper uses the phrase "three years of full time study in commercial law and accounting, but with no less than one year of equivalent full time study for either".

We confirm that the intention of the change is to provide that a 3-year commerce or business degree would satisfy the requirements, or a law or accounting degree with subsequent study. This appears to be the way the regulators are interpreting the current legislative requirements. The intended result is that a person will meet the requirements where they have completed 2 years of study in accounting and 1 year in commercial law; or, 2 years of study in commercial law and 1 year in accounting. We suggest that the drafting take account of standard tertiary terminology in describing these requirements, while at the same time being broad enough to allow the final determination to the judgment of the committee.

2.3 ***Extent of experience***

We have some concern that the reduction in the required experience to engagement in relevant employment on a senior full-time basis for a total of not less than 3 years in the preceding 5 may reduce the standards of the profession. Currently the corporate insolvency requirement is for the equivalent of 5 years' full-time corporate insolvency experience in the preceding 10 years, and the equivalent of 3 years' full-time corporate insolvency experience at a very senior level in the preceding 5 years: ASIC Regulatory Guide 186.48. In bankruptcy, the requirement is not less than 2 years in the preceding five: Bankruptcy Regulation 8.02.

While we see some risk in this reduction, we suggest that these experience criteria could be reinforced by properly defining what is a "senior role" in which the experience is gained. We suggest that this would be more in line with the "very senior" status currently used in the ASIC guidelines.

2.4 ***Ultimate discretion of the committee***

We also think that the law should give an ultimate discretion to the committee to refuse an applicant even if they otherwise have the requisite qualifications and experience, or to allow registration to an applicant even if they do not have the requisite qualifications and experience. For example the Bankruptcy Act says that:

- if the committee considers that the applicant is suitable to be registered, it may decide that the applicant should be registered even if it is not satisfied that the applicant has the qualifications, experience, knowledge and abilities prescribed: s 155A(3).
- Similarly, the committee must refuse an applicant if the committee is not satisfied that the applicant has the ability (including knowledge) to perform satisfactorily the duties of a registered trustee, even though the person may have the requisite experience and qualifications: s 155(4A).

Given that these decisions are reviewable to the Administrative Appeals Tribunal, the registration committees should be given a wide discretion but at the same time proper guidance on how that discretion should be exercised.

2.5 ***Different types of registration - receivers***

Our members have expressed some concern about this proposal and ultimately the IPA disagrees with it. It would involve an important change in the law and we have considered it carefully.

While a receiver may in some respects have different fiduciary and other obligations to a liquidator or administrator, receivership often involves intersection with other external administrations, and duties owed as an officer of the company, and to unsecured creditors. There are also some unique features of receivership akin to the responsibilities of a liquidator such as the statutory duty imposed by section 420A. Thus, it is important that persons appointed as receivers have the same broad qualifications and experience as other insolvency practitioners and have detailed knowledge of the other forms of insolvency administration.

We are also concerned that the reform sends a message that receivership is in some respects less complex and therefore requires some lesser standard of experience, while recent experience in complex receiverships following the collapse of a number of managed investment scheme (MIS) schemes tends to suggest the opposite to be the case.

Receivers are typically appointed by banks and other sophisticated lenders, who generally are well placed to judge the receiver's resources, expertise and experience. Further, there is a recent trend of banks not appointing receivers but instead appointing a voluntary administrator where they are permitted to do so by section 436C of the Corporations Act and there is no conflict of interest involved. These factors would tend to mitigate against the need for specific reform in this area.

However if the proposal is to proceed, we recommend that the only difference in registration requirements between an unrestricted and restricted (receivership only) registration should be as to the range of experience. That is, a person seeking restricted registration as a receiver only should have the same qualification requirements as an unrestricted applicant (including post graduate insolvency training), but their experience mix requirement will be different from a person seeking unrestricted registration. For example, rather than having to have practical experience across all insolvency administration types at a senior level, an applicant for a restricted (receivership only) registration would have an emphasis on experience working on receiverships at a senior level.

