21 December 2012

The General Manager
Financial System Division
Treasury
Langton Crescent
PARKES ACT 2600

Email: SafeFinancialSector@treasury.gov.au

Attention: Mr Danny Namgyal

Dear Mr Namgyal

Strengthening APRA's Crisis Management Powers – Consultation Paper – September 2012

As you are aware, the IPA is the professional body of company liquidators, bankruptcy trustees, and lawyers, financiers, academics and others concerned with insolvency law and practice. We welcome the opportunity to comment further on these proposed laws in relation to banks and other ADIs, life and general insurers, and APRA regulated superannuation funds ('the regulated entities'), which are an important aspect of Australia's insolvency and financial services regime. A number of our senior IPA members have administered these types of entities over the past years and we have drawn on their experience when preparing this response.

We provide these general comments on the consultation paper. As we advised, we needed an extension until this date to finalise this submission.

1 Clarification of regulatory roles

We suggest that the proposed regime be clear as to the respective regulatory roles of both ASIC and APRA.

Registered liquidators are experienced and qualified practitioners registered and regulated by ASIC under the *Corporations Act*, and by the courts. The paper appears to substitute APRA in a regulatory role in relation to the insolvency of the regulated entities. We suggest that close policy and drafting attention be given to the respective roles of both ASIC and APRA, and consequently the respective regulation, guidance and assistance given to practitioners.

2 Regulatory interests vs commercial interests

This is so in particular given that APRA will be pursuing interests that are fundamentally different from those of insolvent commercial entities, namely the interests of policyholders and prospective policyholders under insurance policies, and the protection of the depositors and the promotion of financial system stability in Australia: see for example s 12 *Banking Act* 1959. Commercial insolvency has primary regard to the interests of creditors, including trade creditors and employees. These regulated entities will have commercial and trade creditors and employees whose interests will still require protection. A practitioner will need to operate according to the *Corporations Act* and relevant ASIC regulation and guidance in relation to those interests, as well as operate according to the industry Acts and APRA guidance.

There would need to be care taken in relation to drafting the law concerning the relative position of the interests of creditors and the relative responsibilities and standing of other parties, including the practitioner. Apart from existing difficulties in relation to the insolvency of insurers,[1] difficulties arise at present in relation to the interests of investors and the duties of practitioners in dealing with the insolvency of managed investment schemes.[2] Issues have also arisen under the current law where insolvency law, regulated by ASIC, intersects with competition and consumer law, regulated by ACCC.[3]

3 Insolvency criteria

The criteria by which it is proposed that APRA does and will act are also not familiar to commercial insolvency law. For example, APRA may act to appoint a practitioner where an entity's financial position is 'rapidly deteriorating'; or an insurer's circumstances have the potential to 'pose a risk to the stability of the Australian financial system', and so on. We are aware of the existing provisions in the *Banking Act*, for example. Such provisions and any extension or refinement of them will alter the way that practitioners are appointed and conduct administrations. We suggest that this will call for particular regulatory guidance from APRA.

4 Separate laws

Also, the paper proposes that the law for the regulated entities continue to be contained in separate industry Acts, which will then apply in parallel with relevant provisions of the *Corporations Act*. That in itself has the potential to produce interpretation difficulties unless drafted with precision; and even then unforeseen issues may arise. An example given in the paper is the proposal to deal with the uncertainty in the law as to the impact of the appointment of a statutory manager or judicial manager under the *Insurance Act* on an existing deed of company arrangement under the *Corporations Act*; see *APRA v ACN 000 007 492 (Under Judicial Management) (Subject to Deed of Company Arrangement)* (*Rural & General*).[4] Another example in the paper arose in APRA *v ACN 000 007 492 (in Liq)*[5] (also *Rural & General*) which raised issues in the operation of the winding up provisions between the industry Acts and Corporations Act.

On balance, we agree that these provisions be contained in each of the separate industry Acts, with cross-referencing to the *Corporations Act* as necessary but that there be particular care taken in the drafting.

5* Harmonisation with *Corporations Act

Assuming that the law for the regulated entities will be contained in separate Acts, there could usefully be some harmonisation with existing concepts and wording the Corporations Act. For example, s 62P of the *Insurance Act* provides that while a general insurer is under judicial management, a creditor cannot take or continue court proceedings against it without the consent of the judicial manager or leave of the court. This restriction does not apply to a pecuniary penalty proceeding. That is not an exception under the equivalent provisions in

[1] See *AssetInsure Pty Ltd v New Cap Reinsurance Corporation Limited (in liq)* [2006] HCA 13; (2006) 225 CLR 331

[2] For example, see *Timbercorp Securities Limited (in liq) v WA Chip & Pulp Co Pty Ltd* [2009] FCA 901 at [11], as to whether the liquidators were required to look after the interests of investors as opposed to the interests of other creditors. "There is nothing in *ss 601FC* or *601FD* that overrides the liquidator's duty to those interested in the winding up".

