Submission to Proposals Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia

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We applaud the government generally for the proposals set out in the December 2011 paper. We believe that they have taken into account all submissions, and the resulting proposals will significantly modernise and harmonise the regulatory framework for insolvency, in particular through improved transparency, accountability and responsiveness. If implemented, This Australia will become an international leader in this respect..

Our submission is confined predominantly to Chapters 2 and 3 of the Paper, and builds on our earlier submission to the June 2011 Paper.

Chapter 2- Standards of Entry into the Insolvency Profession

Para26(a) proposes that one aspect of the qualification requirements for practitioners should be:

"Holding degrees representing collectively three years of full time study in commercial law and accounting, but with no less than one year of equivalent full time study for either."

We support the requirement for a minimum amount of both law and accounting study, and we support the greater recognition of a legal study requirement. The statutory requirements have previously lacked clarity and perhaps not been strictly implemented or checked for compliance.

However, it is important that the new requirements are clear, open to competition amongst providers, and enable the industry (including educational and professional organisations) to facilitate and respond to the requirements within the government's Australian Qualifications Framework.

Unfortunately few, if any, Commerce or Business degree graduates would satisfy this requirement. Commerce degrees commonly available in Australian universities provide for majors or areas of specialisation, so not all have large amounts of accounting. Business law is more likely to be one compulsory half-year subject in the earlier years, with optional law subjects in later years.
There has been a trend in recent years to teach Commerce and Business degrees with fewer law components. The accounting professional bodies have required a basic introduction to business law of half-year duration, followed by two further half-year subjects,usually a corporate law taxation subject. An 'equivalent full time' load would usually be eight half year subjects and so the law components would not amount to one year of study. We suggest the requirement for 'legal study' be at least three subjects, namely an introductory business law subject, a corporate law subject and any

other law-related subject as this would include taxation, trade practices, banking and financial institutions law or even an insolvency law subject.

Accounting, as it can be chosen as a major area of study that leads to a professional career and professional body membership, does not present a problem in terms of 'equivalent full time' of at least one year. However, care needs to be exercised in that there is a multitude of offerings under the nomenclature of Business degrees and Commerce degrees, and not all will offer substantial amounts of accounting.

Therefore there is a danger that, in attempting to open up the entry route by removing the current preference for accounting over law studies, the result will actually be to prevent more accountants who are currently eligible on the educational element of their qualifications, from entering the profession. Given the culture in Australia that the accountancy profession takes on almost all insolvency appointments, one wonders whether the risk of bringing about this unintended consequence is disproportionate to the objective, as few lawyers or those with legal study, will take up insolvency appointments irrespective of the university requirement being changed in their favour.

A Prescribed element of insolvency-specific study

We consider the next proposal, for a mandatory element of insolvency study, to be far more crucial to the objectives in the Paper. As pointed out in para 26(a) bullet point two of the Paper, such insolvency study could be included as part of the tertiary study referred to above. However, we do have some detailed points to make about the recommendation for insolvency-specific study.

The second bullet point in Para 26(a) states that another requirement of the educational qualification for practitioners would be : "A prescribed level of formal tertiary studies in insolvency administration specific study. The prescribed level would be at least equivalent to that currently provided under the Insolvency Practitioners Association (IPA) Insolvency Education Program provided by the Queensland Institute of Technology."

We submit that this 'prescribed level' should be more detailed, primarily with the expressed reference to the IPA Education Programme and its current course provider, Queensland University of Technology (QUT, being removed. Whilst it is understandable that the Government would use this existing industry course as a guide to the content and level of what is being considered, given that it is the only 'tailor-made' course at present, this does not mean that the 'prescribed level' should take that course as a minimum benchmark. First,it is important to note that IPA membership is voluntary and that membership does not completely cover all insolvency practitionersWe question whether the Government, which has not endorsed in this Paper the concept of insolvency practitioners having to belong to the IPA or any other organisation, should be using the IPA course as a unit of measurement against which any other course or provider should be judged. If the Government merely meant to say that the IPA course was an example of the level, length and content of insolvency-specific study that it would consider, that would be generally an acceptable proposition, although it is fair to say that, as we have both taught on the IPA course, there are many aspects of it which could be improved, particularly the balance

between personal and corporate insolvency, and we think the IPA themselves would acknowledge that, as with any course, review must always be cyclical.

Furthermore, QUT is the current successful tenderer of this Insolvency Education Program and it should be recalled that the Program was previously offered by the University of Southern Queensland (USQ). Therefore again, the name of the current provider should not be tied to measurement or benchmarking, as this would not reflect either the IPA's own practice of putting this course out to tender every three years, and also for the reasons set out above, would not only be seen to be the government measuring the minimum insolvency education requirement by reference to one professional body, but more specifically to one educational provider.

The proposal should instead acknowledge more explicitly that in future such a Program could be offered by other tertiary or professional institutions, such as those currently offering, or proposing in future to offer, Masters level courses or qualifications in insolvency by coursework. These offerings are or could be done as intensives or standard semester delivery like other Masters programs. It may be useful to note that there is a growing number of academics from a disperse group of universities that research and teach insolvency, all would be more than capable of delivery Masters level coursework on insolvency administration.

In framing a more appropriate wording which facilitates flexible responses by educational and professional bodies to any new insolvency-specific requirement, and as we stated in our previous submission on this point, the Government should consider how this fits within its own AQF measurement of levels of education, including tertiary study. When mentioning a 'prescribed level of tertiary study', it is not clear whether the prescription relates to the level in the AQF sense, e.g postgraduate certificate or diploma level, or whether more generally it is being used to indicate the type of content/length as exemplified by the current IPA course. In relation to the first point, if the government has in mind that the insolvency study should be at a postgraduate level, then this would not be compatible with its earlier suggestion, which we support, that any insolvency study in a law/accounting degree (usually undergraduate level) could count towards this qualification.