2.6 *On-going training*

We accept that the regulators would be empowered to impose industry wide conditions in relation to continuing professional education but we do not agree that this should extend to requiring practitioners to pass "assessments of required learning" on any on-going basis - paragraph 33. The IPA and other professional bodies require their members to attend a certain number of hours of continuing professional development and we consider that these obligations are more than adequate.

3 Chapter 3 — Registration of insolvency practitioners

3.1 *Official liquidators*

We note that at paragraph 38 of the paper it is proposed that the separate class of official liquidator be abolished. We agree with that, but point out that the obligation for practitioners to consent to court appointments would be removed. This does raise the issue on which we have made previous submissions, that it is unreasonable to expect practitioners to take assetless administrations, in the absence of the equivalent of the Official Trustee in Bankruptcy. This applies equally to voluntary liquidations.

3.2 *Committee members*

We note that an IPA nominee is proposed for the committees, for registration and discipline, in both personal and corporate. While most members of the IPA would see it as a professional obligation to give their time, expertise and support to these committees, we consider that remuneration be paid based on existing arrangements with ITSA or at rates determined directly by the Remuneration Tribunal.

3.3 *Standing of the IPA to apply to court*

The paper notes that certain professional bodies – and this would include the IPA - would be given standing to apply to court for the review of a practitioner's conduct. As we advised at the beginning of this submission, we are interested to discuss this proposed regime with you.

4 Chapter 4 — Remuneration framework for insolvency practitioners

4.1 *Minimum fees*

We suggest that any minimum fee be expressed as excluding GST, as in bankruptcy (s 161B Bankruptcy Act) and indexed.

4.2 *Capping of fees*

The proposal that prospective fee approvals be capped is in fact already in accordance with the current requirements of the IPA Code: see 15.2.2 and 15.3.3. It should be made clear that the cap can of course be raised with the approval of creditors.

4.3 *Disbursements*

We accept in principle the proposal for creditor approval of the incurring of disbursements where the practitioner or their related entity would "profit". The IPA Code already requires its members to treat payment for professional service disbursements to related entities of the members as remuneration, with approval as remuneration required before payment can be made: see IPA Code at 14.10.2.

The situation that this proposal is intended to address seems to be one where a practitioner seeks to unfairly benefit their firm or service company by engaging their services rather than cheaper and better external services. However, the law remains that a practitioner must only incur disbursements as if the practitioner were a reasonable person conducting their own business.[1] We are concerned that any law that attempted to define and prescribe the circumstances would be difficult and may lead to unintended consequences. For example, to require creditor consideration and approval of the relative costs and advantages of in-house copying over that photocopying undertaken at market rates by a third party provider would be unnecessarily burdensome. It would also result in increased costs to the administration and potential delays at being able to undertake necessary statutory tasks such as preparing and sending reports where the photocopying of documents is proposed to be done in-house.[2]

We suggest that the law remain as it is, with any detailed guidance left to the IPA Code or regulator guidelines.

Reimbursement to a firm for paid disbursements

In many administrations without funds, practitioners often have to advance their own funds for the costs of advertisements and search fees, with those costs to be reimbursed from the estate when any funds become available. The reimbursement of these costs is therefore a payment to a related entity of the practitioner (their firm). This reimbursement should obviously not require creditor approval. Should this proposal proceed, care in the drafting will be required to ensure that this usual practice is not affected. A member has advised us that their firm advances more than $1m per annum to its administrations on account of disbursements. To require creditor approval before reimbursement would severely affect any firm's cash flow and prevent the timely securing and recovery of assets.

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[1] *Re Korda; in the Matter of Stockford Ltd* (2004) 140 FCR 424; [2004] FCA 1682.

[2] Similar laws were at one stage proposed in bankruptcy by the Attorney-General's Department, requiring creditor approval of all disbursements above $100, but were withdrawn, perhaps for similar reasons.

4.4 ***Gifts, benefits***

We do not disagree with the proposed new restriction in relation to gifts and benefits. The terms of s 165 of the Bankruptcy Act are some guide for the drafting of this provision but there are some circumstances that fall within that section that we consider are legitimate. These include payments that are made directly by DEEWR to a practitioner for work done for GEERS related activities (both in corporate and personal insolvency administrations), and payments made by ASIC under the assetless administration fund.