[3] http://blogs.adelaide.edu.au/law-bils/2011/06/15/ami-administrators-appointed-just-in-case-you-didnt-know/ concerning *ACCC v Advanced Medical Institute Pty Limited (Administrator Appointed) (No 3)* [2011] FCA 348.

[4] [2010] FCA 912

[5] [2011] FCA 353

the *Corporations Act* – s 471B (court liquidations) and s 500(2) (voluntary liquidations).[6] While there may need to be differences in such situations for policy reasons, we suggest that the existing policy approaches under the *Corporations Act* be assessed and compared when the laws are drafted.

6 Insolvency proposals paper

Also, you will be aware of the release of the Insolvency Law Reform Bill 2013 which would reform Ch 5 of the Corporations Act. These APRA reforms will need to have regard to the reforms that are proposed to be introduced in Ch 5 by that Bill. There may also be proposals in the Bill, for example in relation to the powers of the regulators, that could be adopted in relation to APRA. The IPA will be making comments on that Bill by the due date of 8 March 2013 and we will have regard to this consultation paper in making any submission.

7 Harmonisation in relation to each of insurers, life insurers and banks

Again assuming that there will be separate Acts, we support the need to harmonise the external administration provisions in relation to each of insurers, life insurers and banks. For example, it is proposed that the current moratorium provisions be replaced with a new, standardised set of provisions in the industry Acts, drawing on relevant provisions in the *Corporations Act* and in the external administration regimes in other jurisdictions. These new sets of provisions would be modified as appropriate to take into account the differences between statutory management (as a process under APRA's control) and judicial management (as a process under the Court's control).

As an example, we think there is also a need to align a provision such as s 11F of the *Banking Act* (an insolvent foreign ADI's assets in Australia are to be available to meet the ADI's liabilities in Australia in priority to all other liabilities of the ADI) with a provision like section 116A and related sections of the *Insurance Act* [defining when an amount is taken to be an asset in Australia of a general insurer].

In the context of this industry and its international scope, we also support any available harmonisation with international precedents, in particular in relation to any changes to the regime under the *Cross-Border Insolvency Act* 2008.

8 Ipso facto clauses

A feature of insolvency law is that the law permits what are termed *ipso facto* clauses, allowing a contracting party to withdraw from a supply of services in the event of the insolvency of its customer. We note that it is proposed to prevent suppliers from taking such action upon the appointment of a statutory or judicial manager, along the lines of existing s 15C of the *Banking Act*. We point out however that submissions by the IPA and others have been made from time to time about the need to restrict such clauses in commercial insolvency. They nevertheless remain valid. The policy reasons taken by government in maintaining the validity of such clauses in commercial insolvency should be considered.[7]

9 INSOL International

We mention that the next quadrennial conference of INSOL International, of which IPA is a member, has two themes at least that relates to this consultation paper.[8] The major one is the focus on dealing with "global systemically important financial institutions" ("too big to

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[6] There is in fact inconsistency between the wording of these two sections that requires attention: see *Workcover Authority (NSW) v Josef & Sons Contracting Pty Limited (In liq*) [2002] NSWIRComm 226.

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[7] We can explain this issue further if required.

[8] The conference is being held in The Hague, in May 2013. See www.insol.org.

fail" banks etc) and how GSIFIs can be resolved in a manner that mitigates systemic risk, including techniques like "bail-in", recapitalization and the creation of bridge financial firms, some of which options are discussed in the consultation paper. The conference will examine the progress of law reform efforts to reduce any impediments to orderly resolution of these systemically critical firms. The other topic at the conference is on harmonisation of insolvency regimes, both domestically, and internationally. Harmonisation of the laws in the industry Acts is an important aspect of the consultation paper.

IPA will be represented at INSOL 2013 and will have regard to the proposed reforms in Australia at these sessions. We can report on any issues that may assist you.

10 Contact

We trust these comments are helpful. We would be pleased to discuss further if needed, in which case please contact the IPA's Legal Director, Michael Murray – 02 9080 5826 – mmurray@ipaa.com.au - as necessary.

Yours sincerely

Robyn Erskine
President
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