The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Madam/Sir,

With regard to the above paper, my comments are below:

CHAPTER 2

The new qualifications requirements regime should not be applied retrospectively to existing practitioners. Any new requirements should only apply to new ab initio applications received after a nominated date. This point needs to be made clearer.

I welcome that the Government has recognised that the Insolvency Practitioners Association of Australia ("IPAA") Insolvency Education Program ("IEP") is recognised in its current form as a formal course of study in insolvency. The requirement should be made however that the IEP or its equivalent must be post graduate study with no credit allowed for what may be similar study achieved at under-graduate level. I am critical of the 'crossing" of the boundaries Universities have played in under graduate and post graduate study and for that reason it is essential that this reform require that there be no credit against this qualification for any studies taken as part of an undergraduate qualification. To allow such a loop hole would defeat the purpose of this reform. Any application for credit otherwise should be left to the discretion of the accredited Australian University.

I agree with the experience requirements proposed.

With regard to 26(b), the specific requirements of professional indemnity ("PI") insurance need to be stipulated. In particular, the maximum excess requirement allowed; the parameters for fidelity cover; run off cover; and a minimum coverage per claim. What also needs consideration and not mentioned here is that PI needs to be considered on a company by company basis, as the practitioner is appointed.

In terms of 26(d), this requirement is too loose. It should instead read "has not been convicted within the last 10 years before the date of the application, of an offence involving fraud or dishonesty and any sentence or penalty imposed as a result of any conviction in a court of law must have been fully satisfied/expended for not less than ten years from the date of application.

My reasoning for this is that there is no point entertaining an application from someone convicted over 10 years ago but who was released from jail 12 months prior to making application. The risk is low but there is a big difference in the years after the conviction and any sentence/penalty being expended.

26(e); Similar again. This should be made clearer to make unambiguously clear that any administration must have concluded not less than 10 years ago.

29.1: The provisions of this paragraph are not clear. It needs to be made crystal clear here that no existing registered practitioner will be required to undertake further study as a result of these reforms. To expect them to do so would be punitive.

Conditions on Registration

As a general rule specifying conditions to any registration needs to be avoided. The only "conditions" should be those to retain a registration, such as specified CPE/CPD and PI for example. When assessing an application, the outcome must only be accept or reject. Having shades of grey is testimony of doubt on the applicant and if in doubt, any doubt, the application should be rejected.

Imposing conditions over and above those required on an ongoing basis heightens the risk of problems resulting from poor management of the conditions. I would suggest that the only interests served in placing conditions on a registration are those of the regulator.

There is only one question to answer; is the applicant ready for registration or not? Having the "flexibility" of imposing conditions on registration gives the committee a convenient excuse to avoid doing what they are supposed to do; make a decision.

33(a): I am all in favour of specified CPE, profession wide. I am implacably opposed to any requirement that stipulates practitioners must sit and pass assessments of required learning.

Practitioners are already required to do post graduate study. When is enough enough?

All practitioners are mature professional adults. They would not be registered unless they were. Being assessed on required learning after you are already a registered professional is a brazen insult to any professional. If there is doubt on any aspect of a professional, then it will show up in performance to date. Sitting an exam is all about theory. Not about performance. Knowing theory is one thing practising it is another. Practising the demonstrated theory is what needs to be shown; not that the theory is known. I cannot see any merit whatsoever in the regulator having the power to impose this. If anything, giving this option to the regulator only shows astounding naïveté in coming to grips with regulating this profession.

33(g): The way this is presented provides no clarity to the reader. What should happen is that any registrant residing overseas should be able to hold registration on the basis they stay in the profession; continue to meet Australian CPE requirements; and that they have PI to meet the standards of the overseas jurisdiction, if they are practising over there. The objective needs to be that overseas experience is to be encouraged without penalty to registration.

CHAPTER 3

Agree totally that all registered Liquidators should perform all functions currently vested in and restricted to Official Liquidators.

38.1: I agree with the introduction of a consent to act. This consent to act however needs to be clarified in that any consent to act certifies that the person signing is certifying that there are no conflicts of interest, at the time of signing the consent.

39: Any appointment made should only be in terms of "Registered Liquidator – Receiver and Manager"; or "Registered Liquidator – Receiver"; or otherwise the appointment should be "Registered Liquidator". Conditions or "conditional" should never be used in a professional registration. Having a "P" plate is fine for a learner/ab initio driver. Here we are dealing with mature professionals with under graduate and post graduate qualifications and extensive experience as an insolvency professional. That does not deserve the professional humiliation of attaching "P" plates to their registration.

I very strongly recommend that the registration process reflect the aforementioned.