We note that the 2010 corporate insolvency reforms in Chapter 10 of the proposals paper addressed the issue of payments by ASIC from the assetless administration fund. It is proposed that this be extended to payments by DEEWR in relation to GEERS. As long as these proposals for exclusion of such payments are implemented, and address any other such payments by government, this should address the concern that we have raised. We suggest that these exclusions be extended to section 165 of the *Bankruptcy Act*.

4.5 ***Remuneration***

We note that there are to be two remuneration regimes for corporate and personal insolvency, which we think is unfortunate. Remuneration issues are broadly the same in both regimes. However, we assume that the two regulators will maintain consistent guidelines on remuneration claims.[3] This is so particularly given that there are to be external corporate costs assessors and internal ITSA assessors.

5 Chapter 5 — Communication and monitoring

5.1 ***Creditor involvement, COIs***

We generally support changes in the law to give increased opportunities for creditors to be involved in the administration of an insolvency. However, we are concerned to ensure that the law does not unduly compromise or fetter the ultimate discretion and judgment of the practitioner in favour of the creditors. The reason for the high levels of qualifications and experience required of insolvency practitioners is that the issues and decisions with which they deal can be complex, require attention to fiduciary and regulatory responsibilities, call for quasi-judicial decision making, and otherwise call for high level attention to the maintenance of the integrity of the regime.

On the other hand, creditors owe no duties to the insolvent or each other. Creditors appointed to a COI are not accountable (or at least never held to account), and are often confronted by conflicts of interest between their personal interests as a creditor, and their duties to act in the interests of all creditors. The law traditionally gives practitioners the authority to make discretionary value and business judgments throughout their administration, with which in many cases the courts are reluctant to interfere.[4] This is apparent in relation to the limits that the courts impose on giving a practitioner assistance by way of directions. We consider this approach should be maintained in any law reform in this area.

[3] See for example, Inspector-General in Bankruptcy Practice Direction No 6.1 – Remuneration entitlements of a Registered Bankruptcy Trustee, January 2010 which explains the particular requirements in personal insolvency.
[4] For recent comment on this, see *DCT v Prentice* [2011] FCA 1535.

5.2 *Shareholders*

We support a change in the law that shareholders have no involvement in COIs unless they have a financial interest in the administration.[5]

5.3 *Information to creditors*

It is proposed that practitioners will be required to give information about the administration to a creditor who reasonably requests it. We note there is a drafting precedent in s 19 of the Bankruptcy Act, although that section could be improved. The drafting of the prescription of valid requests - creditor details, WIP reports, transaction reports and the time limits – should ensure that there is both clarity and flexibility. It may be wise in practice for the practitioner to give an estimate to creditors of the costs of meeting the request where such requests are made by the general body of creditors, say at a creditors meeting. Also, this provision must apply only where there are funds to meet these requests, beyond the rule preventing unreasonable or vexatious requests. Refer section 1.2 above.

5.4 *Privacy issues*

In respect of the provision of creditor details, we point out that there is some uncertainty overall as to whether creditor lists should be on the public record, in terms of privacy law principles. This uncertainty extends to other issues of communication of information about an insolvency, both in personal and corporate insolvency. The Australian Law Reform Commission has made recommendations on the competing issues between insolvency and privacy laws, in response to an IPA submission, to which we draw your attention.[6] While the Commission accepted that there are clear policy reasons for information about insolvency proceedings to be made publicly available, practitioners' disclosure of personal information was not unrestricted, in particular in internet-based communications. It recommended that guidance be issued for insolvency practitioners as to the limits of publication.

However the balance in insolvency is to be decided between the need for publication and the need for privacy, we ask that the obligations of and restrictions upon insolvency practitioners be made clear.

5.5 *Annual and final meetings*

We agree that the annual and final meetings in corporate insolvency should no longer be mandated.

This should also be the case for publicly listed companies that are required to hold AGMs under Chapter 2M of the corporations Act. At present, practitioners rely on ASIC to provide general or particular relief from these meeting requirements.[7]

As is the case with member involvement in Committees of Inspection, there should be no requirement to continue with AGM's under Chapter 2M where there is no reasonable prospect of the members having a financial interest in the administration.

