Submission to the Productivity Commission Inquiry: Reducing Barriers to Business Dynamism in Australia

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1. Executive Summary

The Ruhe Group (TRG), a specialist insolvency practice, welcomes the opportunity to contribute to the Productivity Commission's inquiry into barriers to business dynamism. We strongly support the Commission's focus on how insolvency frameworks influence business exit, resource reallocation, and entrepreneurial risk-taking.

In our experience, Australia's insolvency system is functionally sound in principle, but is constrained in practice by cost inefficiencies, fragmented powers, and unnecessary procedural hurdles. These issues materially undermine:

- The effective investigation and recovery of assets
- The timely and economical winding up of failed entities
- The deterrence of misconduct (including illegal phoenixing, transactions to defeat creditors and the actions of untrustworthy advisors)

CHARTERED ACCOUNTANTS
Liability limited by a scheme approved under Professional Standards Legislation

We propose targeted reforms in five key areas:

1. Removal of unnecessary creditor approval constraints under s 477(2B) *Corporations Act 2001* (“**Corporations Act”)**
2. Harmonisation and expansion of investigative powers between corporate and personal insolvency regimes
3. Legislative reform of trust structures in insolvency
4. Reform of remuneration priority rules to ensure minimum practitioner recovery
5. Improved information flows between the Official Receiver and bankruptcy trustees

These reforms would significantly reduce costs, increase recoveries, strengthen system integrity, and improve overall productivity outcomes.

2. Context: Insolvency as an Enabler of Business Dynamism

A well-functioning insolvency system is critical to economic dynamism because it enables:

- Efficient exit of non-viable firms
- Reallocation of capital and labour
- Confidence for entrepreneurs to take calculated risks

The Commission has highlighted that inefficient or costly exit processes can inhibit these outcomes.

However, current legislative and procedural settings can often result in:

- Under-investigation of misconduct
- Abandonment of asset recovery actions
- Excessive cost layering in simple matters

This weakens both productivity and market integrity.

3. Key Reform Areas

3.1 Reform of Section 477(2B) – Liquidator Autonomy

Issue

Section 477(2B) of the Corporations Act requires creditor or court approval for certain agreements exceeding 3 months, including:

- Litigation funding arrangements
- Long-term recovery strategies
- Compromises of debts

Impact on Productivity

- Introduces delay, duplication, and cost
- Discourages pursuit of meritorious claims
- Particularly problematic in low-asset liquidations, where approval costs can exceed expected recoveries, especially where these may be speculative

This creates a perverse outcome where misconduct goes unaddressed due to procedural barriers.

Recommendation

- Remove or substantially relax s 477(2B) approval requirements where:
  - The liquidator is acting within ordinary course powers and duties, and
  - Appropriate professional standards already apply.

Rationale

Liquidators are highly regulated, often officers of the Court and already subject to:

- Fiduciary duties
- Regulatory oversight (ASIC)
- Professional discipline mechanisms

Requiring creditor or specific court approval in these circumstances can be cost-prohibitive, duplicative and inefficient.

3.2 Harmonisation of Investigative Powers (Corporate vs Bankruptcy)

Issue

Liquidators lack equivalent investigative tools available to bankruptcy trustees, including:

- Compulsory examination powers (e.g. s 77C of the *Bankruptcy Act 1966 (Cth*) ("Bankruptcy Act"))
- Notice regimes (ss 77A, 77C of the Bankruptcy Act)
- More flexible information-gathering pathways

Impact

- Slower and more expensive investigations
- Reduced ability to pursue recoveries and misconduct
- Increased reliance on court processes, adding cost, delay and inefficiencies.

This disparity is inconsistent with the Commission's interest in harmonisation across regimes, particularly for small business operators.

