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AUSTRALIA + NEW ZEALAND

18 December 2014

The Manager
Corporate and Schemes Unit
Financial System and Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear Sir / Madam

Insolvency Law Reform Bill 2014

We welcome the opportunity to comment on the legislative reform and appreciate the government's commitment to enact change and its ongoing consultation process. We note that the current proposals represent a first step in streamlining legislation to reduce inefficiencies and improve process and outcomes in the handling of corporate external administrations and personal bankruptcy. We support these objectives and agree that much of the proposed legislation will enable the appropriate running of insolvency proceedings efficiently with due regard to the interests of those impacted by the insolvency.

However some of the current drafting will not serve these objectives and in the Appendix to this letter we set out the detail in relation to this point. In addition we believe that there are a few areas where the proposals themselves will have a negative impact on protection or efficiency, namely:

- The education, qualification and registration proposals
- The disciplinary process
- The proposals in relation to deriving profit and agreeing remuneration
- The balance between red tape and appropriate protection.

We highlight each of these below and include more specific recommendations for the draft legislation in the Appendix.

We note that there is opportunity in the second tranche of legislation to look again, in the corporate space, at the balance of requirements between insolvencies of large entities and small or medium entities. We are undertaking joint research in this regard to assist evidence-based proposals for change.

We also note that the second tranche of legislation could usefully provide a framework for the administration of restructuring work. This work is increasingly important as entities and individuals seek an efficient allocation of capital. The management of this work by qualified, experienced individuals following robust standards and a Code of Conduct would increase efficacy and returns.

Chartered Accountants Australia and New Zealand

33 Erskine Street, Sydney NSW 2000,
GPO Box 9985, Sydney NSW 2001, Australia
T +61 2 9290 1344 F +61 2 9262 4841

charteredaccountantsanz.com

Education, qualifications and registration proposals

The education and qualifications requirements should reflect the existing structures and processes. Members of professional accounting bodies are required to have minimum education standards and undertake study as part of the membership training program in business related areas including accounting, economics and law. They are also required to undertake continuing professional development and are subject to ethical and professional standards. There is no benefit in replicating these extensive requirements when reference to membership will enable the objective to be met.

The proposal to introduce standard types of registration (i.e. receiver, or receiver and manager) brings added complexity, cost and confusion which outweigh any potential benefit in terms of a possibly simpler registration process. The skill sets are not substantially different. Potential creditors or appointees are unlikely to have deep knowledge of the difference and so would not know who to use. If a particular proceeding moved in a different direction from that initially planned, the proposals could mean that another person would need to be involved when that aspect of the proceeding could reasonably be undertaken by the existing practitioner had they registered differently.

The draft legislation already provides for conditions to be placed on registration. In circumstances where a practitioner only has experience in a particular field or where a regulator or committee believe work should be restricted to a particular area after reviewing the individual's application, the legislation allows for this. There is no benefit to introducing additional provisions, regulation and cost to cover circumstances which are already adequately dealt with.

Disciplinary process

In the corporate sphere, we do not believe it is appropriate to move the disciplinary process from the Companies Auditors and Liquidators Disciplinary Board (CALDB) to a committee. We understand that the committee approach works in the personal bankruptcy arena. However corporate proceedings often involve many more stakeholders and complex issues and often the financial or other impacts are higher. Therefore a robust and transparent process for resolving these issues is essential and we do not believe that the committee approach as proposed will provide the requisite rigour.

Our recommendation is to maintain the CALDB process for corporate insolvency hearings.

We note that there are minimal costs associated with the CALDB process. It holds meetings only when necessary. Therefore we do not believe that there is any substantial cost saving in moving to the committee approach.

Should the proposed committee approach be maintained, we have serious concerns on the proposed governance, independence and due process. It is not appropriate to have a system whereby one party is able to refer a matter, assess its validity, determine action to be taken, and then be responsible for undertaking that action. This is particularly so when there are serious consequences from the decisions of the committee. We provide our recommendations for changing the constituents of the committee in the Appendix.

