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By email: insolvency@treasury.gov.au

Reforms to Modernise and Harmonise Insolvency – KPMG Submission

Dear Sir/Madam

KPMG is pleased to provide its submission on the Proposals Paper “Reforms to Modernise and Harmonise Insolvency”.

Insolvency processes play a critical role in maintaining confidence in the Australian business environment. The law governing insolvency processes and the powers of regulators is also critical to ensure an efficient and effective insolvency regime.

KPMG supports a strengthening of the public’s confidence in the insolvency regime. We also acknowledge the challenge of regulating an industry with a diverse range of market participants from sole practitioners to international accounting practices.

It is in this context that we make our submission.

Regulatory Powers

Paragraphs 196-209 propose broad powers to enable ASIC to provide information to “stakeholders” in an insolvency process. We assume this is to facilitate an appropriate level of information being provided to stakeholders rather than have ASIC determining the manner in which an insolvency is to be conducted.

We support adequate information being provided to stakeholders to enable them to be informed on the conduct of an insolvency progress and to ensure their interests are protected.

It is also imperative to ensure that procedural fairness and equity is applied by ASIC in the exercise of any increased powers. To better assess the proposed reforms, it would be beneficial for greater information to be given as to the procedures to be adopted by ASIC in the exercise of its powers to ensure procedural fairness is achieved. We expect ASIC would only use these powers in a small number of instances where there is clear evidence the practitioner's behaviour is obstructive.

Some examples of where greater clarity would be beneficial include details of circumstances where ASIC would:

- attend premises at which the practitioner is carrying out administrations or keeping books in order to inspect those records. The proposal states that suspicion of a breach would not be required for these powers to be exercised, however, what are the circumstances where it would be exercised (paragraph 198).
- require a practitioner to answer questions concerning an administration or their conduct (paragraphs 196 to 197).
- provide information to stakeholders or to direct a practitioner to do so (paragraphs 199 to 203).

Some ways in which procedural fairness can be achieved include:

- a requirement for ASIC to notify the practitioner of its intention to intervene or facilitate information flows between bodies which may have an interest in allegations of misconduct of practitioners
- a requirement for ASIC to provide a written and adequate time for consultation and clarification
- an appeals process. In our view, the potential commercial, legal and reputational consequences of the proposals merit the protections afforded by an appeals process.

Clearly practitioners should be accountable for the quality of their work, however, this has to be done in a constructive way to ensure procedural fairness but also to ensure ASIC's resources are not diverted to pursuing unnecessary investigations which will impact the overall cost of insolvency to the economy.

Insurance Requirements for Insolvency Practitioners

ASIC Regulatory Guide RG186 "External administration: Liquidator registration" states the purpose of the requirement for insurance. That is to provide "a source of funds to compensate people who may suffer pecuniary loss if a registered liquidator fails to perform their duties adequately and properly."

KPMG supports the requirement for insolvency practitioners to maintain insurance arrangements. We also believe that 'adequate and appropriate' coverage should be considered having regard to the nature and scale of an insolvency practice as well as the broader business structure within which the insolvency practice operates.

While the proposal paper indicates that the regulator would be able to impose industry wide conditions regarding maintenance of insurance cover to provide direction on what is adequate and appropriate, it remains uncertain whether the various insurance markets that provide coverage to insolvency practitioners (from the sole practitioners to international accounting practices) would be willing to provide the required cover.

Depending on the level of specificity of the proposed regulatory requirements, there may be different challenges for the various market participants to obtain the required cover. It therefore is not appropriate to have a single industry wide requirement.

Rather, we believe it would be adequate for practitioners to have to satisfy ASIC that the coverage they hold is adequate and appropriate in their specific circumstances. We believe ASIC already has sufficient powers for this purpose through the existing registration process.

It would always of course be beneficial for ASIC to provide guidance on what they believe is 'adequate' and 'appropriate'.

We would be pleased to discuss any of these points further; should you have questions please contact me on (03) 9288 6532.

Yours faithfully



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