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[5] This appears to take up the outcome of the decision on s 548 in *Jindal Transworld Pty Ltd, Scottsdale Homes No 10 Pty Ltd* [2010] SASC 210, which we drew to Treasury's attention at the time.

[6] ALRC 108 at 44.80 to 44.87.

[7] See ASIC's two Regulatory Guides – *RG 174 - Externally administered companies: Financial reporting* and AGMs, and *RG 108 – No action letters.*

5.6 ***Company deregistration process***

We note there will be changes in the company deregistration process for voluntary liquidations. We assume this reform is to be co-ordinated with the changes proposed in the Corporations Amendment (Phoenixing and Other Measures) Bill 2012 and we have made the same point in our 24 January 2012 submission to Treasury on that Bill. Also, this change of process should apply to court ordered liquidations, given that the distinction between the two types is to be removed.

5.7 ***Creditors calling meetings***

There are proposals for new consistent rules about when practitioners can be required by creditors to call a meeting, including as to security being required to cover the cost of the meeting. We point to the requirements as to security for the costs of holding a meeting in s 73A of the Bankruptcy Act as a precedent and also our comments at 1.2 regarding situations where the practitioner is without funds.

5.8 ***Virtual meetings***

We agree that the Corporations Act should be aligned with the Bankruptcy Act to allow for voting on resolutions without requiring the calling of a meeting. We suggest the wording of s 64ZBA be examined for this purpose. However, that section limits the resolutions to a single proposal for decision by creditors. We consider that multiple proposals should be possible, as is proposed, and recommend that the Bankruptcy Act section be extended to align with this proposal for the Corporations Act.

5.9 ***Receipts and payments***

We are against the proposal that in corporate administrations, six monthly receipts and payments are to be replaced with an annual report of all administrations. This is of significant concern to many of our members because we consider that this is information that should be available to creditors or other stakeholders about administrations.

We do however suggest that the form of report – ASIC Form 524 – should be improved to allow easier and more meaningful reporting. In that regard, it may be that the Standard Business Reporting (SBR) project of your department, in which ASIC is participating, may be able to assist on this issue. The input of the Australian Bureau of Statistics may also be useful in terms of extracting statistical information from forms lodged.

Improvements to the Form 524 should also mean that the requirement for the lodgement of audited accounts of a company in liquidation or administration could also be removed, rather than having to rely on exemptions from ASIC (refer discussion on AGMs at 5.5). Improved Form 524s could provide sufficient information for the period of the insolvency administration, with the company having to bring its financial statements up to date in the event that the company returns to solvency.

If lodgements were to be made annually, our strong view is that the requirement to provide an annual accounting for every corporate and personal insolvency administration on the same day each year would impose a significant burden on practitioners and their firms which would be unreasonable.

If this law were to be introduced, it would be better if reporting were required to be made on the annual anniversary of the practitioner's appointment.

6 Chapter 6 — Funds handling and record keeping

We generally support the proposals in this chapter.

6.1 *Combined bank accounts*

We agree that allowing combined bank accounts will be of particular use in small insolvency administrations. We however suggest that the monetary threshold be reduced to $10,000 and that combined accounts not be available for any insolvency administration in which a business is being traded on. Although we think it is unlikely that a trading business would meet the threshold requirements, we still believe that it should be clearly stated that an insolvency administration involving a trading business must have a separate account.

The input we have received from members indicates that this provision will be most useful in situations where only small amounts of cash are recovered in an administration (for example, on the closure of the company's bank account) and it is not anticipated that any further funds will be recovered.

6.2 *Electronic copies*

We disagree with the proposal that the regulator should need to decide whether to allow electronic copies of document to be retained. We suggest that instead the law should give the practitioner a clear right to choose in which form records are to be retained, including electronic if so chosen.

