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14 February 2013

Email: insolvency@treasury.gov.au

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

Dear Sir/Madam

Exposure Draft Insolvency Law Reform Bill 2013

We the undersigned Registered Trustees in Bankruptcy have reviewed the abovementioned Exposure Draft related to bankruptcy law and make the following comments.

General comments:

- The changes appear to be a stop-gap measure and if the Government is serious about harmonisation of the Bankruptcy and Corporate Insolvency regimes the Government should, in our view, introduce an "Australian Insolvency Act."
- It is apparent that the Exposure Draft is not yet ready for detailed review because in many instances we expect the details to be included in the as yet unknown regulations.

Accordingly, we reserve the right to make further and detailed comment particularly as much of the detail in the proposed legislation is yet to be drafted.

Specific Comments:

Division 8 - Registering Trustees

- 8.15(2)(a)

We assume that the Inspector-General will not attend every interview and therefore this paragraph should include a reference to a delegate of the Inspector-General. (The current definition of Inspector-General set out of Section 5 of the Bankruptcy Act (the Act) states that: "the Inspector-

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General means the Inspector-General in Bankruptcy and includes a person acting as the Inspector-General”).

- 8.20(2)

Six months (150 business days) is an excessive time to refer an application to a Committee.

- 8.25(3)

45 business days is an excessive time for the Committee to decide whether or not the applicant should be registered especially in light of the 10 business day timeframe in clause 8.60(3).

- 8.25(4)(a) and 8.25(5)

8.25(5) which provides for conditional registration is an unnecessary complication in the registration process. The applicant either complies with (a) or the applicant should not be approved.

- 8.30

Why does this Section not include a timeframe for the Committee to report?

- 8.35

Similarly, how long does the Inspector-General have to register the applicant? We assume that the normal two day period which already applies to lodgement of certain documents as required by the Act will apply to the Inspector-General personally including the strict liability provisions as derived from the Criminal Code.

- 8.50(1)

The Inspector-General **may** convene a Committee to consider an application... made under clause 8.45, but refer to clause 8.55(1) in which the Inspector-General **must** refer an application to a Committee. Surely in such circumstances the Inspector-General **must** convene a Committee.

- 8.50(2)(a)

Refer comments regarding clause 8.15(2)(a).

- 8.55(2)

Six months is an excessive timeframe.

- 8.65

Once again there is not a timeframe in which the Committee is to report.

- 8.70

This clause does not impose a timeframe on the Inspector-General. See notes on clause 8.35 above.

- 8.80(1)(d)

Following lodgement of Annual Estate Returns in July 2012 we understand a number of Registered Trustees received an apparently computer generated letter from the Perth office of ITSA advising that amounts had been underpaid in respect of various administrations. Upon checking with the nominated ITSA officer, we were told to ignore this letter as the letter should not have been sent. We question whether or not the contents of these letters remain as “notified estate charge” outstanding on various trustee files.

Division 16 – Disciplinary and other action

- 16.35(c)

We query whether or not this clause provides procedural fairness.

- 16.40(c)

Refer comments on clause 16.35(c) above.

- 16.50(1)(a)

In accordance with clause 8.25(5), qualifications, experience, knowledge and abilities are not necessarily a requirement for a person to become a Registered Trustee.

- 16.55(2)(a)

Refer to comments concerning clause 8.15(2)(a) above.

- 16.55

- Firstly, we query the procedural fairness of such a Committee. Based on the composition of the Committee we could well have two members of the public service generally with little experience or knowledge as to how Registered Trustees are able to carry out their duties outside of the confines of ITSA where ultimately accountability is not really an issue. For example, if the Official Receiver and/or staff err on a file, the error is not career ending. We suggest that to provide some procedural fairness at least one of the members of the Committee should be a Senior Counsel.

