8 March 2013

The Manager
Corporate Governance and Reporting Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: insolvency@treasury.gov.au
Attention: Mr Aaron Jenkinson

Dear Mr Jenkinson

Exposure Draft – Insolvency Law Reform Bill 2013

The Insolvency Practitioners Association (IPA) is the professional body representing company liquidators and trustees in bankruptcy, as well as lawyers, financiers, academics and others practising in or otherwise interested in insolvency law and practice. We make this submission on the Exposure Draft based on the informed views of the IPA and its members.

The IPA has given comments and made submissions in response to the options paper and the proposals paper in the lead up to this Bill. These included comments on the policy that should be adopted – for example in relation to practitioner regulation, or communication with creditors – in the proposed law. We do not see a need to repeat those comments in any detail unless they are relevant to particular provisions. We can say that we think the Bill addresses the objectives of aligning and modernising the registration and disciplinary frameworks for practitioners, and of introducing a range of efficiencies in the handling of personal and corporate insolvencies. The Bill would also improve ASIC's powers and assist in allowing the two regulators to cooperate and communicate.

We have also participated in three stakeholder consultation meetings this year where we gave comments on the Exposure Draft. In this submission we seek to amalgamate all of the feedback we have previously provided into one document.

We address the Exposure Draft in the same order that it is presented, however, we have, where the same amendments are proposed to both the *Corporations Act* and *Bankruptcy Act*, addressed these provisions at the same time. We also make the following introductory comments.

1 General issues

1.1 Qualifiers

Our comments on the Bill are qualified by the fact that we do not yet have the proposed changes to the Bankruptcy and Corporations Regulations, nor the consequential amendments to the *Corporations Act* and the *Bankruptcy Act*, and transitional measures. This is important because the approach taken in the Bill is to leave much of the detail to the regulations, for example as to the committee processes and their procedural fairness requirements, and as to creditor requests for information. The Bill would also substantially amend and replace many provisions in the existing insolvency legislation.

1.2 Discipline

In that respect a major change is the replacement of the CALDB by a committee system for the discipline of practitioners, as contained in Division 16 of the Bill. We have supported this change based on our experience with the committee system in bankruptcy over a number of years. At the same time, we want to ensure that any difficulties with the existing bankruptcy discipline processes are resolved so that the new regime operates as fairly and efficiently as possible. We have pointed out below a recent issue that has arisen with the meaning of the word 'convene' on which a court has made reform suggestion. We are also aware that much of the procedural fairness structure in the new process – required by section 16-65(2) - will be found in the regulations. We make this point to re-emphasise that we would like to reserve our final comments on Division 16 until we have seen the supporting regulations. We suggest also that the regulations should contain provisions governing remuneration to be paid to IPA nominated committee members. The framework provided for members of the CALDB under Part 11 of the ASIC Act 2001 is a precedent.

1.3 Replacement of practitioners

We have also supported the proposal whereby creditors are given more authority in insolvency administrations, including, in corporate matters, to be able to vote to remove and replace a practitioner. This is based on our experience in personal insolvency where such a power exists though is rarely used. Issues would generally be more complex in corporate insolvencies and we would like to ensure that there are avenues for redress if the creditor driven process is abused. The drafting of the relevant provisions, on which we comment below, provides limited avenue for court intervention. As well, while the process may be conducted properly, we are concerned to ensure that the replaced incumbent is not prejudiced by legal complications involving approval or and payment for their remuneration. The present drafting – that this is to be resolved on a basis that the two practitioners "agree on" (s 22-65, based on s 164 Bankruptcy Act, but with no equivalent provision in corporate insolvency) – is not satisfactory.[1] We comment on this more below.

1.4 Unfunded work

The laws proposed will impose additional obligations on practitioners, as well as remove other obligations. These include the notification of creditors of the insolvency, the calling of meetings, the provision of information and so on. The IPA and its members accept that in some cases such work must be done even if no funds are available. However, we consider that a general principle throughout these reforms should be that it is not *reasonable* for a practitioner to attend to tasks if there are no funds from which they will be remunerated, or for which no security can be taken. We note that the term "reasonable" is one commonly used in respect of such requirements throughout the Exposure Draft, but which is to be defined in the regulations.