6.3 *Audits*

We note that at paragraph 128 of the paper it is proposed that, in the case of corporate insolvency, the audit provisions be extended to empower a regulator or the court to appoint another insolvency practitioner (practitioner A) to review and report on all or part of another practitioner's (practitioner B) administration. We are concerned to ensure the law provides proper legal protection for practitioner A as the person providing the report and natural justice for practitioner B as the practitioner being audited. We would be concerned if, as the paper says, practitioner A would have to report their findings directly to creditors as a whole or to the COI. This would be potentially unfair to practitioner B, who may dispute the report. We consider that A be required to report only to the court, or to the regulator. It will then be a matter for either of those to deal with the issues in the report and, if necessary, seek a response from practitioner B before such information is disseminated to creditors.

7 Chapter 7 — Insurance requirements for insolvency practitioners

We agree with the changes but say that the penalty of 1,000 penalty units is too high. Compliance with the law is not necessarily secured by high penalties, rather by effective regulation.[8] There is no penalty of that degree, or at all, in bankruptcy or in relation to insurance requirements of auditors.[9] We agree that a penalty is appropriate but consider that a maximum of 100 penalty units is sufficient.

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[8] We also note that "there is only very limited evidence of a practitioner letting their insurance lapse ...": *'A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia'*, 2 June 2011 at [422].

[9] Section 1299B Corporations Act.

8 Chapter 8 — Discipline and deregistration of insolvency practitioners

As we have said, the proposed law in relation to powers of the regulators to take direct action in relation to certain breaches – including preventing practitioners taking new appointments - without reference to a discipline committee, will need to address natural justice concerns of the practitioner. Care should be taken in managing the potentially conflicting roles of the regulator acting as the prosecutor and the determiner of the outcome and of the penalty. This is why, in most instances, the IPA considers that it should be up to the Committee to determine the final outcome of a matter, even if ASIC or ITSA take interim suspension action against a practitioner.

We note that the IPA and other bodies would also have standing to refer their members to a discipline committee. As we have explained, this is a regime which we would like to discuss with you further.

8.1 *Restriction on insolvency employment*

We note there is a power of a Committee to restrict a practitioner from working in insolvency, that is, acting on behalf of another practitioner following their deregistration or suspension. Practitioners would have a corresponding duty to not knowingly engage such a person to act in an administration contrary to the terms of such a determination by a Committee.

We do not agree with this. It is a matter for a practitioner to engage assistance in an administration. Although delegation of tasks is proper, it is the appointed practitioner who has the responsibility for ensuring that they maintain the necessary control over the decisions made and discretions exercised.

From the perspective of the practitioner who has been sanctioned, we do not see why as a matter of principle they should be deprived of the means of earning a livelihood by undertaking paid employment under the supervision of a licensed practitioner. We see no reason why their position should be any different from that of a director who has been disqualified from managing a corporation. The conduct prohibited by section 206A would not, in our submission, prevent that person being an employee of a corporation engaged in the same line of business as the corporations whose affairs gave rise to the disqualification.

What we do suggest is that if a deregistered practitioner goes to work in another firm, none of their files should be transferred to a practitioner in that firm. The reason for this is that the files may have been poorly managed and there is a need, even if on a perception basis only, for an independent practitioner from another firm to deal with those issues. In that respect, there is a proposal that upon a vacancy following the appointee's suspension or deregistration, the regulators would be able to appoint a replacement practitioner, unless the Committee or Court has done so. This may therefore be an issue for regulator guidance or direction as to how that decision is made.

8.2 *Review of conduct – new section*

The proposed reforms would consolidate into a single provision, replicated in both the Corporations Act and Bankruptcy Act, a power of a person to seek review of an insolvency practitioner's conduct. Any new section would address the problem with s 536 raised by the Victorian Supreme Court in *Vink v Tuckwell.*[10]

[10] [2008] VSC 100; [2008] VSCA 204

We note that paragraph 174 of the proposals paper says that certain prescribed bodies would be given standing to apply to Court for the review of a practitioner's conduct. We understand that it is intended that the IPA may be prescribed, in relation to an IPA member's conduct. We would like to discuss the detail of this with you.

9 Chapter 9 — Removal and replacement of insolvency practitioners

Creditors would be given the power to remove practitioners by resolution passed by a majority in value and number.

