

3 February 2012

Manager  
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The Treasury  
Langton Crescent  
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**By email:** insolvency@treasury.gov.au

Dear Sir/Madam

**Feedback on Proposals Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia (the "Proposals Paper")**

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1. IMF (Australia) Ltd is a public company listed on the Australian Securities Exchange. Its business is the funding and management of litigation.
2. IMF has extensive experience with, and an interest in, the regulatory framework applying to insolvency practitioners in 2 respects:
  - (a) IMF provides litigation funding to insolvency practitioners (receivers, trustees in bankruptcy, deed administrators and liquidators) to conduct examinations and to pursue causes of action; and
  - (b) IMF provides litigation funding to creditors (primarily those making a claim arising from the alleged failure by the corporation to comply with its continuous disclosure obligations) to lodge and pursue proofs of claim or to pursue the insolvent company in Court, with leave of the Court.
3. As a consequence, IMF's feedback is provided from the perspective of both a recipient of insolvency administration services and as a service provider to insolvency practitioners.
4. In general terms, IMF supports the initiative to make changes to the law to promote professionalism and competency, to improve transparency and information flows and to increase efficiency. Comments are provided below on aspects of Chapters 5 and 11 of the Proposals Paper.

**Chapter 5 – Communication and Monitoring**

5. IMF agrees that it is important to enhance the ability of creditors to request and receive information relevant to the conduct of the administration and the affairs of the debtor. This promotes confidence in the administration and the fair and efficient conduct of creditors' claims.
6. Paragraph 95 of the Proposals Paper states: "An insolvency practitioner would be required to give information about the administration of the estate to a creditor who reasonably requests

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- it. The power would be based upon the current Bankruptcy Act obligations”.
7. It is not clear whether “information about the administration” would include information concerning the affairs of the entity the subject of the administration. There is some doubt about this because paragraph 100 of the Proposals Paper makes a distinction between reporting requirements regarding the “debtor’s affairs” and those regarding “administrations”.
  8. It would promote the purposes of the Proposals Paper in improving the ability of creditors to access relevant information if the changes proposed by paragraph 95 made it clear that the information referred to, included information about the debtor itself.
  9. IMF also suggests that consideration be given to the application of section 486 of the Corporations Act, in this context.
  10. Section 486 (which appears in Part 5.4B of the Corporations Act) states:

“The Court may make such order for inspection of the books of the company by creditors and contributories as the Court thinks just, and any books in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.”
  11. By virtue of the words “but not further or otherwise” in section 486, there is an argument that liquidators cannot make the books of the company available to creditors and contributories for inspection, without Court order.
  12. The word “information” (as used in the Proposals Paper) is capable of being construed as including “books” (as defined in section 9 of the Corporations Act).
  13. IMF submits that:
    - (a) “information” contemplated by paragraph 95 of the Proposals Paper (and as extended pursuant to the suggestion in paragraph 8 above) should expressly include “books”;
    - (b) section 486 should be amended so as to remove any potential conflict between section 486 and the capacity of an insolvency practitioner to provide “information” (including books) to creditors who reasonably request it (without Court order); and
    - (c) a section equivalent to section 486 as modified pursuant to (b) above, should be introduced so that the Courts’ power could be exercised in administrations and deeds of company arrangement, as well as in liquidations.
  14. Paragraph 97 of the Proposals Paper states:

“A few key specified kinds of requests (for example, requests for the most current creditor lists (including names, amounts owed and contact details, and email addresses if available), detailed Work in Progress reports, and transaction reports) would be prescribed as being reasonable to request, and time limits within which such requests must be complied with would also be provided. It is intended that there would be rules preventing nuisance or vexatious requests which could cause the administration to incur unreasonable costs. This could include situations where a request is made repeatedly and within a short timeframe.”
  15. Information relevant to certain creditors may include information concerning insurance policies held in favour of the debtor, particularly in light of the operation of section 562 of the Corporations Act.
  16. Section 562 states:

562 (1) [Payment of amount received under insurance contract] Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any

part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.

562 (2) [Effect of subs (1) were payment results in partial discharge of liability] If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.

562 (3) [Effect of section where contrary agreement] This section has effect notwithstanding any agreement to the contrary.

17. Section 562 elevates the priority of creditors whose claims fall within it, over the relevant insurance proceeds.
18. However, creditors whose claims may potentially become the subject of section 562 can have trouble obtaining information about the existence of insurance policies from the Liquidator, who may be concerned about revealing such policies in case that constitutes a breach of the policy. This has the effect of frustrating the rights of a creditor and adding to the creditor's expense in seeking recovery.
19. IMF suggests that information about insurance policies (which would include the policies themselves) be prescribed as being reasonable to request in circumstances where the insolvency practitioner considers that the company is likely to be insured against liability to the requesting party.

#### **Chapter 11 – Specific Issues for Small Business**

20. Paragraph 216.1 proposes an amendment to the statutory powers of insolvency practitioners to clarify that they are empowered to assign statutory rights of action arising under the Corporations Act.
21. Although this paragraph appears in the chapter headed "Specific issues for small business", IMF assumes that this amendment is not proposed to be restricted to "small business". If that assumption is incorrect then IMF submits that the amendment should not be so restricted.
22. Paragraph 218 states that "The inability to obtain funding is a major obstacle to the commencement of these actions".
23. In order to address this position and to enhance the prospects of funding being obtained, IMF suggests that a general requirement be introduced into the Corporations Act and the Bankruptcy Act for insolvency practitioners to consider whether funding may be available for the prosecution of rights of action available to the debtor or to the practitioner.

Yours sincerely



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