If the law is to require practitioners to undertake work for which they cannot be paid it should clearly say so. Section 545 of the *Corporations Act* could be adapted and clarified for this purpose, for both personal and corporate insolvency.

1.5 Practitioner conduct – remuneration and disbursements ("benefits provisions")

We make particular comments on these provisions in Subdivision E. There are a range of issues covered by these benefits provisions, which we divide broadly into four categories:

- Practitioners' engaged of related parties for work on an insolvency administration;
- The incurring of disbursements;

[1] See *Section 449E – an unfortunate interpretation by a court?*, on the IPA website, which refers to a deficiency in the last law reforms about replaced practitioners' remuneration, discussed in *Re CMC Cairns Pty Ltd (in liquidation)* [2011] QSC 240. We have previously alerted Treasury to this problem.

- Extra benefits, giving up remuneration etc; and
- The purchase of assets.

We disagree with the general approach taken to these benefits provisions. While the conduct they appear to proscribe – overcharging, secret commissions, kick-backs, secretly acquiring company property – is not lawful, there should be a better and more effective way to state the proscriptions.

We suggest that a parallel can be drawn with the principles-based drafting used in existing bankruptcy laws. Section 19 of the *Bankruptcy Act* contains provisions that require a trustee to administer the estate as efficiently as possible by avoiding unnecessary expense, and to act in a commercially sound way. Dividends must be paid with all convenient speed: s 140. There are independence requirements in Schedule 4A to the Bankruptcy Regulations – reg 2.2 and 2.3 – and there is a general duty imposed in relation to dealings with assets and their sale, discussed below, in regulation 2.11 - Disposal of property. Other examples are ss 180-183 of the Corporations Act in relation to directors duties.

Such provisions give guidance on how a general duty could be framed. For example, the duties of a trustee or liquidator could be stated along these lines, that:

> a practitioner must exercise their powers and discharge their duties with care and diligence; in good faith; and for proper purposes. A practitioner must not improperly use their position, or use information gained as a liquidator, to gain an advantage for themselves or someone else or cause detriment to the creditors or the company.

These could be supplemented by performance standards along the lines of those existing in Schedule 4A to the Bankruptcy Regulations, and in regulator guidance and professional guidance such as found in the IPA Code of Professional Practice. The courts have regard to professional standards in deciding on practitioner conduct.[2]

These principles based duties and responsibilities may then be enforced under proposed section 16-50(1)(k) [existing s 1292 CA, s 155H(1)(f) BA] in so far as it may be shown that the duties of a liquidator or a trustee were not carried out adequately and properly.

We are not aware of liquidators' conduct being proscribed in the way drafted in section 22-40 and following of the Bill in comparable New Zealand or English law.[3] In fact the existing law (s 165 *Bankruptcy Act*) and the proposed provisions (section 22-40 to 22-50) come from old English bankruptcy law.[4]

However, if the proposed approach is to be adopted, we wish to make these comments on the relevant sections. We have previously raised all these issues with you during the stakeholder consultations and we understand that our comments are being considered.

1.5.1 Use of related entities – s 22-35

At times, a practitioner may wish to engage the services of a related entity in an insolvency administration. This is normal practice, particularly in multi-disciplinary firms where tax, accounting or even legal services may be sought in-house. The IPA deals with this practice in the IPA Code by saying that in situations where the benefit of the engagement fee will be received by the Practitioner, the Practitioner's Firm (which has a wide definition in the Code) or an entity related to the Practitioner or perceived to be related to the Practitioner, the engagement fee must be treated as remuneration. Thus, it must be reported and approved in the same way that the Practitioner's remuneration is reported and approved.

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[2] *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* [2006] FCA 1438.
[3] Section 164 - Corrupt inducement affecting appointment – is the only example form the Insolvency Act 1986 (UK)
[4] See for example s 82 of the English Bankruptcy Act 1914.

Section 22-35 requires disclosure of such arrangements, but provides no power for creditors to actual approve the arrangement. By considering the interaction of the proposed s 22-35 and 22-40, a Practitioner will, in our view, be unable to use a related entity on an insolvency administration.