Deriving profit and agreeing remuneration

The new requirements concerning deriving a profit or advantage and engaging others are intended to prevent a practitioner using related parties at a potentially inflated cost, to the detriment of the creditors. In summary, to prevent improper gain. While we recognise the desire to incorporate more specific provisions in relation to the idea of improper gain in the legislation, we believe that as written (sections 60-20 and 60-25 of the draft Bill), the requirements instead will prevent effective running of the proceedings and indeed could prevent a practitioner from either being appointed, or enacting procedures to obtain returns for creditors. For example, the requirement not to give up remuneration

could prevent a practitioner from using staff in their own firm which will introduce significant impracticalities and inefficiencies. Similarly the prohibition on employing a related party without creditor consent could prevent a practitioner from using experts in their firm to secure premises or IT systems on appointment to the detriment of the proceedings.

We recommend using provisions from sections 181 and 182 of the Corporations Act (which relate to director's obligations for good faith and use of position) rather than attempting to prescribe specific situations. Guidance on application can be provided by the regulator.

Red tape vs appropriate protection

We support the streamlining of process between personal and corporate areas but note that the stakeholders can be different and the issues involved can also be different. Therefore there are valid reasons why certain structures, processes and requirements should be different. By maintaining separate regulatory bodies, this distinction seems to be recognised.

We also support moving requirements from the legislation into the Insolvency Bankruptcy Rules (IBR) where possible. However we note that it is difficult for us to assess the effectiveness and appropriateness of the specific changes without seeing a more advanced draft of the IBR.

In relation to "red tape", we believe it is important to recognise that every requirement to assess, consider or undertake an action, could be taken to require documentation in insolvency working papers, for example to allow subsequent inspections to make an assessment based on paperwork. Every such requirement therefore will add to the cost of the administration, and potentially impact on the returns to creditors. This point needs to be considered when determining the balance between perceived protections and efficiency.

In this regard we note that there is also a possibility that requirements intended as protections could be utilised for vexatious purposes by some impacted by the proceedings. This is a particular danger in insolvency proceedings which can be emotive. A requirement which introduces this possibility could have a more adverse impact on the outcomes for creditors as a whole across a range of proceedings than the potential impact of an unscrupulous practitioner in a particular circumstance. This particularly applies to the new requirements for review of fees and review of administration. We suggest options in the Appendix.

Resourcing

We note that the Bill envisages substantial new requirements and obligations on ASIC at a time when its resources have been cut. There is considerable danger that if the regulator is not resourced to fulfil its obligations, returns to creditors may suffer. This is because any inefficiencies, delays or inadequate responses caused by lack of resources, will have a direct impact on a practitioner's ability to manage the proceedings – either at all or in an efficient manner. Given the potentially serious consequences of poor resourcing, the cost for ASIC to apply the new requirements should be separately identified and discussed within government as part of the Bill's progression.

Professional body

Please note that Chartered Accountants ANZ is a Professional Body. A professional body is distinguished from an "industry" body by, for example, its remit in relation to the public interest, by its education and standards, by its monitoring and professional conduct activities and ongoing education requirements, and by its membership of individual professionals. If references remain in the Bill to our organization, please ensure the reference is to a professional body.

Chartered Accountants Australia and New Zealand is made up of over 100,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of Chartered Accountants Australia and New Zealand are known for professional integrity, principled judgement and financial discipline, and a forward-looking approach to business. We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

Overall

In relation to the draft legislation overall, we refer you to the submission by the Australian Restructuring Insolvency & Turnaround Association (ARITA), which provides comprehensive analysis in relation to the practicalities and implementation of the proposals.

If you have any questions regarding this submission, please contact Liz Stamford (Audit and Insolvency Leader) via email; lizstamford@charteredaccountantsanz.com.

Yours faithfully

Rob Ward FCA
Head of Leadership and Advocacy
Chartered Accountants Australia and New Zealand

Appendix: Recommendations on specific provisions and the Insolvency Business Rules