We believe that it should be possible for applicants to apply for undergraduate level insolvency study to be counted towards satisfaction of this requirement, but this should not be an automatic process, since some undergraduate level insolvency courses will not be sufficiently tailored to the requisite content or level.

Our view is that the most important point is that there should be a mandatory requirement for insolvency-specific study. In the government's June 2011 paper, the proposal was for one-year of insolvency study. We pointed out that, whilst that may be a general guide, courses are not measured in time but in units, and intensive courses can be taught over a few days or weekends, or online. Therefore what is required is a measurement that can be easily applied to a range of modes of delivery. We propose a measurement in hours of insolvency study. As a guide, we would think that 48 hours (equivalent to two standard length Australian Masters courses) could be a minimum contact time or directed learning activity
We believe that the government should develop this proposal further in consultation with educational providers, professional bodies, ASIC and ITSA. A working group

could be established tasked with drawing up prescribed course content and length, the objective being to prescribe general core areas of competence and knowledge to be met through the insolvency-specific requirement, without being so prescriptive as to stultify or prevent innovative or competitive delivery of the course. We believe that these groups could work harmoniously and expeditiously to assist the government in this respect.

Chapter 3- Registration of Insolvency Practitioners

Para 44 refers to the composition of committees and again refers to "an IPA representative". We appreciate that it reflects the composition of the current committee for personal insolvency trustees, butin terms of the objectives of transparency and accountability in this Paper, again it should be noted that all insolvency practitioners are members of the IPA and whilst it is the most relevant and organised industry body, perhaps further thought should be given to the selection of an "industry representative" rather than specifying a particular professional body. (NB: To avoid confusion, where references in future are to the Insolvency Practitioners Association, these should be spelt out or defined, because a renamed body, the Institute of Public Accountants (IPA) now has the same initials as the Insolvency Practitioners Association of Australia (IPA).)

Chapter 5

We believe the term 'Committee of Inspection' is outdated, and inconsistent with the term 'creditors' committee' used for Part 5.3A (and in most other jurisdictions). Notwithstanding the increased role proposed in this Chapter for such committees, which we support, they do not inspect anything and it is a nineteenth century term which should be removed from a paper whose title promotes 'modernisation' of the law

Chapter 10

Transparency in regulator activity.

In addition the proposed ASIC reporting measurements suggested in paragraph 210, we would submit that ASIC and ITSA both be required to make statistics publicly available via its website, in a form which analyses and summarises the results of reporting information that is collected from insolvency practitioners and other returns under Part 5 Corporations Act or Bankruptcy Act 1966. As noted in the Senate Inquiry, there is a discrepancy between the extensive information provided by ITSA and the much more limited information and analysis of that information provided by ASIC. The IPA and insolvency academics have suggested to ASIC the types and form of information that could readily be made available from data collected by ASIC at present, but ASIC's statutory requirement to collect data from insolvency practitioner reports does not currently require it to collate, publish or analyse that date. Part of the problem has been technological, in that some ASIC reports are still collected in paper or microfiche form, rather than electronic filing. However, a more prescribed reporting requirement would certainly encourage ASIC to make such information available, since it could be the source of useful information for wider economic purposes. Transparency is required for the confidence of stakeholders, as para 211

points out, but ASIC's wider role under the ASIC Act suggests it has a wider economic function, and publication and communication of its data assists researchers, economic analysts and professional bodies.

In addition, ASIC currently charges significant fees to academic researchers for purchase of datasets, and this is a significant barrier to much-needed empirical research which will assist government and practitioners, as well as the regulators themselves in future. Consideration should be given to whether these fees truly reflect the cost of provision of this data, and in any event whether it is appropriate. We have suggested to ASIC that they could consider the model of the ATO, which makes available anonymised samples of tax data for academic and economic analysis at no charge.

We can give further details of the type of insolvency data which ASIC could provide and analyse from its existing databank. This would also facilitate benchmarking of Australian insolvency internationally, which would assist the government when receiving requests from bodies such as the World Bank and IMF for such benchmarking exercises.

Chapter 11

Para 235 refers to persons having to "complete a prescribed course in director's duties" and we note that these are not readily available in Australia, though they can often form a component of courses in corporate law, insolvency or other business and management courses. The Australian Institute of Company Directors has some programmes at different levels. As with our comments on Chapter 2 above, if a broad syllabus/length of the course under consideration could be agreed, be possible for universities and other providers could respond accordingly by making available existing courses or developing more discrete courses on director's duties. The working group suggested in the submissions above, could also examine this aspect of the proposals.

Chapter 12

Para 251 carries forward a proposed amendment to effect that the administrator should notify creditors of known breaches of the terms of a DOCA where the DOCA has provided for return of the company to control of the directors.

A concern that has arisen in the last few years, addressed in an ASIC Regulatory Guide and considered in a number of judicial decisions, has been the increasing use of creditors' trusts as a method of exiting a DOCA, placing a deed fund in trust, and thereby removing the creditors' protections under Part 5.3A and replacing them with the more uncertain and limited protections of trust law. It is suggested that the proposal to inform creditors of breach of the terms of a DOCA is rendered superfluous if the creditors' trust route continues to be upheld (see ***re Bevillesta***, NSWSC 2011 as a lawful method of exiting a DOCA. Both ASIC and some judges have expressed concern about this, though it is arguably lawful under the current wording of the legislation. It is suggested that, rather than pursue this amendment further, the Government in conjunction with ASIC should review whether creditors'

trusts should be permitted to circumvent the express procedures built into Part 5.3A for creditor protection.

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