- Secondly, if the IPA is represented on the Committee, we question who will act as an advocate of the probable IPA member? There may well be circumstances in which the IPA and ITSA disagree on matters before the Committee. This poses a conflict of interest for the IPA. We ask how this is proposed to be resolved and what would happen in such circumstances?

- 16.65(2)

This clause talks about procedural fairness and yet the complaint will be based on the information provided by the Inspector-General who is also represented on the Committee. We note there is no mention of the trustee being afforded natural justice in the Committee proceedings. We consider the omission of the principle of natural justice is a major omission from the proposed legislation and is therefore cause for major concern.

- 16.70 (1)(e)

Given the shortcomings of the Committee in not affording a trustee natural justice and procedural fairness, why should the Committee be given the power to publicly admonish or reprimand a trustee?

- 16.70(1)(g)

We question how a condition can be imposed on all of the Trustees who are not a party to the proceedings, restricting them from employing the deregistered Trustee. This means that all Registered Trustees have conditional licences for the period specified.

- 16.75

Once again there is not a timeframe for the Committee to report.

- 16.85

We query why a complaint by an industry body negates the need for a Committee to consider the complaint. On such a complaint the Inspector-General acts unilaterally with no apparent procedural fairness and natural justice being afforded to the Trustee.

- 16.90

Given the view of the Attorney-General's Office as espoused at the last IPA National Conference held in Brisbane on the necessity to lodge documents to maintain the integrity of the system surely, as soon as reasonably practical, should be limited to 2 days with the inherent penalties applied personally to the Inspector-General if the timing is not complied with.

Division 18 – Committees under the part

Our comments contained herein regarding the lack of procedural fairness and natural justice apply. At this stage there is no mention as to whether a Committee acts unanimously or by majority.

- 18.10(2)(e)

We assume that a position with knowledge and experience in “public policy relating to bankruptcy” will either be a second delegate of the Inspector-General or a representative of the Attorney General’s Office. This of course creates very much a bias towards the Regulator’s views.

Division 22 – Remuneration and other benefits

We assume no regard has been given to the task and inherent cost of the current reporting regime for bankruptcy administrations which will no doubt be mirror imaged into corporate administrations. Trustees are presently being questioned as to why creditors receive so much paperwork ostensibly merely to justify the Trustee’s fees. We question whether different levels of complexity of bankruptcy administrations should have different reporting requirements for remuneration.

We express our concern generally, that both the current and proposed extensive reporting requirements in relation to remuneration adds to the cost of administering an estate without providing any additional benefit to creditors of the estate.

- 22.25

Why is the behaviour of the bankrupt not included in this clause? We consider that whomever drafted this clause must believe that all bankrupts are 100% compliant, 100% of the time.

- 22.30(1)(a)

Is the amount of \$5,500 inclusive or exclusive of GST?

- 22.30(2)

This clause is inconsistent with the automatic rounding down of Proofs of Debt in a bankruptcy.

- 22.35(1)

What is a related entity of a Trustee?

Does this mean:

- A national affiliation is unable to use its interstate offices until creditors approve such an arrangement? Obviously if that is the case then the Trustee may necessarily need to expend significant amounts of creditors' money in attending on the bankrupt or the bankrupt's business in another state. For example the Trustee may reside in Perth and the bankrupt may run a business in Cairns where the Trustee also has an affiliated office but is unable to use it until such time as he is notified the creditors and they have approved same.
- A registered Trustee who already employs a member of his or her family or intends to employ such a family member is unable to use that family member on the administration until disclosed to creditors? For instance the Trustee's daughter maybe the office junior clerk or working through her Christmas vacation.
- A Trustee who has utilised a Service Trust for a number of years may no longer be allowed to do so?

When any of these occur the Trustee is guilty of an offence of strict liability under the Criminal Code.

As presently drafted this clause does not allow for the commercial realities of running a business and conducting a bankruptcy administration in accordance with Section 19(1)(j) of the Act.

