CREDIT ISSUES

WOODGATE & CO.
Chartered Accountant
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INSOLVENCY UPDATE

Another insolvency law reform

The Federal Government has released an exposure draft of the primary amendments to be included in the Insolvency Law Reform Bill 2013 ("the Draft"). The government's intention was for the Draft to be finalised as a bill and for the bill to be passed by the current parliament. This has now been deferred.

The Draft proposes amendments to:

(a) the regulation of insolvency practitioners;

(b) certain rules relating to external administrations; and,

(c) the powers of regulators.

Regulation of insolvency practitioners

In September 2010 the Senate Economic References Committee proposed that the regulation of personal and corporate insolvency practitioners be transferred to a new body, called the Australian Insolvency Practitioners Authority. The Draft states that the Australian Securities and Investments Commission ("ASIC") will continue to regulate corporate insolvency practitioners. However, the system for registration of Liquidators by ASIC, will be aligned to the system for the registration of private trustees by the Inspector General of Bankruptcy. It is proposed that candidates will be interviewed by a three person panel, prior to ASIC approving applications for registration as a Liquidator. The Draft also proposes that the category of Official Liquidator be removed and that ASIC be given the power to restrict practitioners to particular types of external administrations. The current system for the registration of private trustees by the Inspector General of Bankruptcy will be retained.

The Draft proposes that the insurance obligations of insolvency practitioners be strengthened, by substantially increasing the penalties for those insolvency practitioners who do not maintain adequate and appropriate professional indemnity and fidelity insurances. The maximum penalty will be increased to 1,000 penalty units, currently $170,000, where the practitioner intentionally or recklessly fails to comply with those obligations.

The registration of a corporate insolvency practitioner who becomes personally insolvent, will be automatically cancelled.

Amendments to rules relating to corporate external administrations

The Draft proposes the following amendments to the *Corporations Act*:

(a) insolvency practitioners will be entitled to claim remuneration as specified in the remuneration resolution(s) or up to a limit of $5,500, indexed to the consumer price index;

(b) the remuneration of Provisional Liquidators is to be determined by a Committee of Inspection, by creditors or by the Court, as is the case with liquidations;

(c) corporate insolvency practitioners will be required to file with ASIC a single return of receipts and payments covering all administrations. The return will be lodged annually, as is the practice in personal insolvencies. Currently, corporate insolvency practitioners must file six-monthly accounts and statements (Forms 524) with ASIC, from the date of appointment, for each administration. The form of the single return has not yet been finalised;

(d) if an insolvency practitioner is replaced, the books and records of the external administration are to be transferred to the incoming insolvency practitioner;

(e) a meeting of creditors will be required to be convened, by a corporate insolvency practitioner, if:

- resolved by creditors or by the Committee of Inspection; or,
- requested by at least 25% of creditors, by value, in writing; or,
- requested by at least 10% of creditors, by value, and if security is provided to the insolvency practitioner for the costs of convening the meeting;

(f) ASIC may direct an insolvency practitioner to convene a meeting of creditors;

(g) the corporate insolvency regime would be aligned to the current personal insolvency regime, which allows for resolutions being passed without physical meetings;

(h) a creditor comprising 10% or more of total creditors' claims, by value, would be entitled to appoint a representative to the Committee of Inspection. Further, employees owed entitlements would be entitled to appoint a representative to a Committee of Inspection;

(i) the Committee of Inspection would have the power to give directions to an insolvency practitioner;

(j) creditors may resolve to remove an insolvency practitioner and appoint a replacement, without recourse to the Court. A Court would only have the power to reinstate the former insolvency practitioner, if the Court determined that the removal was an improper use of a power by the creditors; and,

(k) ASIC or the Court may appoint a reviewer of an insolvency practitioner's remuneration. The costs of the reviewer will then form

part of the cost of the administration.

Increased regulator power

The Draft proposes that ASIC and the Insolvency Trustee Service of Australia may share information regarding insolvency practitioners.

The Draft increases the maximum penalty for directors who fail to complete Reports as to Affairs to 50 penalty units, currently $8,500. For those directors who intentionally or recklessly fail to provide requested books, the maximum penalty will be 100 penalty units, currently $17,000 or two years imprisonment. Further, in certain circumstances, ASIC may disqualify a person from managing a corporation for failing to complete a Report as to Affairs or failing to deliver up the books and records of a company.

The Draft proposes that insolvency practitioners may assign statutory rights, such as claims for trading whilst insolvent and other antecedent transactions. However, if legal proceedings have already been commenced, then the consent of the Court will be required.

Procedural amendments

The Draft proposes the removal of final meetings for companies subject to members' voluntary liquidations and creditors' voluntary liquidations. Currently, the filing of the return of the final meeting is the trigger for deregistration of those companies.

Conclusion

The Draft contemplates a further tightening of the regulation of insolvency practitioners and an alignment of some, but not all, rules governing the personal insolvency and the corporate insolvency regimes. Whether such changes to the law would have averted the malfeasance of Stuart Ariff, only time will tell.

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