Composition of Committee

In terms of the Committee members, each member must bring to the Committee the prestige of their qualifications; the respect of their profession and/or business; and a depth of experience that would be difficult to challenge. Appointments made purely to fulfill the function will make a mockery of the entire registration process and will be regarded with silent contempt by those forced to abide by the decisions.

In terms of the delegate of the regulator, the delegate must have experience in the insolvency profession; must hold a high position in the regulator; and should have experience both in the profession and in business rather than being a career public servant. Overall such an appointee should have a minimum of 20 years experience in the work force.

I question the appointment of a delegate from the IPA. I acknowledge and fully commend without reservation the IPA's representation of insolvency professionals. It is the only professional member body representing insolvency professionals and has performed that role to the highest standards and to the full credit of the profession. I am a full member of the IPA and I am proud of it.

My reservation is that the IPA does not afford full membership to professional accounting members of all three Australian accounting member bodies. Specifically the IPA will not grant full membership to those insolvency professionals that have membership of the Institute of Public Accountants (formerly the National Institute of Accountants) even though those members have similar undergraduate professional qualifications; have completed the IPA IEP; and are registered by ASIC as Liquidators.

The Institute of Public Accountants (formerly the National Institute of Accountants) is a prescribed professional disciplinary body as per ASIC regulation 8AA.

I submit that the IPA needs to show that it respects the process of ASIC registration by recognizing membership of the Institute of Public Accountants to the same extent it does for CPA Australia and the Institute of Chartered Accountants in Australia before the privilege of appointing a delegate to this committee can be justified.

With regard to the third member being appointed by the Minister, I would suggest that the Minister consider an appointee who is not involved in the professions of law or accounting. Such a person should have a minimum of 20 years of work experience in business with the majority of that experience in the management of a corporation. In particular what is not required is any form of political appointment but someone that will make a significant contribution from a business management perspective. The other two appointees will have sufficient experience in insolvency, accounting and law to give some balance to the decisions.

By specifying the above, appointees will have "street cred". Without each member having that, the Committee overall will have no integrity.

Initial Registration

46: Any decision on an application for registration must be either to accept or reject. There must be no shades of grey. Placing conditions on a registration is proof positive that the committee cannot make up its mind. The only outcome of that is that the committee loses professional credibility. If necessary, applicants can be requested to improve their application and re-submit at a later time, say in six months time. But the decision must be either or. No bets each way.

Renewal of Registration

53: Requiring practitioners to submit evidence of PI renewal annually is petty. The evidence for the three years previous can be produced as part of the renewal process. Such a proposal is just plain extreme, offers no advantage to nor adds any merit to the registration process.

54: (f) needs to be changed to the following: "was subject to disciplinary proceedings by any professional member body or Australian or overseas regulator." My point here is that notification of any disciplinary proceeding should apply to any professional body whatsoever, be it law, management, human resources, accounting or insolvency specific. Whoever the professional body is that has taken the disciplinary action, the outcome will be relevant to the bona fides of the ongoing registration.

In that regard there needs to be a definition of "disciplinary action". That definition needs to be that "… where a person has been formally notified of an adverse decision against their membership of a nature that provides for the decision to be published and whether or not the member is identified or not." This is as distinct from an investigation process that is under way to validate or otherwise the veracity of a complaint; and as distinct from merely an appearance at a Disciplinary Tribunal where the case against the member was not proven. An ongoing investigation is not a disciplinary proceeding.

CHAPTER 4

I agree with the imposition of a minimum fee. Although such a change looks good, the imposition of a minimum fee does not guarantee that the funds will be there for the practitioner to take the minimum fee.

Although it is not mentioned and I hope the intent is not there, but in cases where the funds are not available to pay the minimum fee, there should not be assumed any automatic recourse to the taxpayer in such circumstances.

Disbursements

The suggestion that creditors may control the use of disbursements where the practitioner or related party would receive a profit or advantage sounds like great reform, on paper, but that is all it is.

The practitioner is already under an obligation to disclose interests. Apart from the difficulty I see in spelling out the detail in this proposal, I fail to see any merit in this whatsoever as it is presented.

Cost Assessment in Corporate Insolvency

I have no issue with the regulator having the power to "call" in a cost assessor to examine any remuneration costs. I urge that the regulator use this power wisely in that it only be applied with good reason.

Reviews of Trustee Remuneration in Personal Insolvency

I agree with allowing the regulator to initiate a review of a Trustee's remuneration without referral. This power should only be used with good reason and that reason should be divulged to the Trustee on providing notice of the review.

The essential point here is that a regulator's powers are there for good reason only. Not for the sole discretion of the regulator to be used as the regulator sees fit, but for the ultimate benefit of the community. If there is a good reason to prompt the use of such a power, that reason needs to be identified.

