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Proposed reforms to Australia's corporate insolvency regime

On 14 December 2011, the Parliamentary Secretary to the Treasurer, together with the Attorney-General, released a paper detailing a number of proposals designed to harmonise the regulations relating to personal and corporate insolvency.

It is important to note that the reforms have not yet been implemented. Parties interested in influencing the nature of the reforms have until 3 February 2012 to make their submissions to the Department of Treasury.

The proposals are designed to simplify and streamline the current processes and make the regimes easier for practitioners, liquidators and members of the public to understand and utilise.

Some of these reforms are brand new. Others have previously been part of one regime and are now being adopted by the other.

Some key changes are set out below.

Standards of entry

The qualifications and experience required of insolvency practitioners would be the same whether they were practising in the personal or corporate sphere. A practitioner would be required to:

- obtain adequate insurance cover;
- have reached a threshold level of study (3 collective years of full-time study in commercial law and accounting **including or in addition to** a prescribed level of formal study in insolvency administration; the latter is a new requirement and is found at paragraph 26(a) of the proposed reforms;
- pass a 'fit and proper person' test;
- provide information showing that he/she has not been convicted during the last 10 years of any fraud or dishonesty offence;

- show that he/she has not been involuntarily deregistered **in either the corporate or personal insolvency regime** within the last 10 years; further, suspension in one regime will result in a prohibition on registering in the other (paragraph 26(g));
- undergo a 'probationary period' of two years – paragraph 33(e).

In addition, insolvency regulators would be entitled to place industry wide 'conditions' on the registration of insolvency practitioners regarding matters such as continuing professional education and ongoing review of practitioners' work.

Regulation of insolvency practitioners

Many of the reforms proposed in this part are not new. They are already part of the personal insolvency regime but are intended for implementation in the corporate regime also. Corporate practitioners will be required to apply to a Committee for registration and have their registration renewed every three years (paragraphs 41, 45 and 51).

They will also be required to inform the regulator of any circumstances that would have a bearing on their ability to perform their role. These may include criminal convictions or disqualifications (paragraph 54).

Remuneration

These changes are designed to provide additional accountability to creditors and streamline requirements to minimise costs. They include:

- mandated caps on fee approvals (to satisfy creditor expectations) – (paragraphs 64 and 65);
- ability for a regulator to appoint a cost assessor to determine the reasonableness of costs charged in an administration (corporate insolvency only) – (paragraph 73), and the assessor may appoint an expert if needed – (paragraph 76);
- in addition, a regulator may commence a costs review on his own initiative without needing to have the matter referred to him – (paragraph 80).

Communication and monitoring

These are aimed at enabling a free flow of information between creditors and insolvency practitioners, and enabling creditors to keep themselves informed. These proposed reforms include:

- improved abilities for creditors 'to make requests for information, set requirements for regular reporting' and require meetings to be convened[1];
- the passing of resolutions occurring without a need for meetings in order to reduce cost and improve efficiency – (paragraph 109).

Funds handling and record keeping

The purpose of these reforms is two-fold: to increase the accountability of practitioners and reduce costs. Practitioners are currently required to comply with multiple fund handling rules, which can drive up the costs of administration. The reforms include:

- aligning the powers of regulators across both regimes to appoint independent third parties to audit the records of an insolvency administration – (paragraph 126);
- adding a requirement in the corporate regime to perform regular bank reconciliations – (paragraph 119); this requirement already exists in the personal insolvency regime;
- the Corporations Act rules regarding prohibition on document destruction would be extended to cover both personal and corporate insolvency – (paragraph 122).

Insurance

Practitioners are required to maintain proper professional indemnity and fidelity insurance with significant penalties proposed for failure to comply (paragraph 134).

Disciplinary mechanisms and deregistration

Significant changes have been made in the corporate regime to match the personal regime. Examples include:

- the empowerment of regulators to suspend or deregister practitioners for certain breaches (paragraphs 141 and

[1] See paragraph 84

143), or prevent them from accepting new appointments until they comply with the conditions of their registration (paragraphs 145-146);

- the 'show cause' process currently adopted as part of the personal insolvency regime would be extended to the corporate insolvency regime (paragraph 149). Circumstances that could lead to the commencement of a show cause process, together with potential remedies, can be found at paragraphs 150 and 155.

Removal and replacement of practitioners

These reforms are designed to provide more power to recipients of insolvency services in determining whether a practitioner should be removed, but also to protect practitioners from any abuse of that power.

Creditors can remove practitioners by resolution (paragraph 181), so long as the removal is not done improperly (paragraph 184).

There are also proposed amendments to ensure quick transfer of records from outgoing practitioners to those incoming (paragraph 191), with regulators able to facilitate the transfer (paragraph 193).

Increased power to regulators

The intent is to equip regulators sufficiently to monitor practitioners' conduct and address stakeholder concerns. These include:

- an enhanced ability to gather information themselves (paragraph 199) or to require practitioners to provide it (paragraph 201), and require the calling of meetings (paragraph 204);
- increased transparency regarding the conduct of insolvency practitioners including surveillance (paragraph 198), but also regarding the conduct of the regulators themselves (including complaints received, referrals and general regulator activity) (paragraph 211).

The proposed reforms also devote additional sections to regulation of small businesses and the impact of these reforms on the 2010 Corporate Insolvency Reforms that were announced on 19 January 2010.

A full copy of the proposed reforms can be found on the Department of Treasury website.

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