

5 November 2020

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Via email matthew.bowd@treasury.gov.au

Dear Matthew,

Corporations Amendments (Corporate Insolvency reforms) Bill 2020 Exposure Draft (ED) and Explanatory Materials (EM)

CPA Australia and Chartered Accountant Australia and New Zealand (together 'the Major Accounting Bodies') address in this joint response, separate to our respectively earlier individual submissions, matters specific to the registration and discipline of individuals as **Small Business Restructuring Practitioners (SBRP)**.

Basis for comments - Government's expressed intent

We reference Treasury's Fact Sheet 'Insolvency reform to support small business' and the various specific reforms and elaborations provided in the above ED and EM, as the relevant materials concerning the creation of a sub-category, or second tier, of registered insolvency practitioner.

The two pertinent expressions of Government's intentions with regards expanding the availability of insolvency practitioners are contained on page 9 of the Fact Sheet:

Making changes to allow for more flexibility in the registration of insolvency practitioners by removing requirements which are overly rigid, but do not provide demonstrated benefits in ensuring the integrity of the profession. ('Practitioner measure 1')

And:

Establishing a new classification of insolvency practitioner whose practice will be limited to the new simplified restructuring process only. ('Practitioner measure 2')

Relevant also is the final paragraph on page 3:

*To support more practitioners being available to work with small business, they will be able to choose to register as a small business restructuring practitioner only. Their practice will be limited to the new simplified restructuring process. Qualifications required to register as a small business restructuring practitioner only will be in line with the streamlining requirements of the role. **Registered liquidators will also be able to manage the new process.** (our emphasis)*

Our interpretation is that Items 8 and 9 of Schedule 3 (Simplified liquidation) of the ED (and as elaborated on in Chapter 4 of the EM) achieves 'Practitioner measure 1', whilst Division 4 of Schedule 1 (Restructuring of a company) achieves the highlighted passage from the immediately above quoted paragraph from page 3 of the Fact Sheet.

Our observations and recommendations

With the above as background, the Major Accounting Bodies make the following observations and recommendations concerning 'Practitioner measure 2' noting that there seems, at least from some commentary in the media, a wide divergence of views as to the types of professional practitioner, and their accompanying qualifications and experience, who should be recognised as an SBRP.

Location of oversight regulations

Whilst self-evident, it is worth emphasising that the overarching regulatory framework is that of the Corporations Act 2001. Proposed Part 5.3B follows immediately on from Part 5.3A (Administration of a company's affairs with a view to executing a deed of company arrangement) with the EM, at para. 1.7, highlighting the commonality of features.

Therefore, it follows that the registration and discipline of SBRPs should fit squarely within the ambit of Part 2 of Schedule 2 (Insolvency Practice Corporations) of the Corporations Act, the accompanying Rules, and as further augmented and elaborated on in ASIC's Regulatory Guide *Registered liquidators: Registration, disciplinary actions and insurance requirements (RG 258)*. As such, we believe it would be sub-optimal, and indeed of potential significant risk, to have oversight arrangements for SBRPs promulgated through regulation appending to ED Schedule 1 Subdivision C section 456G), whilst those applicable to registered liquidators remain, and correctly so, within Schedule 2 of the Corporations Act.

We recommend that the registration and discipline of SBRPs is included within Schedule 2 of the Corporations Act as it is the most suitable framework for SBRP regulation.

Minimum standards for SBRP

Treasury will no doubt be aware that the present regulatory regime for registered liquidators, and similarly with that applicable to trustees in bankruptcy, implemented through Insolvency Law Reform Act 2016 No. 11, occurred after extensive consultation and review. In the view of the Major Accounting Bodies, this remains 'fit for purpose' as the mechanism for registering SBRPs – though, of course, with appropriate and targeted adjustment.

Part 5.3B Restructurings of a company, refer to an external administration having the underlying objective stated in section 452A(b) of enabling the entering into of a restructuring plan with creditors. On this aspect the EM, at paras. 1.10 through 1.13, elaborates on the aligning of processes with both Part 5.3A and Part IX of the Bankruptcy Act. There are two interrelated, salient points which the Major Accounting Bodies consider illustrates the Schedule 2 framework as the appropriate mechanism for registering SBRPs, along with RG 258 providing the appropriate source of guidance.

The Major Accounting Bodies have undertaken preliminary informal examination of how key parts of RG 258 (Table 3: Qualification requirements, Table 4 Experience requirements and Table 5: Fit and proper requirements) might be amended to accommodate SBRPs. We would be pleased to share these ideas and insights with Treasury.

