Submission regarding

Proposals paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia, December 2011

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[1] The views expressed in this submission represent the views of the authors and not their respective employers.

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Introduction

We welcome the opportunity to comment on these proposals. However, as academics we remain frustrated that the response by the Government fails to address a key shortcoming in the reform of the law. There is nothing in the proposals or the response, which facilitates the production of data around insolvency laws, including professional matters. Despite the recommendations of the Senate Economics Committee Report and indeed the Joint Parliamentary Committee Report on Corporations and Financial Services Report on Insolvency Laws in 2004 and the Harmer Report in 1988 that better statistics in this area be facilitated, nothing has been done. In the area of corporate insolvency in particular it seems clear that ASIC remains hamstrung by legislation restricting the right to provide data for research or to have any ability to assist in such regard. We note that in relation to taxation law research the recent announcement of the Taxation Research Institute.

Standards of Entry into the Insolvency Profession

1. We strongly support the harmonization of entry standards into the profession. It is clear that much of the training undertaken will apply to both personal and corporate insolvency. Whilst we have argued strongly for complete harmonization of the law of insolvency in both corporate and personal areas and the harmonization of the regulatory authority for the profession, we consider that the Government has adopted a second best solution of merely harmonizing the law and not the regulatory authorities that administer that law, we support the general thrust here as a step in the right direction;

2. We have a particular interest in the area of qualifications. We note the basic qualification of having a degree with 3 years of full time study in commercial law and accounting but no less than one-year fulltime study in either. It may be because this is merely a proposal that the wording is very general however it appears somewhat unsatisfactory given the structure of most law/accounting degrees as they are in Universities now. Courses such as a law degree or an accounting degree, are made up of units of study –generally of one semester or its equivalent (eg accelerated intensive units). When the paper refers to one year of equivalent full time study it is difficult to know what is intended. For a standard business or commerce degree (which is the name usually given to "accounting" degrees) the typical graduate will do 3 semesters of law. This is one semester each in the areas of general introductory law (usually largely contract), corporate law and taxation law. However this is not one year if the meaning is that it is a year of the degree. Thus one year will typically

be 8 units. Therefore 3 units is not a "year of commercial law. Sometimes students do have the opportunity to do more elective units in the law area. Although the areas covered might be classed as 'commercial law' they do not necessarily involve any insolvency law. It would be much more appropriate therefore for the legislation to be clarified here. Unless the intention is to significantly increase the amount of law to be studied in the accounting degree, we submit that it would be appropriate to stat the requirement is 3 semesters of law, which should be stated explicitly rather than a vague term about "years". Law graduates will generally do no accounting except in so far is required for professional requirements. Again a question as to what is meant by one year of fulltime study is raised. Presumably it is only those who do double degrees who would fit within the category of having done a year of accounting;

3. The proposal to allow law graduates to be admitted as insolvency practitioners does provide a potentially larger pool of practitioners. However, in light of the general pattern of study for law and accounting students it would seem that only those law graduates who have undertaken a double degree are suitable. Having regard to the point above about the limited amount of law covered in the accounting degree there would seem to be some imbalance herein that the amount of accounting required of a law graduate would far exceed the amount of law required for an accounting graduate. We submit though that this is as it should be. That it is necessary that insolvency practitioners have the requisite business skills given their obligations and it is difficult to see how this can be obtained without the base study at undergraduate level;

4. The recommendation that a prescribed level of formal tertiary studies in the area of insolvency administration is one we support. We note the reference to the course that run at the School of Law at QUT currently (on behalf of the IPA). Clearly we support that requirement. We emphasize that although we believe this should be a *necessary* condition for registration, we point out that the course is designed as part of the entry requirements for membership of the IPA. It is only two units. It is not designed as a direct test of student's suitability for registration as an insolvency practitioner. It may not be *sufficient* to meet what might be expected in that regard if some further formal tertiary study is required. This may of course vary if registration is only as a receiver or receiver manager. We suggest that something beyond the current units might be required and it would require input from the regulators and the profession as well tertiary institutions to determine the type of course required;

5. We believe the key to the registration, as an insolvency practitioner is the engagement in the relevant employment. Given the extension of the qualifications to allow for law graduate admission, we submit that it is necessary to specify what would be relevant employment. We do not support the reduction in the requirements from 5 years in respect of corporate insolvency. Rather we suggest that 5 years should be the period

in both corporate and personal insolvency. It is correct that suitability for a particular profession is not always determined by years engaged, but we believe given the level of responsibility that falls upon an insolvency practitioner, 3 years is too short;

