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Pitcher Partners, including Johnston Rorke,
is an association of independent firms
Melbourne | Sydney | Perth | Adelaide | Brisbane

3 February 2012

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

By Email: insolvency@treasury.com.au

Dear Sir

PROPOSALS PAPER: A MODERNISATION AND HARMONISATION OF THE REGULATORY FRAMEWORK APPLYING TO INSOLVENCY PRACTITIONERS IN AUSTRALIA – DECEMBER 2011

Pitcher partners New South Wales welcomes the opportunity to offer comment on the proposals paper and accordingly includes its submission thereon in the below numbered paragraphs.

Pitcher Partners New South Wales is an independent accounting firm with a specialist insolvency division represented by four official liquidators and two bankruptcy trustees. Pitcher Partners is a national association of independent firms and an independent member of Baker Tilly International. Anthony Elkerton is a member of the Insolvency Practitioners Association (IPA) NSW state committee, and is the point of communication with Pitcher Partners New South Wales in relation to this submission.

Overall Comments

We are firmly in favour of the majority of the proposed reforms and are of the opinion that the reforms largely achieve the stated objectives in paragraph 4 of the proposals paper. Whilst we are in agreement with most of the reforms, we have a number of concerns and comments in relation to certain of the proposals. We deal with those issues in the following section.

Specific Comments

Adopting the numbering of the proposals paper, we offer specific comments as follows:-

Paragraph	Comments
HARMONISED STANDARDS OF ENTRY	
26	We are supportive of the reforms proposed; however some clarity as to the definition of "senior experience" needs to be provided. Will the definition be the same as already exists in ASIC Regulatory Guide 186 (paragraph 186.54)? We support the restricted class of registration for those who practice only in certain areas of insolvency such as receiverships. However, our view is that a practitioner who has that restricted registration equally needs the knowledge of a liquidator and trustee. In many insolvencies, there are frequent dual appointments with competing and complementary roles. Therefore we recommend that the restricted registration require the successful completion of the IPA Insolvency Education Program (or approved equivalent).
CONDITIONS ON REGISTRATION	
33	In respect of the residency requirements, while the New Zealand exemption is applauded, we note that many of the larger firms will have offices or affiliated practices in other parts of the world where practitioners may be seconded for periods of more than 12 months. Some large administrations may require an individual to relocate for extended periods. We recommend that the exemption should apply to other countries with similar insolvency systems as Australia.
APPLICATION TO BECOME A PRACTITIONER	
43	The registration fee should be harmonised between corporate and personal insolvency registration if the registration process is to be brought into line. The current bankruptcy trustee fee represents the additional costs of having registration by committee. We also consider that the industry representative should be remunerated for their time in participating on the Committee so as to ensure the broadest industry representation as possible.
CASTING VOTES ON REMUNERATION	
66	We consider that the definition of "ordinary resolution" should be aligned under both corporate and personal regimes. Creditors will otherwise remain confused, which ultimately will lead to greater costs.
COST ASSESSMENT IN CORPORATE INSOLVENCY	
73	We recommend that reasonable timeframes be legislated for the regulator to appoint a costs assessor from the time the practitioner makes a remuneration claim. It would be disadvantageous to a firm's business operations to have costly remuneration reviews after lengthy periods have elapsed from notice of the claim by practitioners and possibly after the administration has been completed. We suggest a 6 month time limit.
74	The Inspector-General in Bankruptcy already has the ability to review remuneration claims in personal insolvency. If harmonisation is the key purpose of the reforms, cost assessment regimes should also be harmonised to lower the costs to practitioners who operate in both corporate and personal matters.
77	If a costs assessment is consented to by the practitioner, at a creditor's request (or creditors voting), then the costs of that review should be borne by the individual creditor (or creditors voting) if the reduction is less than 10%. If a costs claim is