CHAPTER 5

Committees of Inspection

87(e): I question the role of the COI to obtain specialist advice or assistance. The wording is in effect allowing the COI the approval to incur expenditure. The Practitioner has control over the bank account, not the COI. The practitioner manages the administration, not the COI. The COI should have no recourse on its own to obtain specialist advice or assistance. That responsibility belongs to the practitioner.

This should be changed to unambiguously reflect that the COI only may obtain specialist advice or assistance from corporate funds with approval of the practitioner.

88: the reference or qualification that such a power is only open to individuals and not the COI seems to be out of place. Either the COI has the power or it does not. That is all that needs to be stated.

90: COIs can make any decision they like. The point is at what stage do these recommendations become a requirement on the practitioner?

Annual Estate Returns.

I support the requirement for an annual return on each administration as I support the requirement generally for the regulator to demand receipts and payments details. The power is already there.

CHAPTER 6

125: Is it really necessary to specifically provide the regulator with the power to allow electronic copies to be preserved in substitution of hard copies? I am astounded that this issue is mentioned and even more astounded that specific approval is required by the practitioner. What we need for insolvency is the clear right for the practitioner to choose the form of copy; a clear definition of what is electronic storage; what can and is not be stored electronically; and how so in terms of a accessibility and security protocol.

CHAPTER 7

I thoroughly agree with the requirement to have PI insurance and adequate insurance at that. What I am concerned about is the requirement to report the proof every year. This seems to be treating the practitioners as though they are inexperienced idiots.

Rather than engage in professional humiliation, make it a requirement to show continuous PI insurance coverage each three years. The only definitive outcome of requiring annual reporting is that it will adversely reflect more on the credibility of the regulator.

CHAPTER 8

143: Generally I have no issue with the regulator having the power for direct administrative action over a practitioner. The power to de-register a practitioner is not administrative action; it is punitive, or, disciplinary action. With the exception of the instances mentioned below, that power should absolutely not reside ever with a regulator.

A regulator should have the power to suspend and de-register on request from the practitioner. Once suspended, the form of “sentence” should be left with the court or a statutory disciplinary body to determine. Regulators should never have the power to both suspend and sentence. Such a concept is more appropriate to a third world country.

The power to de-register a practitioner should only be left with the regulator in the specific cases of 143(a); (b); (d); (f); (h); & (i). In all the remaining cases, a judgment is required and given that the regulator would most likely have already suspended the practitioner, allowing the regulator to also de-register, in effect be the judge and jury, without a third party making the ultimate decision is tantamount to an abuse of power.

The distinction needs to be made here as to what “administrative action” actually is. Administrative action as a result of any of the cases mentioned at (a); (b); (d); (f); (h); & (i) that results in either suspension or de-registration is appropriate. The remainder may appropriately and initially involve suspension, but de-registration in such cases is punitive and is in fact a sentence. That power is plainly not appropriate in the hands of a regulator. That power should only belong to a Court.

I submit that an appeal review of a suspension decision by the Administrative Appeals Tribunal is appropriate. Given that the appointments are statutory appointments, a court is the only appropriate avenue to appeal a de-registration.

144: In terms of this provision, where a practitioner has failed to meet the requirements specified by the Committee, the only power the regulator should have is that of suspension. In that regard, what the consequences of a suspension are needs to spelt out. The power to de-register is an ultimate power and should be with a Court not a regulator. The Court has the statutory legitimacy to ensure procedural fairness, the regulator does not.

Where a decision needs to be made on administrative action against a practitioner within a probationary period, the decision on the form of administrative action should rest with the Committee, not the regulator. The reason for that is that the Committee is in effect an expert panel. The regulator is not.

145: I agree with this proposal.

147: It is a very poor motherhood statement to justify de-registration powers for the regulator by stating "…….. the regulators would be required to afford natural justice to the practitioner." Natural justice can only be afforded where the punitive or disciplinary power is in the hands of a third party, not the prosecutor.

Disciplinary action by Committee

149: I fully support the introduction of a show cause process.

152: I suggest that this be amended to reflect the fact that only duly constituted Disciplinary Tribunals of prescribed legal or accounting professional member bodies and the IPA have the standing to refer complaints directed at practitioners direct to the Committee.

The reason for that is that even the act of referring a complaint to the Committee is in effect a form of disciplinary action. Disciplinary actions against members of professional accounting bodies are usually the sole preserve of independent Disciplinary Tribunals. That decision of referral should not rest with the member body itself but with the formally constituted Disciplinary panel within the member body. Those Disciplinary Tribunals would require some form of formal recognition by the Committee.

Committee Functions

157: The proposal here is a concern. It is acknowledged that de-registered practitioners and those with some form of disciplinary action against them are continually employed in high level insolvency case management. Given that their decision making power has been removed and all decisions and discretion rest with another practitioner, what is the concern? The registered Liquidator takes responsibility, not the Consultant. This proposal is akin to the regulator and/or the Committee having the power to determine who will work on any particular administration.

