SUBMISSION OF THE INSOLVENCY PRACTITIONERS ASSOCIATION TO THE PRODUCTIVITY COMMISSION

Regulatory Burdens – Business and Consumer Services

1. We refer to our meeting on 20 January 2010 with representatives of the Commission at which we discussed an intention of the IPA to make a submission on this reference.

2. The Insolvency Practitioners Association (IPA) is the peak professional body representing company liquidators, trustees in bankruptcy, lawyers and other insolvency professionals, financiers and academics. The IPA and its members necessarily have particular knowledge of and expertise in insolvency law and practice and the surrounding policies issues. We appreciate the opportunity to comment.

3. The IPA's principal submissions are that there are separate and differing laws and regulations that apply to the administrations of each of personal insolvency and corporate insolvency that impede efficient conduct of the insolvency regime; and we recommend that steps be taken for those laws and regulations to be harmonised where this is possible.

1 Background

4. Australian insolvency laws are based on the s 51(xvii) power under the Constitution – "bankruptcy and insolvency". While it has always been possible to have one insolvency statute, for both personal and corporate, it is a matter of history that there have been separate laws for both.

5. We therefore have a Commonwealth *Bankruptcy Act* 1966 that deals with personal insolvency and Ch 5 of the Commonwealth *Corporations Act* 2001 that deals with corporate insolvency.[1]

Supporting each of the Bankruptcy Act and the Corporations Act are:

Bankruptcy regulations[2] Corporations regulations[3]

[1] The insolvency of other particular bodies is covered by specific legislation – for example Aboriginal corporations and co-operatives, and insurers. We do not address those in this submission.

[2] Bankruptcy Regulations 1996

[3] Corporations Regulations 2001

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Bankruptcy – ITSA[4] - guides	Corporations – ASIC[5] - guides
Bankruptcy court rules[6]	Corporations court rules[7].

6. There are also professional standards that apply - the IPA Code of Professional Practice for Insolvency Practitioners[8] and APESB 330.[9] These apply to both personal and corporate insolvency practitioners.

7. In the terminology of the issues paper, these all come within the words primary legislation, subordinate legislation, quasi-regulation, and co-regulation. We consider the insolvency regime comes within the Commission's terms of reference, that is, rules where there is a requirement of compliance and laws, or other government rules that influence or control people and businesses.

8. As to terminology, the word 'insolvency' is a generic term that refers to an ability to pay debts, either by an individual or by a company. That is then divided into personal insolvency of individual persons – commonly termed bankruptcy, and corporate insolvency of companies - commonly termed liquidation or winding up. The reference in the Constitution to 'insolvency' as being confined to corporate insolvency is antiquated.

2 Insolvency practice

9. Bankruptcy policy is administered by the Attorney-General's Department, and its practice by the profession is regulated by ITSA. Corporate insolvency policy is administered by Treasury and the practice of corporate insolvency is largely regulated by ASIC.

10. An insolvency practitioner may be a person registered by ITSA as a trustee in bankruptcy, and at the same time be registered by ASIC as a registered liquidator. A trustee is then regulated by ITSA and is subject to regulation and discipline processes under the Bankruptcy Act. Corporate insolvency practitioners – liquidators, administrators, receivers - are registered and regulated by ASIC and are disciplined by processes under the Corporations Act.

11. There are of course obvious fundamental differences of substance between corporate and personal insolvency. It is acknowledged that practitioners who practise in both areas must be knowledgeable in the different laws and rules that

[4] Insolvency and Trustee Service Australia. Its practice statements etc are at www.itsa.gov.au
[5] Australian Securities and Investments Commission. Its regulatory guides are at www.asic.gov.au
[6] Being those of the Federal Court and the Federal Magistrates Court.

[7] Being those of the Federal Court and the State and Territory Supreme Courts.

[8] See www.ipaa.com.au

[9] Accounting Professional and Ethical Standards Board's (APESB) professional standard, APES 330 Insolvency Services, commencing 1 April 2010.

apply. However those differences are of less or no relevance in relation to many matters of process and procedure, time limits and other mechanical issues.

