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18 December 2014

Dear Sir

Submissions on Exposure Draft - Insolvency Law Reform Bill 2014

Thank you for the opportunity to comment upon the Insolvency Law Reform Bill 2014 ("Bill") which amends the Corporations Act 2001, the Australian Securities and Investments Commission Act 2001 and the Bankruptcy Act 1966 to create common rules to modernise and harmonise the regulatory framework applying to Insolvency Practitioners in Australia. We note that the Bill seeks to do the following:-

- Remove unnecessary costs and increase efficiency in Insolvency Administrations,
- Align and modernise the registration and disciplinary frameworks that apply to registered Liquidators and registered Trustees,
- Align and modernise a range of specific rules relating to the handling of personal Bankruptcies and corporate external administrations,
- Enhance communication and transparency between stakeholders,
- Promote market competition on price and quality,
- Improve the powers available to the Corporate Regulator to regulate the corporate insolvency market and the ability for both regulators to communicate in relation to insolvency practitioners operating in both the personal and corporate insolvency markets, and
- Improve overall confidence in the professionalism and competence of insolvency practitioners.

We believe the objectives of the Bill are appropriate and in the interests of all stakeholders and we are supportive of the Bill. However, there are matters that also require modification and we have addressed these matters in our submission.

In making this submission, we would note that the Insolvency Practice Rules, where there is much detail have not been finalised and accordingly the opinions and comments we have expressed must be taken in the context of not being able to review the Insolvency Practice Rules. Given the Insolvency Practice Rules will be a regulatory instrument we would have expected both the Bill and Insolvency Practice Rules to be exposed at the same time.

Whilst, our submission deals with the many matters covered by the Insolvency Law Reform Bill we are particularly concerned about the amendments that deal with profit or advantage and the engagement of a related entity to the external administrator. We believe these proposed amendments will increase costs and inhibit the proper work flows in the assignments. For example it would prevent the external administrator from engaging Forensic experts to capture computer data upon his appointment to enable the data to be secured for later investigations. We consider this to be a serious impediment as currently drafted.

We are also concerned that whilst many of the reforms seek to provide additional powers to creditors and the regulator which is a valid objective, they will ultimately lead to further red tape and costs. This will be in the sense each requirement will add costs and may be used in a vexatious way for the benefit of one creditor or a particular group of creditors. In our view consideration should be given to requiring evidence to be produced to creditors to justify for example why a review of decisions made by an external administrator is necessary, or the right of creditors to require information to be produced is appropriate. Without proper safeguards these measures will add to costs and red tape and this may occur in circumstances where there are no funds for the external administrator to be paid.

We would also note from our reading of the Exposure Draft that there are a number of unintended consequences in the drafting of the Bill and we have addressed these in our submission.

We have also in our submission referred exclusively to the amendments relating to the Insolvency Practice Schedule, based on corporations as we understand that the provisions for corporations are mirrored in the sense of how they apply in the bankruptcy section of the Bill.

Finally, thank you for the opportunity to provide comments on the exposure draft and we would like to take this opportunity to offer to provide any further assistance or clarification if required.

Yours faithfully

DELOITTE TOUCHE TOHMATSU

S. Algeri
Partner Restructuring Services – National Insolvency Leader

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)

Section	Comment
1.1(b) Behaves Ethically	We understand the desire that Liquidator's behave in an ethical manner, however we have concerns that this is made without reference to existing professional standards, such as the ARITA Code of Professional Practice.
20.10(2)(c) ASIC may convene to consider	Consideration needs to be given as to whether this in effect means that the person appointed by the Minister will also be in effect an ASIC appointment. This may create the impression that the committee is not seen as independent.
20.15(2) ASIC must refer applications to a committee – within 3 months	We consider the convening period of the committee of 3 months after application to be too long a period. A more appropriate period would be 1 month which would achieve a much more timely outcome.
20.20(3) Committee to consider referred applications – within 45 business days	We believe 45 business days is too long and question why the committee should consider the matter for this period of time. We recommend that a shorter period of say 30 days should be considered to allow for a more timely outcome.
25.1(3) Registered liquidators to maintain insurance - offence	The requirement to maintain insurance is subject to 1000 penalty units. We ask whether this penalty is consistent with other Commonwealth Law.
40.5(4) Registered Liquidator to remedy failure to lodge documents or give information or documents	Under the proposed changes a registered Liquidator must comply with a direction from ASIC within 10 business days to lodge any document or to give any information or document. We consider if there had been an inadvertent error by a Liquidator and it had occurred across all their current appointments that 10 business days may not be sufficient to rectify the omission. We consider the consequences of failing to provide the information within the proper prescribed time limit as being very severe in that the Liquidator may receive a direction not to accept any further appointments. We consider there should be a provision to allow in an appropriate circumstance for ASIC to grant an extension.
40.100 Notice by industry bodies of possible grounds for disciplinary action	We suggest that the term 'Industry bodies' should be replaced by Professional Body. We believe this term to be more appropriate given the definition of a professional body. Reference should be made to Professions Australia" who define a profession as a "group of individuals who adhere to ethical standards and who hold themselves out as and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others".