Recommendation

- Extend bankruptcy-style powers to corporate liquidators, including:
  - Administrative examination powers
  - Expanded document production mechanisms
- Align investigative frameworks across regimes

Rationale

- Improves speed and cost-efficiency
- Enables earlier intervention, and potential subsequent recoveries
- Strengthens deterrence against misconduct and advisor abuse

3.3 Reform of Trust Structures in Insolvency

Issue

The interaction between insolvency law and trust law remains uncertain and inefficient. In particular:

- "Evacuation clauses" in trust deeds often:
  - Remove the company as trustee upon insolvency
  - Require a court application for the appointment of the liquidator as receiver over trust assets

Impact

- Duplicated appointments (liquidator + receiver)
- Significant additional cost
- Delays in asset realisation (or in some instances forfeiture)

This issue has been widely recognised as a major structural inefficiency in the system.

Recommendation

- Introduce legislation to:
  - Override trust deed provisions that frustrate insolvency administration
  - Automatically preserve the liquidator's control over trust assets
  - Provide a statutory regime for dealing with trust property in liquidation

Rationale

- Eliminates unnecessary cost duplication
- Improves certainty, speed and recovery prospects
- Aligns outcomes with commercial reality

3.4 Priority of Minimum Practitioner Remuneration

Issue

In asset-poor administrations:

- Petitioning creditors' costs are paid ahead of practitioner remuneration
- Liquidators and trustees may receive no compensation, despite performing statutory duties and in the case of Liquidators, with no government alternative to perform the same task.

Impact

- Disincentivises practitioners from accepting appointments
- Leads to work being undertaken pursuant to statute with no course of recovery
- Weakens enforcement and investigation outcomes

Recommendation

- Allowing for the statutory maximum default remuneration to be paid in priority to petitioning creditor costs, when insufficient funds are available to pay both amounts in full.
- There are already statutory amounts set under both regimes, but to be paid *after* petitioning creditors costs in court appointments. We recommend that this modest amount (currently $6,501) can be paid ahead of petitioning creditors costs, out of realised assets, if the realisations are insufficient to pay both in full.

Rationale

- Recognises the public interest function of insolvency practitioners (especially liquidators where there is no government alternative)
- Improves willingness to act in low-asset matters
- Enhances system integrity

3.5 Information Sharing – AFSA and Trustees

Issue

Statements of Affairs can be lodged with the Official Receiver (Australian Financial Security Authority "**AFSA**") but not provided to trustees in a timely or reliable manner. Notwithstanding that Trustees have strict reporting requirements around same. It was previously the case that the Official Receiver provided the Registered Trustee with the lodged Statement of Affairs, but this practice has ceased.

Impact

- Trustees can lack critical financial and other information with respect to the bankrupt's examinable affairs
- Delays investigations and effective reporting
- Creates inefficiencies

Recommendation

- Mandate that AFSA:
    - Automatically provide Statements of Affairs to appointed trustees upon receipt
    - Implement real-time or near real-time information sharing systems

Rationale

- Eliminates unnecessary delays
- Improves coordination within the personal insolvency system

4. Broader System Implications

Collectively, these issues contribute to:

- Higher administration costs
- Reduced investigation and recovery activity
- Weakened deterrence of misconduct
- Lower creditor returns
- Reduced confidence in the insolvency system

This is inconsistent with the goal of ensuring that business failure is:

> *"orderly, efficient and inexpensive"*

5. Conclusion

Targeted reform of Australia's insolvency framework offers a high-impact, low-complexity opportunity to enhance business dynamism.

The changes proposed by The Ruhe Group:

- Remove unnecessary procedural friction
- Improve investigative capability
- Reduce administrative cost
- Strengthen system integrity

Ultimately, these reforms will:

- Increase recoveries to creditors
- Act as a deterrent against bad actors and unlawful behaviour
- Improve the allocation of capital
- Support responsible risk-taking
- Enhance national productivity

We are happy to provide further information, participate in future discussions and answer any queries you may have in relation to the above.

Please see Annexure "A" for further information with respect to The Ruhe Group.

Alice Ruhe
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