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McGRATHNICOL

29 July 2011

The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/Madam

Options Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia ("the Options Paper")

This submission is made by McGrathNicol, a firm of 31 partners including 19 registered liquidators, the majority of whom are members of the Insolvency Practitioners Association of Australia ("IPA").

It is relevant in the context of a number of the options presented in the Options Paper to note that McGrathNicol does not practice in bankruptcy, nor does a material proportion of our practice emanate from the small business, owner/operator sector.

Consistent with our submission to the Senate Inquiry into the role of liquidators and administrators, their fees and practices and the involvement of ASIC prior to and following the collapse of a business which reported in September 2010 ("the Senate Inquiry"), we are supportive of initiatives which seek to improve the efficiency and effectiveness of the legislative regime and regulatory framework to address incidents of poor conduct by registered liquidators. We also support changes which may enhance community understanding and confidence in what we believe is a robust regime.

We have worked closely with the IPA as it has developed its response to the Options Paper. Our views in regard to the options presented in the Options Paper and the questions asked will be reflected in the IPA response.

Matters which we would independently seek to emphasise are:

- The insolvency profession is highly regulated. Further regulation will have no impact on those who are intent on operating outside the existing legislative and regulatory requirements and will run the risk of increasing the costs of insolvency to creditors and/or diminishing competition in the profession as it becomes increasingly difficult for smaller practices to manage the compliance burden.

  The better approach to improving public confidence in the system is to ensure the regulator, ASIC, is appropriately equipped in terms of powers, resources and will to monitor liquidator compliance and act swiftly to address recalcitrant, or indeed criminal, behaviour.

- We oppose any proposals which reduce the qualifications necessary to attain registered liquidator status.

  The thesis that the qualification requirements create a barrier to entry which promulgates excessive fee levels is not supported by evidence. Even if it were, if the objective is to ensure high levels of professionalism and competence, the remedy cannot be to weaken entry and on-going requirements.

- We support a regime involving a periodic renewal of registration requiring registered liquidators to demonstrate ongoing compliance, no adverse findings and continuity of relevant experience.

  It is our assessment that the practitioners who destabilise public confidence in the regime include those who do not practice in the sector on a consistent basis and are ill equipped to maintain professional focus and competence, those who have drifted into complacency over the years and those who are intent on misconduct. A periodic registration renewal process, if properly conducted, will deny these categories ongoing participation.

- We support alignment of bankruptcy and corporate insolvency processes to the extent that this achieves higher standards, efficiency in delivery of services or regulation and simplicity for those stakeholders involved in both.

  In some aspects however, alignment is not appropriate. Some examples:

  - the experience qualifications for a bankruptcy trustee must differ from those of a registered liquidator, although the process for registration may be common;
  - the substance of matters to be reported in personal and corporate insolvencies should differ although the processes (eg use of website notices and streamlined meeting procedures) may be aligned.

- Whilst the Government has eschewed the Senate Committee recommendation to create a new regulator for personal and corporate insolvency, we remain advocates for the concept of an independent ombudsman or similar as an educator and a centralised repository for complaints.

  It is the case in matters of corporate insolvency that few have any interest in what it involves until they are directly affected. Once in those circumstances, the parties in a position to provide the information stakeholders may require (e.g. ASIC, the registered liquidator) are commonly viewed with suspicion. ASIC, because "it should have stopped the insolvency"; the registered liquidator because (s)he is remunerated from assets which may otherwise flow to the stakeholders. Ill-informed as these views may be, they appear to be widely held.

  We would see the ombudsman or similar, as an educative body with the power to investigate and rule on complaints. The ombudsman should be empowered to report complaint statistics and themes and refer matters for investigation to:

  - ASIC which must have the powers to, on a timely basis, deregister liquidators, initiate civil or criminal proceedings and undertake risk based surveillance or inquiry projects; and
  - The IPA which can take alternative disciplinary action and/or implement profession wide education initiatives.

  Should any independent body be set up, it should not be funded by an impost on creditors; rather the cost should be borne by all participants in the corporate sector which enjoys the benefits of a robust insolvency regime, by way of an impost on all companies as part of the annual registration fee.

We thank you for the opportunity to present these views and would be pleased to discuss them further.

Yours faithfully

McGrathNicol
Robyn McKern
CEO