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The Treasury
Langton Crescent
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28 February 2013

By email

Dear Scott

Insolvency Law Reform Bill 2013 – KPMG Submission

KPMG is pleased to provide its submission on the Exposure Draft – Insolvency Law Reform Bill 2013 (Exposure Draft). Our comments relate primarily to the proposed amendments to the Australian Securities and Investments Commissions Act 2001 (ASIC Act) that provide ASIC with further powers in the context of changes to insolvency practice rules.

Some key points raised in KPMG’s February 2012 submission on the December 2011 Proposals Paper “Reforms to Modernise and Harmonise Insolvency” remain relevant to our submission on the Exposure Draft. We understand the Bill implements reforms proposed in the 2011 paper.

KPMG continues to support the stated aim of strengthening stakeholder confidence in the regime.

Regulatory Powers

We note that the draft Bill amends the ASIC Act to provide ASIC with broad powers to enable it to provide information to stakeholders in an insolvency process. We assume this is to facilitate an appropriate level of information being provided to stakeholders, rather than allow ASIC to determine the manner in which an insolvency process is to be conducted.

We support adequate information being provided to stakeholders to enable them to be informed on the conduct of an insolvency process and to ensure their interests are protected. It is also imperative to ensure that procedural fairness and equity is afforded by ASIC in the exercise of any increased powers. Our earlier submission highlighted this point, and suggested some ways in which procedural fairness might be afforded in relation to the enhanced powers of ASIC.

Concerning the expansion of ASIC’s powers:

Requiring a practitioner to give specified information and to produce specified books: ASIC Act s 30B and Providing information to stakeholders or directing a practitioner to do so: ASIC Act s 39C and Corporations Act Sch 2 Pt 3 Div 26.C s 26-75.

It is noted that the proposed section 30B provides ASIC with broad powers to obtain information and books. These powers extend beyond circumstances where ASIC suspects a breach of the liquidator requirements. ASIC will be empowered to obtain information and books for the purposes of the performance or exercise of any of ASIC’s functions and powers in relation to the liquidator requirements as well as for the purposes of ascertaining compliance with the liquidator requirements.

Under the proposals for providing information to stakeholders or directing a practitioner to do so, ASIC will be required to consider any objections made by a practitioner.

KPMG notes and supports the inclusion of the proposed provisions establishing a process through which a practitioner may make submissions concerning ASIC’s intention to disclose information or direct the practitioner to disclose information to a third party.

However, even if a practitioner submits its objection to the release of information, ASIC is empowered to override that objection. It is unclear whether the practitioner will be allowed sufficient time for further recourse in these circumstances.

It is recommended that consideration is given to an additional timeframe for an appeal should ASIC override a practitioner’s objection.

Insurance Requirements for Insolvency Practitioners

ASIC Regulatory Guide RG 194 *Insurance requirements for registered liquidators* states “[t]he underlying policy objective of the insurance requirements is to ensure, as far as possible, that funds are available to a registered liquidator to compensate creditors and other claimants for loss suffered as a result of inadequate or improper performance of duties or other legal obligations by the registered liquidator or their staff in connection with externally administered companies”.

KPMG supports the requirement for insolvency practitioners to maintain adequate insurance arrangements. We also believe that ‘adequate and appropriate’ coverage should be considered having regard to the nature and scale of an insolvency practice as well as the broader business structure within which the insolvency practice operates.

The draft Bill (at *Corporations Act Sch 2 Pt 2 Div 10 s 8-25*) gives ASIC the power to, by legislative instrument, determine what constitutes adequate and appropriate professional indemnity and fidelity insurance in relation to specified circumstances and/or specified registered liquidators. It remains uncertain whether the various insurance markets that provide coverage to insolvency practitioners (which vary from sole practitioners to international accounting practices) would be willing to provide cover that may be prescribed by ASIC.

Our view is it would be adequate for insolvency practitioners to have to satisfy ASIC the coverage they hold is adequate and appropriate in their specific circumstances. We consider ASIC already has sufficient powers for this purpose through the existing registration process.

It would always of course be beneficial for ASIC to provide guidance on what they believe is 'adequate and appropriate', for instance through a revision of RG 194.

We would be pleased to discuss any of these points further; should you have any questions please contact me on (03) 9288 6532 or Tom Seville, KPMG's Head of Regulatory Affairs on (03) 9288 5050.

Yours faithfully



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