6. We support the ability of the regulators to place conditions upon registration though suggest that issues around consistency would need to be addressed in some way. A particular issue might arise here though given the different regulatory authorities remain in existence. So for example might differences between personal and corporate registration simply re-emerge in a practical sense;

Remuneration Framework for Insolvency Practitioners

7. We suggest that any minimum fee should be indexed to allow for change over time due to inflation;

8. The Proposals Paper proposes a change in respect of the voting for fees to prohibit a casting vote being exercised in respect of fee approval. There may well be an inconsistency here between the position in personal and corporate insolvency. See the *Bankruptcy Act* s 162 and the meaning of resolution of creditors in s5. It seems sensible given the broad thrust of the reforms to seek to align the two areas in this regard. As a matter of principle also it is the creditors with the greatest financial stake in the outcome that should have the power to vote on fees. Therefore the division in voting between number and value might be inappropriate here anyway. Perhaps there should be an option for getting say a set majority in value for this particular vote but make it consistent between the two pieces of legislation;

9. We support generally the ability of the regulators to independently review the fees on their own initiative. It should be made clear to creditors that they have the opportunity to request the regulator to do so. Note that although such investigations in themselves will not be costless. The regulators need to be adequately resourced to undertake such a task and there should be redress for those practitioners who incur substantial costs in defending such a claim when the claim is found to be without foundation. Again we would argue that there is no real reason why such a mechanism differs between personal and corporate insolvency;

Communication and Monitoring

10. These proposals overall add a dimension of uncertainty and are potentially open to abuse. The legislation that implements these changes will need to ensure that a level of disincentive is built in;

11. It is not clear what the nature of the rights in respect of appointing a creditor to a COI would be. The determination of a set amount in value would appear to be quite arbitrary. It is not clear how a set percentage of votes by value would necessarily ensure representation by employees. If employees should be represented on such committees it might be simpler for the legislation to require that membership;

12. In terms of creditors being able to request information and to initiate reporting requirements, it should be realized that any increase in reporting requirements would almost certainly increase costs. In larger administrations these costs could be substantial. There needs to be a mechanism within the legislation that allows an insolvency practitioner to seek a review of such requests where he or she considers them unreasonable in terms of costs. Such a review might be to the Regulator rather than the court in order to avoid further delay or larger costs;

13. In terms of calling meetings, where requested by parties listed in paragraph [106], we again submit that a review mechanism is necessary where it can be shown there is a high cost;

14. We strongly support the proposal that resolutions be able to be passed without calling meetings. We suggest this is the most significant reform that could be passed in this area;

Removal and replacement of Insolvency Practitioners

15. These changes are said to give the recipients of the services greater power in removal. This is a laudable goal though how effective it may be in practice is less clear;

16. The proposal is that it will require a majority in number and value. As pointed out above this does not always represent the true economic interests in an insolvency administration if the number represents very low value;

17. It is a little surprising that in light of the thrust of the reforms generally to increase the power of the creditors that the first meeting in a creditors' voluntary liquidation is to be abolished. It seems that a key feature in insolvencies is that there will be a lack of information and a lack of communication between creditors. Accordingly the meeting is a way of overcoming this difficulty even though it may be imperfect. To remove the meeting may simply mean that creditors are less informed and less able to effectively assert their rights by way of removal;

18. It is not clear also what might happen in respect of s 477(4) under such a scheme. Presumably these restrictions were placed in the legislation as a protection mechanism for creditors. Whilst it ought not be presumed that

liquidators will misuse powers this proposal will allow an appointment by members and action by a liquidator possibly before creditors are clear on their position;

Specific Issues for Small Business

19. Some of the difficulties appear to be administrative in terms of a need for one place to receive complaints. This is long overdue. It also demonstrates the advantages of joining the personal and corporate insolvency regimes – a matter that needs to be left on the table and ought to be pursued in the medium term;

20. We support the changes to allow for a assignment of a cause of action by insolvency practitioners. However the extent to which this will be significant might be doubted, as the basis of not taking action is that the defendant will have no funds. That will not alter with a change in plaintiff;

21. There seems little reason why the two funds for AA and s 305 ought not to operate on the same basis. If they do, it might be asked whether they might be merged into one to enable administrative savings with practitioners in either the corporate or personal sphere to apply for them?

END