1.5.2 Charging of disbursements – s 22-40

There has been much discussion around the issue of Practitioners "profiting" from disbursements. Section 22-40 attempts to proscribe this by prohibiting a Practitioner from making, directly or indirectly, an profit or advantage from a transaction or conferring such an advantage on a related entity. This effectively prevents a practitioner from being able to charge for many internally generated disbursements, such as photocopying, where it can be difficult to determine accurately the actual cost and any "profit".

We understand that the intention is to prevent Practitioners from charging inappropriate amounts for internally generated disbursements. However, we suggest that it would be better to put in place a process for Practitioners to report to creditors about the rates for internally generated disbursements (eg. photocopying, postage, telephone calls etc) and for creditors to have the power to approve the actual amount of the disbursements before they are paid.

This would not apply to disbursements arising from third parties (ie. travel, accommodation, legal fees etc) as long as they are charged at cost.

We also suggest that to complement the default remuneration amount under s 22-30, a small dollar amount be prescribed as a default internally generated disbursement amount, which would allow practitioners to pay internally generated disbursements to a certain amount without having to seek creditor approval. This would allow Practitioners to pay a small amount for disbursements where there are insufficient funds in the administration to seek approval of creditors.

1.5.3 Extra benefits, giving up remuneration etc – s 22-50

These provisions appear to proscribe secret commissions and kick-backs. Decisions of the courts have drawn some fine lines in whether a practitioner has given up their remuneration: see for example *Re Dare* [1992] FCA 509 and *Wenkart v Pantzer* [2008] FCA 478. They were recently discussed in *ACN 079 638 501 Pty Ltd (in liq) (recs & mgrs apptd) v Pattison*[5] where the Court held that although the appointments of the practitioner were personal appointments in his capacity as liquidator, his work in progress belonged to his practice company to which he had, in effect, 'given up' his remuneration. The proposed section would simply be re-introducing these legal uncertainties based, as we have said, on old law.

1.5.4 Purchase of assets

We have made comments earlier about alternative drafting in relation to this item. If the current drafting is adopted, it would prevent a Practitioner from purchasing assets of the company without the consent of the Court. However, we suggest this is unreasonable if the appointment is a retail operation where any assets can be purchased in the ordinary course at normal retail prices. The IPA Code contains similar prohibitions on practitioners and on their staff but includes an exception for retail operations. The wording of the IPA Code has previously been provided to you.

1.5.5 General

As we have said, we raised both these issues with you during the stakeholder consultations. We would be pleased to offer comments on any redraft of these provisions.

[5] [2012] VSC 445

1.6 Role of Contributories

We have pointed out in earlier submissions that there is generally no policy or legal reason for involvement of contributories in creditors meetings or committees, unless they have a financial interest in the administration, which is rare.[6] This should particularly be the case with the convening of committees of creditors under s 548 of the Corporations Act.[7] As we pointed out in our discussions, section 28-15, as one example, retains the need for contributories to be involved. We understand you are reconsidering this as a general issue.

1.7 Terminology

There should of course be consistency in describing certain terms in the Bill. One example we raise is in relation to *remuneration* [of a practitioner] and *expenses* [or disbursements, that is, moneys paid by the practitioner for the purposes of the administration such as advertising costs, search fees, legal costs, agents fees etc] and *costs* [being legal costs ordered by a court to be paid].

The Bill is presently inconsistent in the use of these terms. For example section 32-23 refers to "remuneration, *costs* or expenses which the liquidator is appointed to review ...". Section 28-50 refers to "costs in relation to meetings of creditors" but under section 17-5 the court may order that a person's "costs" of and incidental to a court application be paid by another person. We make this point here and do not separately comment on the sections in the Bill where these inconsistencies arise.

Another example is the use and meaning of the word "convene" on which we have commented in the schedules below.

We agree with the removal of the bankruptcy definition of "working days" and the use of "business days"; although there can be difficulties with that approach (different states have different holidays) we ask that this term be used consistently.