Division / Reference	Concern	Recommendations
20-20(4) 35-1(1) 40-25(1) 40-30(1) 40-40(1f)	We note that there are several lists of events which are relevant to registration, notice or discipline, both in the personal and corporate sections. Each of these lists is slightly different. For consistency and ease of use, it would be preferable if there were one list of matters relevant to eligibility to act. This list would be used to assess registration, disqualification or suspension decisions, and changes needing to be notified.	Combine matters relevant to the eligibility to act into one list, either in the legislation or Insolvency Business Rules (IBR), and reference this list in subsequent sections of the Act. As far as possible the list should be consistent between personal and corporate areas.
20-30	There are no time limits on matters for disqualification or registration.	Include a time limit on matters which would prevent registration.
25-1	We do not believe that the regulatory bodies should, or indeed are able to, "determine" insurance levels. Their role is to provide guidance on what may constitute appropriate and adequate insurance levels.	Change drafting to "[The Inspector-General/ASIC] may, ~~by legislative instrument, determine~~ provide guidance on what constitutes adequate and appropriate professional indemnity insurance, and adequate and appropriate fidelity insurance,..."
40-45	We do not believe that the constitution of the committee reflects appropriate governance or sufficient robustness for hearing disciplinary cases. Cases are referred by the regulator. It is not appropriate therefore for the case to be heard and judged by the regulator which will happen as the regulator as one of only three people hearing the case under the current drafting. This is exacerbated by the fact that the Minister's appointment can be delegated to the regulator, potentially meaning at least two of the three members are appointed by the body putting forward the case for action. While the proposal is intended to streamline with the personal bankruptcy regime, there are significant differences in the corporate space, and in the roles and responsibilities of the regulatory bodies and other participants which make consistency inappropriate in this case. Committee matters will involve allegations of a serious nature with potentially serious consequences, including loss of livelihood. Good governance is therefore vital.	Maintain the CALDB process for hearing disciplinary actions. If this recommendation is not accepted, it is imperative that the constitution of the committee is revised. Having an independent committee is vital and so we recommend removing rights of individual bodies to appoint and instead setting more clearly the criteria for appointment – specifically members with experience in insolvency and members with qualifications, knowledge and experience in business and financial markets. The requirements need to address a practitioner's rights in the hearing process, such as use of expert witnesses or documentation requirements. The right to appeal the committee's decision, or require a review, must be included as should reference to the costs associated with the hearing. We note that all of these elements have been worked through in detail and are being used by the CALDB to enable that process to

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	Good governance would require: ***Independence*** – committee members are not appointees of interested parties but rather bring related experience and knowledge ***Consistency*** – we understand that the intention is for a pool of experts who will be drawn on to form individual committees when required. The CALDB process enables consistency by requiring either the chairman or deputy chairman to be on each committee. This is a useful mechanism to maintain consistency of approach to matters heard. ***Right for practitioner to be heard and to appeal*** – it is in the public interest to deal with cases in a cost effective and efficient manner but it is also in the public interest for individual rights to be protected. The requirements therefore need to incorporate safeguards such as the right to be heard, providing supporting documentation and witnesses, agreement of facts, ability to appeal determinations and provision for costs. Not all of these elements are apparent in the requirements as currently drafted.	be fair while keeping costs and time to a minimum. We therefore repeat our recommendation that this process be retained. The cost and unintended consequences of changing process considerably outweighs any advantage of consistency with the personal bankruptcy regime.
60-20 60-25	The new requirements concerning deriving a profit or advantage and engaging others are intended to prevent a practitioner using related parties at potentially inflated cost, to the detriment of the creditors. In summary, to prevent improper gain. While we recognise the desire to incorporate more specific provisions in relation to the idea of improper gain in the legislation, we believe that as written (section 60-20 and 60-25), the requirements instead will prevent effective running of the proceedings and indeed could prevent a practitioner from either being appointed, or enacting procedures to obtain returns for creditors. For example, the requirement not to give up remuneration could prevent a practitioner from using staff in their own firm which will introduce significant impracticalities and inefficiencies. Similarly the prohibition on employing a related party without creditor consent could prevent a practitioner from using experts in	Replicate sections 181 and 182 of the Corporations Act to cover practitioners' obligations for good faith and use of position. Guidance and application material on the matter to be provided by ASIC. This will allow non-legislative guidance which is able to explore the issues, set out examples, and highlight improper practices without setting prescriptions which cannot be easily updated.