12. The IPA considers that there would be considerable benefit in practitioners practising in both areas having to understand and deal with only one set of common provisions where this can be done. There would be time and costs savings in terms of needing only one set of precedents and procedures, with less margin for error.

13. We do acknowledge that some or many practitioners practice in only one area, particularly those who practise only in corporate insolvency[10]. The issue is less significant for those practitioners. Nevertheless, those practitioners will have to deal with bankruptcy issues at times (if as liquidator they lodge a proof of debt in a bankrupt estate, if a director of a company goes bankrupt etc). As well, there is some impediment to the ability of a practitioner specialised in one area, say corporate insolvency, to practice in another area, say personal insolvency, by virtue of the differences in processes and procedures.

3 Creditors and other stakeholders

14. In addition, creditors in an insolvency may be either or both creditors of a bankrupt individual and creditors of a liquidated company. Although in many cases a creditor may only be affected by an insolvency once or twice, many institutional creditors – financiers, trading businesses – are frequently confronted by the insolvency of their debtor individual or company. Those creditors must be aware of the differing rules between corporate and personal insolvency depending on the sort of administration of which they are creditors.

15. Education in insolvency and staff training are affected by this difference in laws and rules, being, as the issues paper describes, "the cost of maintaining awareness of legislation and regulations and changes to regulatory details as well as training staff about regulatory requirements".

4 Previous reform recommendations

16. In support of our views we refer to the two major insolvency reports in Australia of the last 20 years where such harmonisation recommendations have been made but have not been acted upon.

17. The 1988 Harmer Report[11] considered this issue, including the question of unified insolvency legislation. The Report said that while it accepted that there were advantages in unified insolvency legislation it did not "regard the goal of unity to be one of major significance". However the Report went on to say that:

[10] There are currently 657 Registered Liquidators in Australia, and 209 Registered Trustees in Bankruptcy; an estimated 90% of Trustees are also Liquidators.

[11] ALRC 45 at www.alrc.gov.au

> "… as far as possible and necessary, the Commission has sought in the Report to promote the uniformity of the substance of the provisions relating to individual and corporate insolvency. Moreover, to the extent that future reforms proposed for the law relating to either individual or corporate insolvency touch matters which are common to both (particularly where those reforms affect procedural matters), it is the Commission's view that corresponding reforms should be made to both sets of laws".

18. In 2004, the 2004 Parliamentary Joint Committee report, *Corporate Insolvency Laws: a Stocktake,*[12] again recommended that the government

> "ensure, particularly when contemplating changes to the law, that the two streams of Australia's insolvency laws, personal bankruptcy and corporate insolvency, harmonise where possible".

19. IPA had made submissions in support of that approach to the PJC in 2004. It appears that acting on these recommendations has not been a priority for government. This may be because there is no area of government with responsibility for both areas of insolvency.[13]

5 Areas for harmonisation

20. The IPA can assist in identifying areas of both personal and corporate insolvency where common legislative provisions, wordings or approaches are feasible. These have been conveyed to the government at various times. We provide the following comments as an outline of how any reform proposal could proceed.

6 Details of our views

21. The IPA agrees with the law reform recommendations identified in Section 5. Generally, we say that the personal and corporate regimes should have common provisions where this is possible; and we consider it is possible in certain procedural areas where the obvious differences between personal and corporate insolvency will not prevent commonality.

6.1 Procedural harmonisation

22. We have identified the broad *procedural* areas such as remuneration, meetings, proofs of debt and dividends as being particularly suitable for harmonisation. As an example, the provisions for holding meetings of creditors should be able to be common in personal and corporate insolvency. The fact that a meeting is being convened in respect of a company in liquidation or an individual in bankruptcy should not make a difference.

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[12] See www.aph.gov.au

[13] Although the 1988 Harmer Report said that at least both areas were the responsibility of the *one* government.

6.2 Time limits

23. Apart from such procedural provisions, we have also identified time limits as a category where common provisions could be considered. There are different limits in each of personal and corporate insolvency for trustees and liquidators attending to the same processes.