The proposals paper says that a practitioner would be able to apply to court to prevent their removal on the basis of an improper use of the power to remove them, as opposed to any merits review of the collective decision of creditors to remove the practitioner.

While a number of IPA members have expressed some reservations about this, we believe that the relevant provisions in bankruptcy, on which the proposal is based, currently function without giving rise to significant areas of concern. Similar law also applies in the UK.

This right of creditors has always existed in bankruptcy – s 181 *Bankruptcy Act* - and according to our trustee members, has not raised any great issues of concern. The case law confirms that. A review by the court of the creditors' decision to remove the trustee is often based on a range of issues because the courts in bankruptcy have available the broad power under s 30 of the Bankruptcy Act for this purpose. Section 181 itself contains no right of challenge to the trustee, or any other party. Applications under s 30 are made by bankrupts, and creditors, and also by the trustee. The law was recently discussed and applied in *Mango Boulevard Pty Ltd v Whitton* [2011] FCA 138, the court accepting that while creditors have a right to replace a trustee, the court will act to prevent abuse.[11]

We consider that regard should be had to the regime in bankruptcy in drafting the relevant provisions. These include the power of the court to act to prevent abuse, and the range of affected parties who may apply to the court to challenge the removal of a practitioner.

9.1 *Overseas comparison*

We also note that in the UK, the law allows the practitioner to be removed by the creditors, or the court. Section 172(2) of the Insolvency Act 1986 (UK) provides that a court appointed liquidator "may be removed from office only by an order of the court or by a general meeting of the company's creditors summoned specially for that purpose in accordance with the rules". There is no particular provision allowing only the practitioner to review that decision.

9.2 *Provisional liquidators*

However section 172(2) of the UK *Insolvency Act* also says that a provisional liquidator may be removed from office only by an order of the court. We agree that a provisional liquidator should only be able to be removed by the court.[12] Given that their appointment is

[11] The court cited *Re Crawford*[11] to the effect that the court ought not to interfere with a resolution of the creditors that the trustee be removed, *unless good cause is shown for its interference, pointing out that it* is not for the creditors to decide how the bankruptcy law should be administered. The Court will overrule creditors' decisions if it thinks they have been persuaded to agree to some course which the Court thinks is improper.

[12] The relevant provisions are s 108(2) of the Insolvency Act 1986 (UK), ss 171-172 (depending on the type of winding up). Section 298 is the analogous provision, in much the same terms, in bankruptcy. The court cases tend

provisional and subject to direct and ongoing supervision by the Court, this must be the case.

9.3 ***Records, and remuneration***

We note that it is proposed that possession of both debtor and administration records will pass with a change in practitioner, with the former practitioner retaining rights to inspect and obtain copies of the records. Also, a practitioner's right to their own records of the administration, including any liens in respect of remuneration, would arise but this is said to be subject to the rights of subsequent practitioners to take possession of and use records for administration purposes. If that is the case, then any lien in relation to remuneration would be compromised, to the detriment of the replaced practitioner.

In any event, we suggest that the remuneration rights of the practitioner who is replaced be made more certain than is proposed. It is an area of uncertainty and dispute in practice under the existing law; it should properly be the subject of particular legal provisions.

10 Chapter 10 — Regulator powers

Regulators will also be able conduct practice reviews and reviews of individual administrations, and to attend the practitioner's firm for the purpose of doing so. We agree that suspicion of a breach is not required for these powers to be exercised. Again, we suggest an alignment of the laws between ITSA and ASIC to ensure consistency of exercise of these powers.[13]

Laws will facilitate the regulator being able to give to stakeholders in any given administration - including creditors, members, directors, employees, and the bankrupt - information or material relating to the administration that the practitioner could give. Without pre-empting the drafting, ITSA already has powers to disclose information, and may provide a report on the outcome of any inquiry or investigation into an administration to any person it thinks fit: s 12 *Bankruptcy Act*. That section may be a useful precedent.

10.1 ***Sharing of information***

The bodies with which the regulators can share information would also be increased - to the IPA, Law Societies and prescribed professional disciplinary bodies. In that case, the IPA itself would require some legal protection and guidance in relation to its holding of such confidential information and the use to which it may be put. We assume you have sought the views of the relevant Law Societies and other professional disciplinary bodies who may have raised similar issues.

