4 August 2011

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

By email: Insolvency@treasury.gov.au

Dear Sir,

Submission on the "Options Paper: a modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia"

I make this submission on the Options Paper in my private capacity as a chartered accountant and registered company liquidator. Accordingly it does not express the views of the firm in which I am employed or any of the professional bodies of which I am a member.

1 Proposal for a new regulatory scheme

I support the implementation of a two-tiered regulatory scheme for insolvency practitioners that was first proposed and outlined in the report of The Australian Law Reform Commission ('the Commission') titled "ALRC 45 – General insolvency inquiry 1988" (more commonly known as "the Harmer Report") and which has recently been proposed again in an article by Professor Harmer in the Australian Insolvency Journal (2011 volume 23 number 1, January – March 2011) and in a presentation made by Professor Harmer to the National Conference of the Insolvency Practitioners Association of Australia held in Brisbane on 1 – 3 June 2011.

2 "The new regulatory scheme"

The 'new regulatory scheme' set out in ALRC 45 and the abovementioned article and presentation by Professor Harmer is fundamentally a two-tiered scheme which consists of:

a. firstly, a statutory board ('the board') , in which all powers and functions for the registration and regulation of insolvency practitioners should be vested: and

b. secondly, that the board have the power to appropriate powers and functions to the professional associations or association.

3 The statutory board

The statutory board under this proposal consists of seven persons appointed by the Attorney-General: three of which would be registered insolvency practitioners chosen from persons nominated by the profession(s); one as a nominee of the Attorney-General; two lay persons who are not registered insolvency practitioners and one legal practitioner chosen from persons nominated by the Law Council of Australia.

Importantly, the proposal indicates that the functions of the board would be:

- determining appropriate standards for registration and classification of insolvency practitioners
- classifying insolvency practitioners according to their experience, knowledge and ability
- administering a fidelity fund
- arranging for the audit of administrations conducted by insolvency practitioners
- acting upon complaints received against insolvency practitioners
- overseeing standards of ethical and professional conduct
- delegating responsibility for certain functions to the professional bodies (or body)
- issuing annual practising certificates
- setting relevant rates of remuneration

While I consider that the last of these functions (i.e. setting relevant rates of remuneration) is no longer appropriate because the setting of profession-wide rates of remuneration is now viewed as anti-competitive, the remainder of the recommended functions of the board are still relevant today and will continue to be so in the future.

4 The professional bodies

The professional bodies mentioned in the proposal, when it was initially formulated, were the Insolvency Practitioners Association of Australia ('IPA'), the Institute of Chartered Accountants in Australia and CPA Australia, however in view of the growth and increased standing of the IPA since that time, I consider that the role of the professional bodies in this proposal could be adequately performed by the IPA.

This assumes that the IPA would support the proposal. In its submission to the Senate Inquiry the IPA suggested a proposal for an insolvency ombudsman. I consider that the suggestion for an insolvency ombudsman is not that far removed from the statutory board contained in the "two-tiered scheme" proposal.

The proposal provides that the professional bodies would exercise powers delegated by the statutory board and it is suggested that these powers could include:

- conducting the registration system for insolvency practitioners
- conducting continuing education courses
- conducting investigations into complaints concerning insolvency practitioners

5 The benefits of the proposal

I have only outlined the basics of the two-tiered scheme, however the proposal is more fully explained in Professor Harmer's article in the Australian Insolvency Journal, which updates the proposal initially made in ALRC 45. I recommend a full reading of the article for a complete understanding of the scheme proposed.

I note that the article and presentation by Professor Harmer on this proposed new regulatory system focused on the self-regulation aspects of the system.

In my view the proposal outlined above has some major advantages over the current system in terms of cost and efficiency, such as the following.

i Elimination of the duplication of time and money on regulation of the insolvency profession

The Options Paper states that the removal of insolvency from the responsibility of ASIC, would remove substantial efficiencies. This is because removal of corporate insolvency from the corporate regulator, ASIC, would result in corporate insolvency losing its important connections with other parts of ASIC, for example in relation to major corporate administrations, regulation of insolvent trading and of director and corporate misconduct that may have been engaged in leading up to, or during, an insolvency event.

The view expressed in the Options Paper is in response to the Senate Committee recommendation that the corporate insolvency arm of ASIC be transferred to ITSA to form a new personal and corporate insolvency regulator.

In my view the corporate insolvency arm of ASIC should not be transferred to ITSA and thus it should remain with ASIC. However the regulation of insolvency practitioners should be transferred from ASIC to the statutory board. This is not necessarily inconsistent with the above views expressed in the Options Paper because I am not proposing the removal of the remainder of insolvency regulation from the responsibility of ASIC.

My reason for supporting the removal of the regulation of insolvency practitioners from ASIC and its transfer to the board under the above proposal is to overcome the current duplication of time and money that occurs in the regulation of insolvency practitioners. Unlike the regulation of the remainder of corporate insolvency, ASIC is not currently and will never be the sole regulator of the insolvency profession. The professional bodies also regulate the insolvency profession, as part of the normal functions of a profession. This includes, for example, developing and issuing standards of performance and conduct.

The professional bodies devote a substantial amount of time and resources to the development and updating of standards of conduct for their members.

Also ASIC, being the statutory regulator, quite rightly devotes substantial resources to form its own views and interpretations of correct and proper conduct by insolvency practitioners. It currently communicates those views to the public in the form of regulatory guides. While there is room for ASIC to take into account the views of the professional bodies, it is unable under the present system to delegate its responsibility for regulation of practitioners.

Thus under the present system there is duplication of time and money in developing standards of practice, and the like, that would be avoided in the above proposal where the regulation of insolvency practitioners is transferred to the board, which in turn has the power to delegate functions to the professional bodies or body.

ii Elimination of uncertainty and the promotion of a consensus

Under the present system, ASIC and the professional bodies reach their own views about what constitutes proper conduct and practice by insolvency practitioners, and even upon the proper interpretation of legal provisions. While there is a sharing of views between ASIC and the professional bodies, it is inevitable under this system that there will continue to be differences in their respective interpretations. In some matters this may lead to regulatory action against practitioners by ASIC where the profession holds a different view (to the viewpoint held by ASIC) about what constitutes proper conduct.

An often quoted example of the differences that can arise between alternative views of the regulator and the insolvency profession is in relation to the content of reports issued by practitioners under section 439A of the Corporations Act.

Under the proposal outlined above, I consider that this uncertainty about proper practice and conduct would be eliminated. This increase in certainty and consensus about what constitutes proper practice by an insolvency practitioner in a range of areas would lead to more efficient conduct of administrations.

6 Further consideration of the proposed two-tier system

In the context of this submission I have not been able to consider all of the benefits that may arise from the proposed two-tier system. Further consideration is required.

In my view it is timely and relevant in the current debate brought on by the Senate Inquiry and the Options Paper for time and resources to be devoted to a full consideration of the advantages and disadvantages of the two-tier system promoted by Professor Harmer, including the steps necessary for the implementation of such a system.

Yours faithfully,

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