6.3 Particular provisions

24. We have then identified particular provisions in each of corporate and personal insolvency law that are to the same legal effect, but with differences in wording or approach.

25. We have listed these in more detail at attachment A as an indication only of the sort of reforms we say should be made.

7 General comments on the issues paper

26. Your issues paper lists the types of burden which will be examined. We consider the issue we raise comes within the description of regulation that is "unnecessarily burdensome, complex or redundant", in the way the paper describes.

27. However the issues paper also raises a number of queries about regulatory processes. The IPA does not wish to make submissions on this point but we do note that the central issue we raise is inextricably mixed in with the dual regulatory regimes in insolvency. For example, the issues paper refers to the costs of dealing with separate regulators – in our case, ITSA and ASIC - and keeping up-to-date with changing compliance and reporting requirements of both; and the costs of practitioners setting up compliance systems, collecting information, preparing and checking reports, form-filling, document storage, for both. That is an issue for many insolvency practitioners.

28. For the purposes of this submission, we confine our comments to the need for harmonisation of the procedural laws and rules. While that may call for some comment on the regulatory regime, we reserve any views on that. We do say however that we have expressed certain views on the co-regulatory regimes of ITSA and ASIC in our submission to the current Senate Economics References Committee inquiry into Liquidators and Administrators. Our submission is on the Committee website.[14]

7.1 Quantitative issues

29. The issues paper invites us to provide quantitative information, where this is possible, to shed light on the size of what we say is the unnecessary regulatory burden involved, and a quantification of the costs of these separate regimes. We have not had the opportunity, in the context of preparing this submission, to

[14] www.aph.gov.au

attempt such a quantification. It would be possible for us to attempt a rough quantification if further time were available, but we consider it is a problem that is apparent from the nature of the issue itself.

8 Proposed recommendations

30. As to what recommendations should come out of the Commission's review, we consider that an incremental process be recommended, being realistic about the task of implementing full harmonisation.

31. We simply say that the earlier recommendations of the 1988 Harmer Report and the 2004 PJC report be implemented. This could be done by the setting up of a reform task-force comprising officers of both Attorney-General's and Treasury, with input from insolvency professionals, to begin the process of identifying the areas for harmonisation and drafting proposed changes. The IPA would be well content if that process were recommended and the process commenced. That process would need to be applied on an on-going basis to ensure harmonisation, where achieved, is maintained. We mention but do not comment upon the fact that the law of insolvency is dealt with by two separate Ministers and departments.

32. Finally, the issues paper asks whether there are recommendations that could be implemented now. Given that insolvency law reform is continually progressing in both personal and corporate areas, we think that at any stage procedural changes that are being made in one area could be aligned with the other. It is a feature of IPA's on-going reform recommendations to government in a wide range of insolvency and insolvency related areas that we have regard to issues of harmonisation. Whether those views are accepted has been another matter.

33. We have given the contact details of the IPA's Legal Director on the cover page of this submission. Please contact him if you have any questions about this submission.

Mark Robinson
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Attachment A

Procedural

Meetings

The process for the convening and holding of a meeting of creditors should be the same for both corporate and personal insolvency matters wherever possible. For example, notice periods, forms, advertising requirements, timeframes for lodgements, use of proxies etc. We note that there may be exceptions, for example in respect of the particular requirements for voluntary administrations.

Relevant provisions under the *Bankruptcy Act* (BA) come within Part IV Division 5 'meetings of creditors' sections 63A to 64ZF. Committees of creditors, another particular area where common provisions could be used, are covered at sections 70 to 72. In corporate insolvency, meeting provisions are contained in Ch 5 of the Corporations Act (CA), and in Chapter 5 of the Corporations Regulations.

Dividends

Provisions for payment of a dividend, whether from assets of a bankrupt estate or of a liquidated company should be the same.

Part VI of Division 5 of the BA covers dividend payments and the processes to be followed in their payment. The equivalent provisions in corporate insolvency are contained in Corporations Regulation 5.6.63 ff. (That in fact raises another issue, that there are differences between corporate and personal insolvency as to whether certain areas of law and practice are contained in legislation or the regulations).