	reduced by greater than 10%, the cost should be borne by the practitioner.
79	If a costs assessment is initiated by the regulator, then the costs of that review should be borne by the regulator if the reduction is less than 10%. If a costs claim is reduced by greater than 10%, the cost should be borne by the practitioner.
REVIEW OF TRUSTEE REMUNERATION IN PERSONAL INSOLVENCY	
83	Trustee notice requirements are already extensive, complex and costly. Any new requirements must be considered in a way that reduces the administrative costs to trustees.
COMMITTEES OF INSPECTION	
87	We are concerned that if a general meeting of creditors does not pass a resolution, a COI may be able to pass the same resolution at a subsequent COI meeting going against the will of the general body of creditors. Would the practitioner be able to apply to Court for a determination and who should meet the costs? If a practitioner is to have "due regard" to resolutions of the COI, there should be some explanation of what constitutes "due regard", particularly in light of commercial decisions that need to be made by practitioners in the interests of the general body of creditors and where such decisions may impact financially on a member of the COI (eg a preference recovery from a COI member). If a COI can obtain specialist advice or assistance, who is to meet the costs of that advice? The administration, the COI member individually or the COI as a whole? Who determines if that assistance was necessary and of benefit to creditors generally? Who agrees to the costs? Will there be a quote for approval by the practitioner? If a COI requires a meeting of creditors to be convened and disseminate information, who is to bear the cost, particularly in unfunded administrations? Proposal 87(h) is taking the Voluntary Administrators power in S.437C (1A) to allow Directors to exercise some or all of their powers by written consent to all forms of administrations and at the same time extending the power to give consent to the Court, Creditors and a COI. We are concerned that Creditors or a COI may restore director's powers where an administrator has previously refused. This may lead to conflict between the director and an administrator as their interests are very rarely aligned and potentially have a negative impact on the orderly conduct of the particular administration. If the power is to be extended from that that exists currently we are strongly of the view its right to be exercised should be limited to Practitioners and the Court.
COMPOSITION OF COI	
92	Under the proposals, a creditor with more than 10% of the votes could automatically be appointed onto the COI and would then not be able to vote on the composition of the remainder of the COI. However if a Creditor elected not to take up the automatic position they could use their voting power to elect themselves onto the COI and continue to vote in respect of the composition of the COI. We are of the view that a creditor with more than 10% of the vote should have the ability to elect whether or not they wish to be on the COI. However, if they choose not to take up a position, they should still not be entitled to vote on the composition of the COI. This would protect the interests of large and small creditors alike and may ensure a greater likelihood of a more diverse creditor representation on a COI. It should also be stipulated that a nominee to the committee must be a creditor, or an employee or direct consultant

	engaged by the creditor.
AD HOC INDIVIDUAL REQUESTS FOR INFORMATION	
95	The provision of reasonably requested information should be standardised across the corporate and personal regimes in line with the harmonisation goal of the reforms. We also recommend that requests for information be able to be provided in specific categories for example:- • Realisations by type • Amounts paid to the practitioners firm • Amounts paid for legal advice • Other contracted disbursements • Legal actions contemplated • Estimate of dividend • Estimated time to complete
97	We have been and remain concerned that provision of certain types of creditor information such as the debt owed to particular creditors, rather than a total indebtedness of the Company may have privacy and commercial impacts on particular creditors. For example two suppliers of similar products or services to an insolvent company may seek to exploit commercially sensitive information such as an outstanding debt from a company for unfair advantage. We would recommend a threshold (say $10,000) be established and Practitioners would only have to nominate if the amount owed was above or below the threshold. Additionally some creditors (particularly individuals such as employees) may not wish to have their personal addresses made available to other parties. They may have a silent telephone number so their address and contact details don't appear in the White Pages yet Practitioners are compelled by law to provide their details to third parties when their permission has not been sought. Creditors having the ability to opt in or out of the provision of their details, may partially address this concern, however for large insolvencies the administrative costs may be burdensome.
98	We are of the opinion that practitioners should continue to lodge full receipts and payments with the regulators but on an annual basis. This information is computerised and filed online. It is not costly to file the information and provides stakeholders with full disclosure.
REPORTING TO STAKEHOLDERS	
102	Present privacy laws currently prevent the online publication of reports to creditors in personal insolvency matters. Ancillary legislation needs to be enacted to ensure that practitioners do not breach privacy laws with the release of confidential information online. We note that in personal insolvency, Part A of the Statement of Affairs is confidential and not publicly available. With increased access to information, consideration needs to be made as to the availability of certain information.
MEETINGS OF CREDITORS	
106	With the reforms allowing creditors to "more frequently" call meetings subject to sufficient security being lodged, the legislation should be harmonised in similar terms to Section 73A of the Bankruptcy Act, where any excess security is refunded to the provider of the security. Direction needs to be provided as to where those funds are