1. Technical expertise

Technical aspects, such as that of adjudicating proofs of debt and making declarations to creditors regarding a restructuring plan (refer section 453E(1)(c)), require a sufficient familiarity with broad scheme external administration.

Further, there is a need to bring to bear professional judgment to guide both the company (refer section 453E(1)(a)) and creditors on whether or not the preferable option would be to proceed to a simplified liquidation, as provided for under ED Schedule 3.

We note also the potential for an obligation on the SBRP to report suspected wrongdoing on the part of directors and powers to terminate a restructuring (section 453J).

Each of these are matters requiring high levels of technical competence that would need appropriate regulatory articulation around a suitable standard of specialist insolvency qualification.

2. Qualifications

We reasonable anticipate that suitable tertiary qualifications would include both accounting and commercial law to a high standard and breadth. These qualifications point towards more senior, experienced practitioners, not dissimilar to that required of a registered liquidator.

The requirement for a combination of both accounting and commercial skills is, we believe, borne out in detailed provisions within Part 5.3B, such as those in section 453N dealing with share transactions and shareholder rights.

The SBRP's role, though in some aspects advisory in nature, nevertheless requires high levels of exactitude in what are often complex areas of legal application.

3. Ethical standards and quality, conduct and discipline processes

The significance of professional ethics associated with the undertaking of a Part 5.3B restructuring engagement cannot be over-emphasised. Referring to the regulatory regime created under the Corporations Act and applied by ASIC, is the operation of Schedule Clause 40-1 and the elaboration in Rule 40-1, which addresses those industry bodies that may notify ASIC of grounds for disciplinary action. Aside from the listed law societies, the Major Accounting Bodies, along with the Institute of Public Accountants, are recognised in this regard.

Each of the professional accounting bodies applies to its public practitioner members, Australian Professional and Ethics Standards Board's *APES Standard 330 Insolvency Services*, which deals with such critical matters as declarations of independence, relevant relationships and indemnities. This, along with standards such as *APES 320 Quality Control for Firms*, is fundamental to both risk mitigation and public confidence.

By monitoring member compliance with these standards, the professional accounting bodies provide complementary processes to the more formal regulatory mechanisms within Schedule 2 dealing with liquidator registration and discipline. Moreover, the professional accounting bodies are capable of applying a rigorous licencing regime, practice reviews and complaint handling to their members, which are the minimum measures that need to be in place for a practitioner to hold him or herself out as competent and capable of being a SBRP.

4. Professional Indemnity Insurance

Addressed in Rule 20-5(4), and elaborated at length in section E of RG 258, are the requirements for the adequate and appropriate professional indemnity and fidelity insurance. These requirements emphasise our fundamental argument that the regulation and oversight of SBRPs take place through augmentation to existing settings, noting moreover, the professional accounting bodies' existing practitioner requirements for professional indemnity insurance cover.

Implementation issues

We note that matters such as the development of a single Australian Qualification Framework Level 8 unit, that we believe would suitably upskill a practitioner in the application of Part 5.3B restructuring, along with wider external administration and corporate law contexts, would potentially take a number of months to develop.

The new scheme is set for commencement on 1 January 2021, with temporary relief for companies seeking to appoint a SBRP (the yet to be elaborated ED Schedule 2). We acknowledge that issues arise of establishing and implementing this type of rigorous structure in such a short timeframe. Nevertheless, we believe the long-term integrity of the external administration system, the public's confidence and a sustainable economic recovery are dependent on these degrees of formality.

Given the challenges of developing and rolling out an appropriate level of qualification within the available time frame, we consider that the anticipated significant surge in corporate insolvencies, expected when the insolvent trading and other temporary measures lapse at the end of 2020, ought to be treated through other institutional measures such as simplified liquidation. This recognises that after the nine months of temporary measures, a very large number of affected companies may have a substantial debt burden, low level of physical assets available for restructure and very modest cash generating prospects. The tragedy of these realities should, in no way, be compounded by allowing a false hope of a Part 5.3B restructure delivering a return to viability.

Industry Funding Model (IFM)

The new SBRP must be a Registered Liquidator according to Section 456B. The Entity metrics for registered liquidators are listed in the ASIC Supervisory Cost Recovery Levy Regulations 2017 subdivision 1.3 20(3). Given ASIC will be providing regulatory services over the SBRP and Part 5.3B – Restructuring of a company process, the relevant metrics will need to be incorporated into these regulations.

If you require further information or elaboration on the views expressed in this letter please contact at CPA Australia, Dr John Purcell at john.purcell@cpaaustralia.com.au or at CA ANZ Karen McWilliams at Karen.McWilliams@charteredaccountantsanz.com.

Yours sincerely



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