There still exists in corporate insolvency a provision such as s 553E of the CA which says in effect that in an insolvent winding up, "the same rules are to prevail and be observed with regard to debts provable as are in force for the time being under the *Bankruptcy Act 1966* in relation to the estates of bankrupt persons …". This is a remnant of the former approach of bringing provisions of the Bankruptcy Act into the Corporations Act. The IPA does not recommend that this approach be restored or used – each Act should be 'stand alone' in terms of the provisions that apply; or there should be one set of regulations which would apply.

Remuneration

The IPA says that in principle there should be common provisions in relation to the claiming and fixing of remuneration and any court review of that process. The differences between corporate insolvency and bankruptcy are significant, including as to the assessment or taxing processes. That in itself makes the task of working out common provisions more difficult; but at the same time shows a high need for common provisions to be considered.

The personal insolvency provisions are contained in Part VIII Division 2 of the *Bankruptcy Act* and in Part 8 Division 4 of the Bankruptcy Regulations. However, these are at present the subject of proposed legislative change in the Bankruptcy Legislation Amendment Bill 2009. No consideration was given in that Bill to the need to harmonise with corporate remuneration regulations. The equivalent Corporations Act provisions are contained in the Act itself, for example at s 473 in relation to liquidations. Those provisions were themselves the subject of major reform in the Corporations Amendment (Insolvency) Act 2007 which again did not have regard to the comparable processes in bankruptcy.

We also point out that each of the Federal Court and the Federal Magistrates Court has particular rules for the assessment and taxing of bankruptcy costs. These are contained in Part 13 of the Federal Court (Bankruptcy) Rules 2005 and Part 13 of the Federal Magistrates Court (Bankruptcy) Rules 2006. The Federal Court and the State and Territory Supreme Courts, but not the Federal Magistrates Court, has particular rules for the assessment and taxing of corporate insolvency costs.

Service and notifications

Generally, each of the BA and the CA have separate provisions and approaches to service of documents, proof of service, notifications to creditors, and so on.

Time limits

Under this heading, we identify a number of areas and particular sections where time limits are different and where there is no apparent reason for this. For example:

- after an act of bankruptcy is committed by a debtor on failure to comply with a bankruptcy notice, the creditor has 6 months to present a petition for bankruptcy: s 41(1)(c). In corporate insolvency, the creditors has 3 months - s 459C(2) CA.
- In bankruptcy once the creditor's petition is presented, it has an initial 'life' of 12 months - s 52(4); which can be extended to 24 months - s 52(5). In corporate insolvency, the petition has a life of 6 months, which can be extended to 12 - s 459R CA (6 months, plus).
- there are 6 year time limits for commencing certain voidable transactions in bankruptcy (under s 120 and 122): see s 127. In corporate insolvency, the limit under the Corporations Act is 3 years: s 588FF(3).
- a bankruptcy proof of debt may be challenged within 21 days of the trustee's decision rejecting or reducing it: s 104. A company proof of debt may be challenged not less than 14 days of the liquidator's decision - Corporations Reg 5.6.54 form 537.

There are other similar differences in timing which we have not identified.

Particular provisions

We have also identified some particular sections common to both personal and corporate insolvency that could be harmonised. We give these examples:

- Disclaimer of onerous property: s 133 BA; CA s 568 to 568F.

- Penalties for offences: BA s 82(3); CA s 553B. There are no doubt policy differences in this area, in terms of trying to ensure that an individual remains personally responsible for offence based misconduct, which is not so relevant to a company. Nevertheless, we consider that the relevant core parts of the two sections could be made the same.

- Debts provable: BA s 82(1); CA s 553(1). On this issue, we appreciate that there are fundamental differences between persons and corporate entities that require different 'proof' provisions. However there are mechanical and procedural aspects of this that could be the subject of a harmonisation review.

- Set-off: BA s 86; CA s 553C. These provisions are almost identical and do represent that common provisions do exist; save that s 86 relies on the concept of notice of an act of bankruptcy as being the equivalent to notice of the fact that the company was insolvent.