Even with de-registration the practitioner should not be barred from working in insolvency. De-registration means the practitioner is barred from accepting new appointments and all existing appointments are transferred. If the expectation is that de-registration should also involve a career change, is it expected that the practitioner should work in McDonalds to purge themselves of all things insolvency!

Practitioners are typically in the insolvency profession for life. Rarely do they move out into other accounting specialisations.

De-registration in the expectation, either specified or assumed, that the practitioner is barred from also working in the insolvency profession is nothing more than a jail sentence. There are few other professional options open to a mature highly qualified insolvency professional that has worked in that profession a long time.

Whilst I agree totally that a de-registered practitioner should be barred from being a delegate of a practitioner, the concern as expressed otherwise has no merit.

Imposition of Conditions

159: Whilst I do not disagree with the regulator presenting recommendations to the Committee, it needs to be made unambiguously clear that any recommendations of the regulator are just that, recommendations and should not be binding in any form or to any extent whatsoever on the Committee.

Committees - general rules

167: I fully support the proposal that the Committee not have the power to impose costs orders.

170: I fully support the proposal that the Committee take into account findings of a Committee in another jurisdiction.

171: I do not support the proposal that the other insolvency regulator would be able to attend and have access to all materials relating to a Committee process in respect to a person who is registered or seeking registration under another regime.

Firstly, it needs to be decided if these Committee Hearings are open to the public. By allowing other interested parties into a proceeding, the Hearing is by default open to the public. I would suggest that instead all persons attending be identified at the commencement of proceedings and the Committee make a determination as to whether the party may stay. Applications to attend may be made prior to a Hearing.

Secondly, by allowing other regulators into a proceeding, the other regulators are open to hearing all the issues, those that are fair, foul, relevant, irrelevant, justified and those with and without merit. Is that fair to the practitioner? I doubt it. Other regulators should only see the outcomes of Committee Hearings. Regulators should not be given the opportunity to have access to and by definition be in a position to use against a practitioner, all information or testimony that is heard in a formal setting. Regulators should only use fact or evidence, that is the outcome rather than seek to rely on a particular statement at a hearing.

CHAPTER 9

Does this proposal also apply to Court appointed Liquidators? If so, creditors should not have the power to set aside a Court appointment.

CHAPTER 10

198: It is proposed that the regulator may attend a practitioner premises to inspect books, etc. Rather than go down this path with ad hoc visits, why not specify that each practitioner be the subject of a formal quality assurance review every 5 years?

205: I agree with ASIC being empowered to attend any creditors meeting or any COI as it sees fit to do so.

Cooperative Regulation

207: Generally the concept of sharing regulatory information with prescribed professional disciplinary bodies has merit which I support.

Professional member bodies should only be passed information that is an outcome of an investigation and due process, not information that is in the process of being tested and not information that has failed scrutiny by a disciplinary body or a body formed to pass judgment. To do so would put the professional member bodies on ground that is not a part of their purpose.

CHAPTER 11

224: The proposal to facilitate and provide adequate funding to an asset less administration that a practitioner will not accept as an appointment to either or both undertake the mandatory tasks or investigate for phoenix activity, is welcome.

Report as to Affairs/Statements of Affairs

I support the proposals. ASIC already prosecutes where a RATA is not submitted.

GENERAL COMMENTARY

The actions of Stuart Ariff has prompted this wholesale review of the insolvency process and the appointment process of liquidators and Administrators. Whilst any review of what we do is welcome, it needs to be remembered that every profession, para-profession and trade will have a Stuart Ariff that will bring their profession/trade into disrepute. Regulating to prevent all such cases happening is a wasted exercise which only achieves the needless increase in the compliance burden for the professional majority and that in turn encourages shortcuts. In effect, a high level of compliance loses its legitimacy quite quickly. The objective needs to be to maintain integrity in the profession and the regulatory process and back that up with the enforcement tools to bring to account those that do wrong. Unfortunately, those that do wrong wreak significant damage before the enforcement process can kick in. An effective suspension mechanism will alleviate this.

There are some excellent suggestions in this paper and I commend the authors for their work.

Throughout this paper, the reference is to the insolvency industry. That is incorrect. Insolvency is a profession. A cursory look at the registration requirements of practitioners will confirm that.

The author of this commentary is a full member of the Insolvency Practitioners Association of Australia; is a Chartered Secretary; a Fellow member of two professional accounting bodies; has extensive experience in the Federal aviation regulator; extensive corporate experience in listed companies and government entities; and has around four years experience practising in insolvency. The views expressed are my own and not as a member of any professional member body or as a representative of my employer.

Whilst I have no objection to the content of this email being published, I request that my name be withheld.

I am an insolvency practitioner and proud of it.

For consideration.