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8 March 2013

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

By email: insolvency@treasury.gov.au

Dear Sir/Madam

Exposure Draft Insolvency Law Reform Bill 2013 ("Exposure Draft")

I write to make the following submission, *in my personal capacity only*, to Treasury regarding the above Exposure Draft. As a preamble to my submission I must state that I am currently a member of the Companies Auditors and Liquidators Disciplinary Board ("CALDB"). However, I must point out that I am not representing the CALDB in making this submission. It is my understanding that the CALDB has made its own representations to Treasury as to the proposed changes in relation to the disciplining of Insolvency Practitioners involved in corporate insolvency practice. I also understand that my views in this regard will not be dissimilar to those of the CALDB as presented to Treasury.

I am a practicing Chartered Accountant (a Fellow of the Institute of Chartered Accountants in Australia), specialising as an Insolvency Practitioner (both an Official Liquidator and a Registered Trustee in Bankruptcy). I am a member of the Insolvency Practitioners Association of Australia ("IPA") and a former State Chair (SA/NT) and National Board member of the IPA. I have specialised in the area of insolvency practice, as a Chartered Accountant, for more than 30 years. Accordingly, I consider I am suitably qualified to comment on the Exposure Draft.

By a letter dated 14 February 2013 signed by me together with six other Registered Trustees from South Australia, I have already made a joint submission with those Trustees pertaining to specific Bankruptcy law matters as they appear in the Exposure Draft.

My brief submission below, is made in relation to the proposed amendments to both the *Corporations Act 2001* and the *Bankruptcy Act 1966,* as contained in the Exposure Draft and in particular in relation to the proposed disciplinary procedures and committees as outlined in *Schedule 1 – Uniform insolvency practice rules, Part 2 – Registering and disciplining practitioners, Division 16 – Disciplinary and other action* and *Division 18 – Committees under this Part* insofar as this draft legislation relates to both the *Corporations Act 2001* and the *Bankruptcy Act 1966.*

Summary of my submission
In summary, my submission herein documents my concerns as follows:

- In its current form, the Exposure Draft does not contain sufficient detail for informed and detailed comment to be received by Treasury by way of consultation, as to the practical impact of the legislation. This is evidenced by the words included throughout the Exposure Draft that much of the legislation is *"to be drafted after consultation"*, and

- The disciplinary procedures and committees envisaged by the Exposure Draft omit the principles of natural justice and procedural fairness as are embodied in the current workings

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of the CALDB, the function of which, at least in reference to Liquidators, the Exposure Draft seeks to remove in its entirety.

The absence in this submission, of any comment on the draft legislation contained in other *Divisions* of the Exposure Draft is not to be taken as my concurrence or support for that draft legislation. Accordingly, I reserve the right to make further and detailed comment particularly as it appears that much of the detail in the proposed legislation is yet to be drafted.

Insufficient detail and the need for further consultation

If the Exposure Draft is to be put before Parliament without any further opportunity, beyond 8 March 2013, for detailed consultation with stakeholders, the draft legislation including the *"Guide(s) to this Part"* which are yet to be drafted and, as is noted in the Exposure Draft, are to be *"drafted after consultation",* there will not be the proper and reasonable opportunity for all stakeholders to have considered and consulted on the draft legislation. Given there is to be a Federal Election held in approximately not more than 6 months from now (i.e. on or before 14 September 2013), there would appear to be insufficient time for the process of further drafting and completion of proposed legislation and the proper and reasonable consultation by Treasury, with stakeholders, that must occur in relation to that draft legislation.

Disciplinary procedures and committees

I respectfully request Treasury to carefully examine the role of CALDB and in particular the way it operates, based on the principles of procedural fairness and natural justice being afforded to those who appear before it. The CALDB is very much independent of the ASIC but, importantly, can only act if it receives a matter referred to it by the ASIC (or by APRA). The lack of matters referred to CALDB in recent years cannot in any logical sense be regarded as a reason for not referring matters to CALDB or be seen as a failing of CALDB. Regrettably (in my opinion) it seems that in recent years the ASIC has chosen to refer very few matters to CALDB, preferring instead to rely on imposing its own 'enforceable undertakings' upon the practitioners it seeks to discipline, a practice that itself requires scrutiny, especially in terms of the principles of procedural fairness and natural justice.