Section	Comment
60.1 Simplified outline of this division	We do not believe it is appropriate where no remuneration is determined for the external administrator to be entitled to receive a reasonable amount for the work set at i.e. $5,000. This is inappropriate as the $5,000 amount is in effect a default amount where no approval has been able to be obtained and does not represent a reasonable amount of remuneration. We suggest that the amount should be commensurate to the company and tasks required to undertake the administration.
60.11 and 65-45(5)(d) Reference to any other person with a financial interest.	We are concerned that this description may allow parties in dispute with the Liquidator be in a position to obstruct the Liquidator.
60.20(1) External administrator must not derive profit or advantage from the Administration of the company	It is a fundamental need of an external administrator that they can seek the appropriate services immediately in order to be able to administer the company in a way that maximises any return to Creditors; and we are concerned that this amendment may prevent the external administrator from doing so. This amendment deals with the deriving of a profit or advantage because the external administrator engages a related party of the appointee. This would for example mean the engagement of the Forensic division of the appointee's firm to undertake forensic work, such as backing up the computer system or imaging computers would be in breach. It would also mean, and we think unintentionally, that the external administrator could not engage staff of their firm generally until they have received Creditor permission as a result of the appointment being a personal appointment. We recommend that the provision be changed to allow the external administrator to engage their staff immediately. In relation to other services we believe that the current system is more appropriate in that the staff and hours are approved at the time the external administrator seeks remuneration. This is consistent with the processes currently in place under the ARITA code. Finally this amendment may prevent an external administrator from being paid for properly incurred disbursements that were incurred by their firm.
60.25 External administrator must not give up remuneration	We understand this amendment is seeking to address the issue of secret commissions or other improper payments. We believe that the Section should be so drafted in order to catch those inappropriate payments. The section as currently drafted would prevent an external administrator from agreeing to accept a reduced amount of remuneration if that was put to them by Creditors.
65.30 Payments by cheque or electronic transfer	This requirement is overly prescriptive in that it refers to payments made by cheque or electronic funds transfer which is not necessary.
70.5(5) Notice of lodgement to be given	We do not consider there is any need for notification to be given to Creditors when the return is a return which is to be lodged annually. This adds unnecessary costs to these Administrations for no benefit.

Section	Comment
70.6(3) End of administration return.	We believe there should be the capacity for an external administrator of a company to lodge 1 month after the Administration has ceased. It would appear that subsection (3) is in error and was meant to reference not the end of the financial year, but the end of the Administration
70.15(1)(5) Audit of Administration books - ASIC	We are concerned that the costs of this Audit is to form part of the expenses of the Administration of a company and how this would be paid if the Administration is without funds.
75.41 Outcome of voting at Creditors meeting determined by related entity – Court powers	The amendment would be improved if the external administrator had the power to also apply to the court if he was dissatisfied with the voting process due to related party voting.
80.5 Creditors may request a meeting to establish committee of inspection (Company not under Administration)	This particular amendment refers to a request by a Creditor to request a meeting to establish a committee of inspection. We recommend that consideration be given to placing a threshold before this can occur as the section just says 'a creditor'. Reference could be made to Section 75.15 in order to place limits on who should be in a positon to call for a meeting.
100.5(3) External administrator may assign right to sue under this Act	Subsection (3) allows for the external administrator to give notice to the Creditors of the proposed assignment. However it does not provide any mechanism for Creditors to take any action if they disagree with the assignment.