	kept (ie administration account or a firm's trust account) until the costs of the meeting are determined. Additional consideration as to whether general body of creditors needs to approve the meeting costs and draw down on the security by the practitioner.
ANNUAL ESTATE RETURNS	
110	We note the annual reporting proposals which are similar to the Annual Estate Return in personal insolvency. Annual Estate Returns are a summary of the transactions by category with the practitioner maintaining full transaction details on file. As noted in our response at paragraph 98, we do not consider that provision of full transaction details is an onerous task on the administration given the computerised nature of the information. Our view is that full transaction details should be continued to be lodged and personal insolvency aligned in this regard. We agree that the returns should be lodged annually rather than bi-annually.
112	The recent Infringement Notice regime under Section 277B of the Bankruptcy Act is not dissimilar to the corporate late lodgement fee already. Late fees are already the personal liability of the trustee and not reimbursable from the administration. We query whether there is any benefit to amendments proposed.
FUNDS HANDLING	
115	We are supportive of the reforms; however we consider that the accounts should be subject to annual audit in line with similar trust account obligations. If a Practitioner wishes to make use of this facility they should have to provide the Annual Audit Certificate to the Regulator.
117	Interest, whether on deposited funds or penalty interest should be made available for the benefit of creditors generally and not paid to the Commonwealth. The corporate and personal regimes should be aligned and the Bankruptcy (Estate Charges) Act 1997 repealed.
119	Monthly bank reconciliations are an essential risk minimisation tool and we agree with the harmonisation of the regimes. Accounts should also be subject to audit by the regulator in accordance with trust account regulations.
120	As noted in our response at paragraph 117, we are of the opinion that the interest charge in personal insolvency should be abolished and the investment of funds be aligned in both regimes. Interest should be made available for the benefit of creditors generally.
ANNUAL PRACTITIONER RETURNS	
138	We are concerned that the proposed lodgement fee based on the number and type of administrations in corporate insolvency may adversely impact small practitioners or those practitioners who handle large volume but assetless administrations. Additionally, if a fee for lodgement is to be implemented then it should be aligned with the personal regime. The aim of harmonisation is to reduce compliance costs of practitioners. Separate regimes will only increase those costs. We reiterate our view that the Bankruptcy (Estate Charges) Act 1997 should be repealed and a more equitable lodgement fee system implemented across the

	regimes. The imposition of a 4.4% realisation charge payable on unsecured asset realisations is inequitable to creditors of particular bankruptcies who are being disadvantaged for the insolvency of other debtors where no assets are realised.
COMMITTEE FUNCTIONS	
157	While we are strongly in favour of strengthened disciplinary action for non-complying practitioners, we are concerned that restricting some practitioners from acting as supervised (by the regulators) or as delegates of other practitioners (such as managers) may lead to the situation where a practitioner may be unable to earn a living. We are of the opinion that where a practitioner is suspended and they retain their employment with the same firm, then that practitioner's files should be transferred to a practitioner from a different firm. Likewise, if the suspended practitioner moves to a new firm, the files should not be transferred to a practitioner also from the new firm.
IMPOSITION OF CONDITIONS	
162	We question the rationale of not making the undertaking itself public. This we consider to be in the public interest.
COMMITTEES – GENERAL RULES	
163	We question whether any conditions imposed on practitioners could be appealed to the AAT.
REMOVAL RESOLUTION	
181	We agree with this reform save for the motion to be passed, it should be by at least 50% in number of all creditors entitled to vote, not just those in attendance at the meeting.
INITIAL MEETINGS OF CREDITORS	
188	We consider that the proposed 5% threshold to require a meeting is too low as quite often this may represent one creditor. We recommend the threshold be set at 10%.
IMPROVE SURVEILLANCE OF LIQUIDATORS	
198	We recommend that fair and reasonable notice of inspection by the regulator be provided in a similar manner to the notice provided by Bankruptcy Regulation for annual trustee inspections.
ASSETLESS ADMINISTRATION FUND	
224	Consideration of funding phoenix investigations needs to be available to liquidators in court appointed liquidations already in existence not just in the case when no liquidator is willing to sign a consent to act.
225	Is it intended that registered trustees (as stated in this paragraph) be granted access to the AA Fund? Or is this to be restricted to liquidators? We would be in support of a common fund across both the corporate and personal regimes in the interest of harmonisation of the industry.
REPORT AS TO AFFAIRS/STATEMENT OF AFFAIRS	
228	We consider that the RATA form (form 507) should be updated and simplified. We receive many comments from directors that parts of the form are confusing and complicated, which often leads to late or non-lodgement by directors.

234	While we agree that suspensions should come to an end after compliance (ie lodgement of the RATA), this reform needs to incorporate flexibility to extend suspension where a RATA is substantially incomplete or knowingly includes incorrect information. Directors frequently write "nil" or "not applicable" which impedes the administration and increases costs. By having the ability to extend a suspension, there should be an increased accuracy level in the completed RATA forms. In bankruptcy if a Statement of Affairs (SOA) is not completed to the satisfaction of the Bankruptcy Registry, the SOA is rejected and the bankrupt remains bankrupt indefinitely. The same provision could apply to this reform where if the RATA is not acceptable to ASIC, the suspension is indefinite until such time as the RATA is completed to an acceptable level.
ACCESS TO CREDITOR LISTS	
242	We reiterate our concerns as to privacy and the release of potentially sensitive information about a creditor's debt to its competitors as noted in paragraph 97 above.

Generally

Pitcher Partners NSW supports the Government's measures to better regulate the profession and harmonise the corporate and personal insolvency regimes in Australia. We would be pleased to contribute to any further discussion or consultation with the industry.

Please free to contact me in respect to our comments above.

Yours faithfully

ANTHONY WAYNE ELKERTON
Partner