2 Schedule 1 – Uniform insolvency practice rules

2.1 Schedule 2 – Insolvency practice rules

2.1.1 Part 2 – Registering and disciplining practitioners

Section	IPA Comment
Division 8 – Registering Trustees / Liquidators	
8-15, 8-50	The word "convene" should be defined and its meaning made clear given that the convening of a committee must happen within a set period of time. See *Burke v IGB* [2013] FMCA 2.
8-20, 8-55	Six months is too long. We suggest 3 months.
8-25	We suggest 45 business days is too long; we suggest 20 days. We query how the committee may be satisfied that insurance *will be* taken out; we suggest it is enough that this insurance is in fact taken out when the practitioner is registered – see 8-35. We therefore suggest that (4)(b) be deleted.
Division 10 - Insurance	
10-5	(2)(b) we suggest this should say "specified *class of* registered trustees/registered liquidators"?

[6] See s 514 Corporations Act and following sections.

[7] See the decision on s 548 in *Jindal Transworld Pty Ltd, Scottsdale Homes No 10 Pty Ltd* [2010] SASC 210.

Division 14 – Notice requirements	
14-5	(1)(i) – we suggest this should be limited to "material" information, otherwise minor inaccuracies would need to be notified. In fact we think it more appropriate that this issue – incorrect information in an annual return - be either dealt with in Division 12, or removed to a separate provision other than "Notice of significant events" in this Division.
Division 16 – Disciplinary and other action	
16-10	While the Inspector-General in Bankruptcy (IGB) may withdraw a notice, if the practitioner is for good reason unable to comply within 10 days, we suggest it would be preferable to say "or such longer time as the IGB allows"?
16-50	This allows *all* acts of bankruptcy – see s 40(1)(a)-(o) BA – to potentially be the subject of the IGB's belief? If so, this is too broad.
16-55	The IGB should be required to convene a committee within a specified time, say 1 month.
16-70	We suggest it is not reasonable to impose a condition on all other registered liquidators or trustees as a disciplinary outcome of a particular liquidator or trustee. Also, it does not serve rehabilitation of the banned practitioner although we understand it may be used rarely. However, if the section is to remain, we suggest that ASIC and ITSA would need to establish and maintain a public register of those on a 'banned' list in order to assist practitioners to comply with this requirement.
16-85	The referring industry body, which we assume would include IPA, should also be notified by ASIC or IGB if any action is taken, and the outcome of that action.

2.1.2 Part 3 – General Rules relating to estate/external administrations

Section	**IPA Comment**
Division 22 – Remuneration and other benefits	
22-10 (2)	This section provides that the person first appointed as external administrator is entitled to accrue remuneration not exceeding the default remuneration amount of $5,500. There will be many instances where the person first appointed will reasonably accrue remuneration in excess of the current $5,500 default amount. This limit should be removed.
22-10(3)	We do not understand why the first appointed external administrator should be entitled to a minimum of the default remuneration amount even if they have not accrued that much remuneration prior to their replacement. An external administrator should only be entitled to remuneration for work done which was necessary and proper. If this is less than the default amount, then they are only entitled to that lower amount.
22-20	(1)(d) – the word "external" is missing before the word "administration"?
22-30	The default amount should be expressed as $5,000 plus GST if applicable; or use the wording in Bankruptcy Act s 161B.
Division 22 – Subdivision E – Duties relating to remuneration and benefits	
General	See opening comments at 1.5
Division 24 – Funds handling	
24-10	An external administrator should not be limited to opening only a single bank account. The word single should be removed.

