Regulatory Burdens Review
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Via email: regulatoryburdens@pc.gov.au

30 July 2010

Dear Ms Eibisch

We refer to the above matter and provide the following submission as individuals with a keen interest in this matter. The submission is not confidential. The following is submitted in relation to concerns raised with respect to duplication of laws around insolvency and the regulation of that profession.

Yours sincerely

Dr David Morrison

TC Beirne School of Law

The University of Queensland

Dr Colin Anderson

Law School

Queensland University of Technology

1. The terms of reference for the commissioned study include the identification of "specific areas of Australian Government regulation that: a. were unnecessarily burdensome, complex or redundant or b. duplicate regulations or the role of regulatory bodies, including in other jurisdictions" allowing the Commission to "identify areas of reform which have the potential to deliver the greatest productivity gains to the economy as a whole".[1]
2. This submission is made in relation to "4. Regulatory barriers for occupations" and particularly with reference to "4.5 Insolvency practitioners" commencing at page 145.
3. At pages 145-146 the Commission notes the concerns raised by the Australian Insolvency Practitioners Association (IPA sub.7) "that the different regulatory treatment of the administration of personal insolvency (… bankruptcy) and corporate insolvency of companies (… liquidation or winding up) is impeding the efficient conduct of the insolvency regime…" and that there are significant costs in having separate regulators ITSA (Insolvency and Trustee Service Australia) for bankruptcy and ASIC (Australian Securities and Investments Commission) for liquidation seeking to engage and provide similar legal outcomes.
4. In the IPA's opening statement in its submission at the final hearing of the Senate Economics References Committee into the role of liquidators and administrators it was stated: "… we do consider that the present regime of discipline by the two regulators is somewhat uncoordinated and accordingly might benefit from some review… The different approaches to review and the extent to which there is communication with the professional bodies, including IPA, differ considerably between ASIC and ITSA".[2]
5. Wider reference to duplication of the enforcement of similar laws around personal and corporate insolvency is recognised by the Commission at page 146, namely that the IPA recommends that "steps be taken to harmonise the relevant laws and regulations, where possible" (IPA sub.7 p.5).
6. The issue of duplication is directly raised by Dr Morrison at the final hearing of the Senate Economics References Committee into the role of liquidators and administrators[3] who states: "…there is some merit in at least considering a joint regulator [since ITSA and ASIC] are only separate by historic accident…". For example: "what difference does

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[1] http://www.pc.gov.au/projects/study/regulatoryburdens/business-consumer-services <accessed 29 July 2010> Further "the Commission will make recommendations for: alleviating the regulatory burden on these sectors [and] enhancing the consistency or reducing duplication of regulations or the role of regulatory bodies, for the sectors".

[2] Wednesday 23 June 2010, evidence given by the IPA, 19 March 2010, Hansard 23 June 2010, E3-E4.

[3] Wednesday 23 June 2010, evidence taken via teleconference resulting from the submission made by Colin Anderson and David Morrison "Inquiry into Liquidators and Administrators – Senate Standing Committee on Economics", 19 March 2010.

it really make whether or not my business is incorporated? The difference is that if my business is incorporated then ASIC deals with me and if my business is not incorporated then it is a bankruptcy matter. But from the point of view of the outsider, the person who deals with the business, and from the point of view of my conduct or [that of] the insolvency professional that manages it in the end game[4] [business failure], it is all the same.[5]

7. We submit that there is sufficient concern from both the IPA representing the profession and interested and independent academic commentators for there to be a review of the law relating to insolvency with respect to merging personal and corporate insolvency law.
8. We acknowledge that the IPA in recommending that "steps be taken to harmonise the relevant laws and regulations, where possible" have identified areas as 'suitable' including "the claiming and fixing of remuneration and any court review of that process, the process for convening and holding meetings of creditors, proofs of debt, provisions for payment of a dividend, time limits", however we submit that the review is most productive if it considers the regime for both bankruptcy and insolvency in total and at least takes submissions from interested parties as to the possibility of a joint system such as that in the United States where there is one code.
9. It is submitted that one code and the administration thereof will ensure a more efficient regime and enhance information disclosure, the latter being of particular concern to IPA and ourselves as raised most recently at the final hearing of the Senate Economics References Committee into the role of liquidators and administrators.[6] The IPA expressed the view that such a body ought to have an ASIC "style" of resourcing since in their view "ITSA is well short of understanding and being resourced to address corporate insolvency".[7]
10. Therefore, whilst the recent Senate Economics Inquiry referred to above was directed at those registered as liquidators (companies), it led to the related question as to why the registration (and regulation) of trustees (bankruptcy) and liquidators, who are often practitioners registered for both capacities, and in any event perform almost identical functions account to different regulatory regimes, it is apposite that this be addressed by the Commission.
11. The Commission correctly notes that the Constitutional power provided in s51(xvii) is one relating to 'bankruptcy and insolvency', that history provides us with the reason for

[4] The end game being business failure resulting in either insolvency for the corporate separate legal entity or personal bankruptcy for the business owner or partner.

[5] Hansard 23 June 2010, E18.

[6] Wednesday 23 June 2010, evidence taken from the IPA, Hansard 23 June 2010, E2-E15 and evidence taken from Colin Anderson and David Morrison via teleconference, Hansard 23 June 2010, E16-E21.