Appendix: Recommendations on specific provisions and the Insolvency Business Rules

Division / Reference	Concern	Recommendations
	their firm to secure premises or IT systems on appointment to the detriment of the proceedings.	
70-15	The term “audit” has specific meaning in Australia, namely the undertaking of a service following auditing standards set by the Australian Auditing and Assurance Standards Board (AUASB). These standards set the requirements for accepting engagements, undertaking specific procedures and actions, and reporting requirements. The AUASB is a government agency and their standards have the force of law.	Work with the AUASB to use appropriate terminology for the service envisaged.
70-20 90-20(1) & (2)	Although the Court will be able to apply balance, the ability for “any” person with a financial interest to apply for a fee review or review of the administration, could introduce considerable additional workload on the court system. Also it could impact the returns as the expenses associated with the application are taken from the administration.	Remove “any other person with a financial interest” from the list in 90-20(1) and limit applications to those set out in the revised list. This will make the rights consistent, e.g. creditors are able to obtain information, inspect books, approve fees and remove practitioners. Court should be able to require an applicant to pay costs.

Appendix: Recommendations on specific provisions and the Insolvency Business Rules

IBR area	Concern	Recommendations
Register of Trustees / Liquidators	Information to be included on a register includes: • Addresses of other places they practice. For a practitioner working in a network of firms or firm with a large number of offices, this could be onerous. It is difficult to see a compelling reason for this disclosure. • Particulars of any past disciplinary action or suspension. There should be a time limit on this requirement.	Remove requirement for "other offices". Include a time limit on disclosure of past actions.
Qualifications, experience, knowledge and abilities	The aim is to have a harmonised set of entry standards for insolvency practitioners. We do not believe that separate registrations for different types of corporate insolvency are either necessary or meet the aim for harmonisation. We also do not believe that the proposals will reduce cost as it will be more expensive to administer as well as introducing complexity and confusion in the market and with stakeholders. To allow practitioners to apply separately as a receiver, receiver and manager, or liquidator is an unnecessary distinction. The skill sets are not substantially different. Potential creditors or appointments are unlikely to have deep knowledge of the difference and so would not know who to use. If a particular proceeding required a different skill, it would be unnecessarily complex to involve another person when that aspect could reasonably be undertaken by the existing practitioner. The legislation already provides for conditions to be placed on registration if a practitioner only has experience in a particular field or if the regulator or committee believe they should only work in a particular area after reviewing the application.	Remove the standard conditions on corporate liquidation registration.
	The detailed rules for qualifications and experience will have the effect of restricting the pool of potential applicants without improving quality. Members of professional accounting bodies are required to have minimum education standards and also undertake detailed study in business related areas.	We recommend reference to membership of a professional accounting body to assist with the qualifications assessment. We recommend utilising the experience of ASIC's auditor registration process to develop a more effective mechanism for assessing relevant experience for registration.

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IBR area	Concern	Recommendations
	In relation to experience, the corporate audit regime has established processes relating to either time spent on relevant work or demonstrated competencies (validated by a registered auditor). This approach allows a variety of relevant experiences and work histories to be recognised without unnecessary prescription on how that experience was obtained (i.e. full-time work). It does not introduce substantial additional work for the regulator as they will need to assess "relevant employment" in whatever form it is reported. In the audit space, the professional accounting bodies set the standards of competencies which are approved by ASIC.	
Notice requirements	The list of matters required for notice is different from the various lists in the draft legislation (noted above).	Combine all matters relevant to eligibility to act into one list, either in the legislation or IBR, and referencing this list in subsequent sections of the Act. As far as possible the list should be consistent between personal and corporate areas.
Information	There could be implications in relation to providing creditor contact details to others arising from the new Privacy Act and rules. A report on work on request would be reasonable if the information in this report were standard and able to be extracted electronically from records for example. Matters which would require individual narrative will require time away from the administration. This cost to the proceedings could become excessive if there were particular individuals who constantly requested information or who were seeking to subvert the administration. This can be managed by limiting the ad hoc information to be provided and strengthening the guidance around unreasonable requests. We also note that 5 business days is very short and recommend extending this to 10 business days.	Ensure the obligations of the Privacy Act 1988, including the National Privacy Principles set out therein as amended from time to time, are taken into account in the rules for disclosing creditor information. Ensure the detailed Work in Progress is limited to matters readily extractable from records. Extend the requirement to provide information from five business days to 10 business days.