- 22.60

Does this clause mean that if a Trustee uses an interstate office, related or otherwise to assist the Trustee in certain aspects of the administration, then the Trustee is unable to pay the other party for the provision of services from the bankrupt estate but must pay same from his or her own funds with no ability to disburse the payments back to the estate? If so this may well necessarily increase the costs of administration and does not reflect the commercial realities of either running a business or conducting a bankruptcy administration in accordance with Section 19.1(j) of the Act.

We also query whether or not this allows for the Trustee to utilise his or her staff on an administration as a strict interpretation of this clause would appear to prevent the Trustee from claiming the remuneration in respect of those staff.

If creditors or the Committee of Inspection do not authorise the payment there appears to be no right of appeal for the Trustee.

- 22.70(2)

Who is an "authorised employee". We are unable to find a definition.

- 26.65

There is no mention of what happens if they don't agree or the creditors do not endorse the division.

We also query why a Committee of Inspection is not given the power to endorse such a division.

Expenses of administering an Estate where property insufficient

We suggest a provision similar to that of Section 545 of the Corporations Act 2001 be included in any proposed changes to Bankruptcy legislation.

Division 24 – Funds Handling

- 24.10(1)(a)

We note that “interest bearing” has been omitted from this clause, presumably this will be included in the regulations. In addition, a Trustee is unable to maximise the returns of Consolidated Revenue by utilising an investment account with a higher interest rate as the clause is presently drafted.

Certain members of our group query why the Trustee should be expending time at the cost of creditors to maximise the interest income payable to Consolidated Revenue in any event.

- 24.10(4) and 24.15

These two clauses appear to penalise the Trustee twice for the same error.

- 24.20

The cheque must be signed by the Trustee but an Electronic Funds Transfer need not. Surely this is inconsistent. Is there a possibility that the Trustee's business partner acting under a Power of Attorney and with prior approval of the Trustee could sign a cheque? This would allow for example such as follows:

- Trustee is overseas for an extended period of time.
- Trustee suffers a medical emergency, is incapacitated by an accident and is physically unable to sign the cheque.

- 24.30(2)(b)

Any account should be reconciled within 30 days of the end of every calendar month. The use of multi-administration accounts should not be allowed.

- 24.35(2)

This is poor business practice in a modern business climate. The Trustee must sight all appropriate documentation before making the payment. Very few businesses will issue a receipt.

Division 26 – Information

- 26.10

We accept the concept behind this clause but query whether or not the timing is appropriate. Any Trustee doing a large number of returns already has a staff member working full-time on annual estate returns for the majority of the month of July each year. Would this extra imposition not be more appropriate at another time of the year say 31 March or 30 September, especially as no doubt a similar requirement will be implemented in corporate insolvency?

- 26.45

We commend this clause as drafted.

- 26.50 and 26.55

We do not understand the need for clause 26.50 as this seems to be covered by clause 26.55.

- 26.67(2)

Should this not include specific reference to an Offence Referral as an exemption?

Division 28 – Meeting of Creditors

- 28.30

Presumably the entitlement to attend and participate, which is generally welcomed, does not include the right to vote. If the Inspector-General has the right to vote this may disenfranchise creditors.

- 28.50

We presume that as a result of this clause Section 63A to 64ZF of the Act will now be included in the Regulations.

Hopefully any amendment will properly deal with meetings called under Part VI and Part X. Both of which at this stage need the substantial compliance provisions of Section 64ZF of the Act to allow application.

As we stated at the outset of this letter, our comments are limited to proposed changes to Bankruptcy law.

As much of the detail of the proposed legislation is yet to be drafted, our comments herein are not meant to be exhaustive, but rather, to provide you with initial comment on the Exposure Draft. We would be pleased to discuss the above at your request.

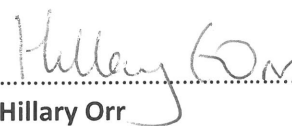
Yours faithfully



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