10.2 ***Regulator reporting***

It is proposed to increase reporting by ASIC against key criteria, including in relation to its insolvency surveillance program. We suggest that common reporting requirements be used by the two regulators where possible.

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to revolve around the exercise of the court's power of removal. See for example *Re St Georges Property Services (London) Ltd (Finnerty v Clark)* [2011] BCC 702; *Re Edennote Ltd (Tottenham Hotspur v Ryman)* [1996] BCC 718. We are not aware of cases from the UK where the court has reviewed such a decision taken at a creditors meeting.

[13] Useful principles and guidance are contained in IGPS 11, Monitoring and inspection of bankruptcy trustees and debt agreement administrators, issued September 2008.

11 Chapter 11 — Specific issues for small business

Reforms are proposed to allow practitioners to assign causes of action in corporate insolvency. We see no real issue with that, although we assume the general law that applies in bankruptcy will remain, that a practitioner should not assign a cause of action that is vexatious or frivolous.[14] The terms of the assignment would invariably be that the estate would receive a payment for the assignment, or a proportion of the proceeds of any successful action. We note that such a law applies in New Zealand.[15]

As to the right to assign an insolvent trading claim, we suggest that attention will need to be given to consequential amendments to s 588R of the Corporations Act, which allows a creditor to pursue an insolvent trading claim, and following sections.

As to the extension of the assetless administration fund, we draw your attention to our submission to Treasury of 24 January 2012 on the Corporations Amendment (Phoenixing and Other Measures) Bill 2012.

The penalty for failure to lodge a report as to affairs is proposed to be increased to 50 penalty units. ASIC would be able to issue notices to directors requiring completion of the RATA, which would mirror the current power afforded to ITSA under s 77CA of the Bankruptcy Act, with an offence provision for non-compliance in section 267B. Those sections may provide useful precedents for corporate insolvency.

The IPA through its Terry Taylor Scholarship has funded a research project by Mr Peter Keenan on the form of the RATA and its effectiveness, the outcomes of which we will raise with you separately.[16]

12 Chapter 12 — 2010 Corporate Insolvency Reforms

We have no particular comments on these proposed reforms but will examine the drafting closely when the draft Bill is released.

13 Co-operatives, Indigenous Corporations

We wish to raise the issue of the regulation of entities that are not registered under the Corporations Act.

Many members of the IPA are appointed as registered liquidators of co-operatives and other not for profit entities registered under state laws. The new Cooperatives National Law will come into effect this year.[17] Co-operatives and those practitioners appointed to administer their insolvency are regulated by state Offices of Fair Trading.[18]

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[14] See *Citibank v Official Trustee* (1996) 71 FCR 550.

[15] See section 260A Companies Act 1993 (NZ). As to New Zealand, we assume that regard will be had to relevant aspects of New Zealand insolvency law in terms of the trans-Tasman cross-border insolvency arrangements announced by the respective governments on 18 March 2009, to which the IPA and others have contributed.

[16] We understand that Mr Keenan has lodged a submission with you.

[17] Treasury will be aware that this is the United Nations International Year of Co-operatives - http://www.2012.coop/.

[18] An insolvency administration handled by Mr Ariff was a co-operative registered under the NSW Co-operatives Act 1992 – Adamstown Rosebud Sport & Recreation Club Co-op Ltd. Its administration was not the subject of attention by ASIC, nor by its regulator, the NSW Office of Fair Trading, nor by the NSW Supreme Court when orders were made against Mr Ariff. We also note the recent establishment of the Australian Charities and Not-for-profits Commission and its role in this area.

Also, the Registrar of Indigenous Corporations has a parallel role to ASIC in relation to corporations wound up or placed into administration under the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006. Again, registered liquidators are often appointed to these corporations including as administrator on the request of the Registrar.

We reiterate the need for mechanisms to ensure that indigenous corporations and state and territory co-operatives, and other such entities, are consistently regulated for the purposes of insolvency.

14 Contact

Please contact the IPA if you have any questions about any aspects of this submission.

Yours sincerely

R Erskine

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