[7] Wednesday 23 June 2010, evidence taken Mark Robinson, President, IPA, Hansard 23 June 2010, E7.

the different regimes regarding the regulation of insolvency practitioners that is merely one result of the differing regimes for individuals on the one hand (the Commonwealth *Bankruptcy Act*) and companies (the Commonwealth *Corporations Act*) on the other.

12. Further differences arise with respect to policy that for bankruptcy until recently managed at ITSA now resides with the Attorney General's Department and for insolvency with Commonwealth Treasury.

13. Further, the Commission notes that the differences have not been continued with respect to recent legislation, namely the Commonwealth *Cross-border Insolvency Act 2007*. It is therefore possible for stakeholders to work together in the national interest and produce regulation that addresses both personal and corporate insolvency matters.

14. There is no reason therefore not to have a good look at the possibility of a uniform code for the regulation of all insolvency events, personal and corporate. Notwithstanding the various reviews in the past two decades noted by the Commission,[8] it is submitted that it is time to critically analyse the possibility rather than refer to possible obstacles historically provided (without accompanying empiric evidence).

15. Whilst recognising the comments cited from the Harmer Report promoting uniformity, the Australian Law Reform Commission suggestion that "corresponding reforms should be made to both sets of laws (ALRC 1988. P.14)[9] must be viewed in the context of the state of corporate law generally at the time of the report. The subsequent transfer to the Commonwealth of the corporations' power removed the need for states to agree to corresponding reforms across jurisdiction. It is therefore useful to think about the differences as between the personal and corporate insolvency regimes within Australia that now arise, as being created by historic accident.

16. It is submitted that an effective review of these differences and the opening up of considered dialogue as to how those changes might be facilitated, is timely and will provide the very real possibility (and one that can be measured and reported upon) of meeting the Commission's stated objectives.

17. The evidence before the Senate Economic Committee has demonstrates some differences between the administration of personal and corporate insolvency regimes. These differences are shown to be costly in terms of the supervision of practitioners. Consideration of the removal of Chapter Five of the *Corporations Act* from the legislation and of its merging with the Commonwealth *Bankruptcy Act* for the purpose of forming a sole "Insolvency Act" is therefore an urgent agenda item. The form that the legislation takes and its administration and professional outcomes are matters for further discussion. Notwithstanding the general agreement in principle by various stakeholders, there has been no real progress on the idea to date.

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[8] Page 147.

[9] Page 147.

18. One primary objection raised against a merger of personal and corporate insolvency legislation, is that the regimes have differing policy considerations.[10] This is also generally true for the United States, England and Canada, who have unified systems of personal and corporate insolvency law. There is little to suggest from these jurisdictions that where policy considerations differ, that they cannot be dealt with effectively within their (unified) system.

19. The concern raised by the Commission that "corporate insolvency law is arguably an integral feature of corporate law and a unified personal and corporate insolvency law could result in fragmentation of corporate law"[11] is well made, however such an obstacle might be overcome with relative ease. Further information is required in order to understand the dimension of this objection – there is no reason, for example, why the unification of the law in this area might not be effectively integrated with the Commonwealth *Corporations Act* where required if overseas jurisdictions provide any guide. There is no more reason why that might not be efficiently achieved than having the current fragmented system.

20. As to the "practical difficulties and costs associated with making the necessary changes [as to harmonisation]… and the subsequent drafting of unified legislation… [being] likely complex and resource intensive exercises" raised by the Commission,[12] we agree that there will be costs involved. That is why it is necessary to open the discussion and for it to include likely estimates of the costs arising from possible options to harmonise and for those costs to be compared against the benefits arising from harmonisation. We think it a worthwhile exercise.

21. Accordingly we refrain from making a direct recommendation at this stage as to outcome, namely either (a) whether the legislation for personal and corporate insolvency be kept separate and amendments be made to harmonise the language of the different statutes, or (b) whether there ought to be enacted a new law pursuant to the constitutional power granted. The former might well see a slower development of the inevitable decision to have a unified regime.

22. The Commission's recommendation[13] as to a taskforce comprising "officials from the Attorney-General's Department and the Treasury and… work closely with" ITSA and ASIC including consideration for having one regulator is in our view sound. We do not however believe it is sufficient.

23. Whilst it is necessary for the Attorney-General and Treasury to give consideration to the option of aligning provisions that might be amenable. It is in our view essential that this

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[10] Page 147.

[11] Page 149.

[12] Page 149.

[13] Page 150.

does not move the debate much further than the apparent memorandum of understanding between ITSA and ASIC; one that does not appear to have received much attention or action. We therefore take the view that the consideration of having one regulator is paramount and that this ought to be the starting point. It follows that the matters that might have been advanced by the memorandum of understanding and other considerations already given to the option of aligning provisions are thereby included in the ruminations of the taskforce.

24. Further we are disappointed that the taskforce is recommended to work closely with only ITSA and ASIC – we feel that ought to be opened up to include at least the IPA, the Law Council of Australia and any interested independent expert, dare we suggest, including insolvency academics. With respect we recommend that the taskforce be urged to contact key stakeholders related to the matter and to either take submissions or hold meetings to determine a wide range of views on a critically important matter. It seems unlikely that the valuable knowledge and experience held by members of the profession and others will be utilised if the taskforce is not widened.

25. Finally, we wish to reassert our long-held and oft-cited view that there is a real need for empiric data to be provided with the making of such decisions so that the process is not only openly accountable but that the claims of seeking to attain an efficient outcome are demonstrated in a manner consistent with the stated outcomes of the Commission.