	The account should be required to be opened within 5 days of moneys coming into the administration, not 5 days of appointment.
24-20	The law should not go to the detail of allowing payment by cheque, requiring the company name on it, and then requiring the administrator to personally sign it: we suggest delete (2) and (3).
24-35	The law should not go to the detail of requiring a receipt to be issued and obtained: we suggest delete the section.
24-40	This section does not accord with the nature and definition of 'securities' [s 9]. We suggest delete and leave it as a matter of good financial practice.
Division 26 - Information	
26-10	(3) More time should be allowed for completion of the annual return for corporate insolvencies. (4) There should be no need to notify if this is an annual requirement. In any event, we assume that (4) means that no notice need be given if no further communications are needed with members, creditors etc. Receivers should also be required to lodge annual administration returns to ensure completeness of information for public record and statistical purposes.
26-15	(2)(a) The law should not go to the detail of where the books are to be kept – they may be stored off-site, or may be in a cloud. We suggest delete.
26-25	The costs are incurred because of a decision by ASIC – they are not expenses incurred by a relevant authority under s 556(1)(dd). (5) gives them no priority. We suggest that this provision be redrafted.
26-40	We suggest "5 business days or such further period as agreed", or "as soon as practicable". This would align with section 26-42(3)(4) which allows ASIC to transfer books "as soon as practicable".
26-45	(3) We do not agree that the company is the correct party to approve the early destruction of books and records in a Voluntary Administration or Deed of Company Arrangement. On conclusion of a successful Deed, the books and records will largely be returned to the company to do with as it wishes. Any books retained by the Practitioner should be subject to the direction of the creditors.
Subdiv D	**Giving information to creditors**
General	Generally, any comments we make here are qualified by the fact that much of the detail will be in the regulations, which we have not seen.
26-50 – 26-60	The term 'provide a report' probably means 'prepare and provide a report' although the clearer wording of 'prepare a report' is used for example in section 421A Corporations Act and section 189A Bankruptcy Act. It would be better to say "... *prepare* a report; or (c) produce a document". This needs to be made clear also because the cost of providing / preparing a report may be payable – 26-60.
26-50 and 26-55	These two sections could be folded into one section.
26-57 and 26-59	These two sections could be folded into one section.
26-60	(3) There needs to be a "reasonableness" test in relation to the alterations that can be made to the requirements under the regulations by the creditors or members.
26-65	The section should say who must pay for the work done in providing the information.

Division 28 - Meetings	
General	We query whether this Division should apply to voluntary administrations since two meetings are already prescribed in Part 5.3A?
28-10	"Convene" should be defined – see *Burke v IGB* [2013] FMCA 2.
28-15	A "reasonableness" qualification should be introduced similar to 26-50(3) for situations where the administration is without funds and/or the practitioner considers that the request being made by the creditors/COI is unreasonable (for example a meeting was only recently held and there is nothing new to report to creditors). There needs to be a balance between the rights of creditors and not allowing those rights to be abused to the detriment of the administration and the practitioner. (2) There should be no role for contributories except in a members' voluntary liquidation, in which case the term members should be used and the reference should be specifically limited to members' voluntary liquidations.
28-25	The term "signed writing" is old practice and terminology – the appointment may for example be by email. We suggest "in writing".
28-40	We suggest this should be broadened to say that a notice may include a proposal about remuneration plus another proposal. This is because it is current practice for a Practitioner to always deal with remuneration whenever he or she is calling a creditors' meeting, so that another meeting does not have to be held in the future simply to deal with the issue of remuneration. The same principle applies in respect of meetings by resolution. There should be a requirement for creditors to lodge a statement of claim prior to being able to vote and a process for the practitioner to be able to assess the creditor's right to vote, just as there is with a physical meeting.
28-42 and 28-43	The current section does not require the chair to explain to the meeting the reasons for the use or not using the casting vote. The requirement in the regulations is merely to include reasons in the minutes (reg 5.6.21(4A)). The section should require the chair to give reasons to the meeting to assist creditors with decision to challenge a resolution under these sections.
Division 30 – Committees of creditors	
30-10	There is no need for separate or any meetings of contributories. Is it intended that these requirements for a Committee of Inspection (COI) will replace the current requirements for a committee of creditors in a voluntary administration? If not, then voluntary administrations should be excluded from 30-10.
30-30	This is unwise – it allows the committee to incur expenses and then have those expenses given priority over creditors under s 556. This could also mean that funds otherwise available to pay a dividend to creditors are used for COI expenses. The practitioner may be put in a position where they have advised creditors that a dividend is to be paid, and then be unable to pay it due to outstanding COI expenses. The practitioner may be unaware of these as the practitioner has no involvement in the COI advice process. Further, what is the position if there are insufficient funds in the external administration to cover these costs? We suggest that there be a reasonableness test associated with these expenses.
30-35	There should be a general duty provision. 30-35(5) deals with a member of a committee. 30-35(8) deals with a creditor who has a member on a committee. Both 30-35(5) and (8) prohibit, without leave of the Court, the purchase of administration assets. However, there is

