[received by email 30/7/10]

Submission on draft Annual Review of Regulatory Burdens report

Our brief submission only addresses Section 4.5 Insolvency Practitioners.

(1) Qualifications for Submission

We are two experienced insolvency academics with many years research (including books and other publications) and teaching in both personal and corporate insolvency, as well as experience as practitioners, presenters and advisors to clients, professional bodies and governments including in the UK, Canada, Germany and New Zealand. We have recently established, from 2011, what, as far as we are aware, is the first university undergraduate course on Personal Insolvency, as well as a separate course on Corporate Insolvency, and specialist Masters courses in Comparative Corporate Rescue, and Insolvency Law. We are also both members of the Law Council Insolvency and Restructuring Committee, and have Academic Membership of the Insolvency Practitioners Association. We made a joint submission and appeared before the Senate Inquiry on Liquidators and Administrators, addressing in particular the issue of Regulation of Insolvency Practitioners and their professional and fiduciary duties.

(2) Endorsement of Commission's discussion and conclusions

We endorse the submission of the IPA, and we agree with the Commission's summary of the previous history of recommendations on the issue of harmonisation or closer alignment of corporate and personal insolvency law.
We endorse the conclusions of the Commission that there are various options, including within the existing statutory architecture, or within a single piece of legislation, to achieve closer alignment of corporate and personal insolvency law provisions than is currently the case. We believe that there a number of common principles of insolvency, which apply to both corporate and personal insolvency, albeit that there will inevitably be some differences, largely in recognition of the human status of the individual debtor, and in recognition of the role of company directors within the Corporations regime and its regulation.

There are also a number of procedural areas where differences in the detailed legislation have accrued for historical reasons or inadvertence, without necessarily adverting to any principled justification for having different approaches in corporate and personal insolvency. However, we do not underestimate the difficult design and drafting choices that will have to be made once areas for harmonisation or closer alignment can be identified, and the need to have in mind the focus on thereby achieving costs savings to business and also, in this case, the insolvency profession.

In assessing the costs saved by any closer alignment, it would be useful to have more detailed statistical information as to:

(a) the proportion of insolvency practitioners who take on insolvency appointments in both corporate and personal insolvency administrations. This should be relatively easy to discover with the co-operation of Insolvency Practitioners Association and ITSA, though the IPA does not have complete coverage of membership. However, since there are two registration regimes at present, through ASIC and ITSA, it should be possible to cross-check.

(b) The proportion of businesses that have to deal with debtors or creditors in both categories of corporate and individual debtor (for example, sole traders or partnerships). This might be more difficult or too difficult to identify and extrapolate.

(3) Task Force- composition

We also agree with the recommendation of establishment of a Task Force, (parallel with the Commission's recommendation that the Government explore the possibility of a single insolvency regulator- which is consistent with our submission to the Senate Inquiry).

However, we believe that the composition of the Task Force should not be confined to officials from Treasury and Attorney-General's Department, since the issue will require close consideration of the policy, principles and provisions of the corporate and personal insolvency legislation, and would also be usefully informed by different approaches adopted overseas, for example in the UK Insolvency Act 1986 and US Bankruptcy Code, among others.

In addition to the previous consideration of this issue by earlier bodies such as the PJC or Harmer Report, there has been some academic work both here and overseas on the question of the appropriate framework for insolvency law, as well as work by UNCITRAL and other international and professional bodies.

We believe that academics, specialist lawyers, and the Insolvency Practitioners Association, are not only stakeholders with an interest in the work of the Task Force, but could be valuable as representatives and experts in the deliberations of the Task Force, without making its size unwieldy.
For example, the topic of harmonisation of personal and corporate insolvency law was raised by Associate Professor Symes in addressing the Hartnell Workshop at ANU, Canberra on 16th July 2010, and we are presenting, as members of the South Australia branch of the Law Council's Insolvency and Restructuring Committee, a discussion paper on the subject, at the forthcoming Law Council Insolvency Workshop in Melbourne on 21st August.

We appreciate that the two Government departments responsible for the respective pieces of primary legislation would need to take the lead role, but the work of this Task Force will have a high technical legal content, notwithstanding that this may be undertaken within the terms of reference of investigation of closer alignment where possible.

(4) Cross-Border Implications

Another reason why the recommendation is timely is because of work to which both the New Zealand and Commonwealth Governments are committed in relation to closer agreement on cross-border insolvency, as part of the the Memorandum of Understanding between those two governments in relation to harmonisation or closer co-operation in commercial law (see the Joint Statement of the two relevant Ministers in March 2009). It is certainly the case that closer alignment of domestic corporate and personal insolvency law in some key procedural and/or substantive areas where common principles and outcomes can be identified, as well as a single insolvency regulator, would assist with attempts to harmonise or achieve closer co-operation in relation to New Zealand and any other jurisdiction in future. The recent enactment of the UNCITRAL Model Law on Cross-Border Insolvency into the domestic laws of Australia, New Zealand and other major trading partners is also designed to reduce the costs of failure, and closure or rescue, of businesses with a cross-border aspect.

(5) Recent legislation that applies to both corporations and individual debtors

The Cross-Border Insolvency Act 2008, and also the Personal Property Securities Act 2009 (which is also relevant to insolvency practice) are recent examples of Commonwealth legislation concerning insolvency, and these Acts cover corporate and individual debtors and creditors.

Please do not hesitate to contact us if you require further information or discussion about our submission.

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