In relation to the proposed disciplinary and other action and committees as proposed by the Exposure Draft, it is envisaged that a committee of three, ***including*** the complainant (the Regulator), a representative of the IPA and a third member nominated by the Minister is to hear and adjudicate on disciplinary matters. There does not seem to be any mention as to whether a committee is to act unanimously or by majority decision. Ostensibly, it would be very difficult to argue the principles of natural justice and procedural fairness exist in this proposed structure. How, on its face, can it be argued that the Regulator in bringing a complaint, together with the Minister's representative, can then form a committee of three (including one member of the IPA) to hear the complaint and determine the outcome of disciplinary proceedings whilst at the same time affording the practitioner appearing before the committee at least the basic rights of procedural fairness and natural justice? At the very least, the Regulator, as the complainant, should not form part of this committee. Quite apart from a committee comprising the complainant lacking independence, the third member of the committee in acting as a representative of the IPA, will most likely put the IPA in a position of conflict given that the IPA claims to have as its members nearly 80% of insolvency practitioners and that its very reason for existence is to be the peak body representing its members.

By way of example, one concerning provision in the proposed legislation is that giving the committee power to decide *"that the liquidator/trustee should be* ***publicly*** *or privately admonished or reprimanded"* (my emphasis added). One can imagine the repercussions (and costs) should the committee err in this regard, having arrived at its decision to do so without affording (or being seen to afford) the practitioner appearing before it natural justice and procedural fairness. Another

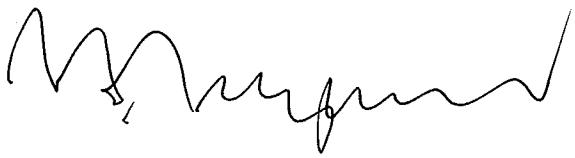
example giving rise to concern is the provision giving the Regulator, the Inspector-General or the ASIC, the power to cancel the relevant trustee or liquidator registration only on the grounds that the practitioner's registration in the other capacity (i.e. as liquidator or trustee) has been cancelled or suspended by the other Regulator. Again, this does not afford the practitioner natural justice and procedural fairness and, if it is thought to be sustainable, begs the question as to why, in the first place, there are separate registrations under current insolvency law

In making my brief submission, I ask Treasury not to see this submission as one from a practitioner who might be advocating a position where errant insolvency practitioners are not dealt with appropriately, and severely if warranted. This submission is not in any way to be seen as a 'soft on crime' approach. On the contrary, I believe there should be rigorous but *fair* disciplinary procedures in place and that the peak body for insolvency practitioners, the IPA, must *self*-regulate (but not *co*-regulate). The CALDB provides an effective working mechanism for the independent and rigorous handling of disciplinary matters involving both corporate insolvency practitioners and auditors. The principles of procedural fairness and natural justice are embodied in the functioning of the CALDB. Unfortunately, there is nothing of the sort readily apparent in the Exposure Draft. One might ask what is envisaged for the disciplining of errant auditors, if the disciplinary function is to be taken from the CALDB in relation to 'liquidators'? The rationale for the Exposure Draft might be that the Inspector-General in Bankruptcy seems to have an effective disciplinary regime so why not extend that to corporate insolvency by a simple duplication of the legislation as it applies to bankruptcy law and trustees. Unfortunately, such rationale ignores fundamental differences between corporate and personal insolvency practice, the number of practitioners, the nature, size and complexity of the respective administrations and, especially, the volume of creditor claims in both dollar and number in the respective administrations.

A simple and more cost-effective solution for Treasury, rather than changing legislation, would seem to be to ensure the ASIC is sufficiently resourced and actively encouraged to refer liquidator disciplinary matters to the CALDB, to ensure errant practitioners are dealt with appropriately.

Please do not hesitate to contact me should you wish to discuss any aspect of the foregoing.

Yours sincerely



Robert Ferguson