	an exception for members under (5) set out in (6) and (7) which allows the creditors to resolve otherwise but the member of the COI cannot vote. There is no exception like this for the creditor under 30-35(8) – there should be no difference in treatment.
Division 32 - Review	
32-15(4), p 148, p 69	It is not clear w*hose* expenses are associated with the request but we assume it is meant to be the committee member's. In bankruptcy [p 69 of the Bill], the expenses are taken to be expenses of the administration of the estate, which have high priority under s 109(1)(a). In corporate [p 149] the expenses are taken to be expenses incurred by a person as a member of the committee, which have lesser priority under s 556(1)(df). We think the lower priority is more appropriate. There should be a "reasonableness" qualification on the amount and type of expenses. Note also the issue of COI expenses referred to above at 30-30.
32-20	This is expressed very broadly – it should be narrowed to deal only with practitioner conduct issues. Para (4)(e) "any other order ..." is superfluous (6) Note again the issue of COI expenses referred to above at 30-30.
32-20A	This should apply also in bankruptcy, for the sake of alignment.
32-22	(4)(8) This should include not only the cost of the review [if this refers to remuneration and expenses] but also from where the costs are to be paid
32-23	A reviewing liquidator should be required to sign a consent to act and provide a DIRRI prior to being appointed by creditors.
32-24	We will need to see the regulations to comment on this properly, however, we do note that the review period of 6 months at (4)(d) is probably not sufficient. There will be many instances where the Practitioner may be seeking remuneration approval for a period of more than six months. The entirety of the appointment should be potentially subject to review while the administration is ongoing. However, once the administration has been completed, there should only be a limited time for any application to review remuneration to be made. This is where 6 months may be appropriate.
32-35	(1) To ensure continuity of the external administration, the removal of the incumbent liquidator and appointment of the replacement liquidator should be made in the same resolution. If this is not possible, the replacement liquidator must be voted in immediately at the same meeting (ie. the meeting cannot be adjourned). The replacement liquidator must have already consented and must provide a DIRRI which is tabled at the meeting prior to any resolutions being passed. If a replacement cannot be made at the immediately at the same meeting, the incumbent remains in place until a replacement liquidator can be appointed. The incumbent and proposed replacement liquidators should have the right to speak at the meeting. (3) a creditor should also be able to apply. (4) do costs include remuneration and expenses?
Division 42 Other matters	
42-4	(1) Contributories should not have a role. Para (a) and (b) may be read as confining the range of directions that may be given, which we assume was not intended. The equivalent bankruptcy section (p 74) simply and correctly says, "in relation to the administration of the

	estate". Comparable wording should be used in corporate, ie, "in relation to the external administration".
42-10	(1) We assume it is not meant to be confined to rights to sue under the *Corporations Act*? Consideration should be given as to whether the consent of creditors is required prior to assignment. An unintended consequence could arise in relation to family law claims to which a trustee is a party under s 79 of the *Family Law Act*.

3 Schedule 2 – Further Amendments

3.1.1 Part 1 – Regulator Powers

Section	IPA Comment
Bankruptcy Act at the end of s 12	We suggest to add "(5)(c) a prescribed professional body" to allow the Inspector-General to share information in the same way as ASIC.

3.1.2 Part 2 – Statements and reports of affairs etc

Section	IPA Comment
206BB	We consider that this is flawed at subs (7) in that if a director refuses to lodge a RATA, the administration may be finalised early due to a lack of information and funds, thereby releasing the director from any period of disqualification. Also, the extended period of time to undertake the process under the section means that the director would not even reach the point of being disqualified in such a case.

3.1.3 Part 3 – Miscellaneous

Section	IPA Comment
497	The liquidator is required to send to each creditor various information, including a summary of the company's affairs, within 5 business days after their appointment (497(1)). However, the directors are only required to provide a report as to the company's affairs (RATA) to the liquidator also within 5 business days of the appointment of the liquidator. The liquidator will require access to the directors' RATA in order to complete their summary of the company's affairs and yet insufficient time is currently provided in the proposed new s 497. The timing requirements need to be altered to allow the liquidator sufficient time to prepare and send the summary after receipt of the RATA.

4 Contact

We are pleased to offer these comments and to have assisted in the earlier discussions. The IPA remains available and interested to assist in the finalisation of the Bill, and in the

consideration of the regulations and subsequent legislation. Please contact the IPA's Legal Director, Michael Murray, 02 9080 5826, for this purpose.

Yours sincerely

Robyn Erskine
President