



15 September 2009

Mr David Bergman
Bankruptcy Policy Branch
Civil Law Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email

Dear Mr Bergman

BANKRUPTCY LAW AMENDMENT BILL 2009 ("THE BILL")

1. The IPA provides these comments on the Bill in response to the Department's website invitation to do so.

Regulations

2. Much of the new remuneration regime is to be contained in the regulations. We consider that is a good approach because it allows the provisions to be amended more readily as experience with the new regime develops. The IPA would appreciate being able to have input into the regulations when they are being prepared, in particular as to remuneration. We note that the remuneration regime parts of the Bill will commence upon proclamation. We assume that the Act will not be, or cannot be, proclaimed until the regulations have been prepared and after some period of consultation.

Remuneration

3. As to remuneration, s 167 of the Bill preserves the right of a bankrupt (or a creditor) to have the Inspector-General review the trustee's approved remuneration. That right to review remuneration in corporate insolvency is only available to the court: s 473(6) *Corporations Act*. We agree that review by the Inspector-General is satisfactory in the particular circumstances of personal insolvency, rather than simply leaving any review to the court.

4. However this right to appeal to the Inspector-General should also be available to the trustee, for example if creditors approve remuneration at one half that claimed by the trustee for no valid reason. This right of a liquidator to appeal exists in corporate insolvency: s 473(6).



5. New section 167 says that the regulations may make provision for how this review is to occur. The IPA suggests that if this right of a bankrupt is to exist, then there should be some high threshold set for a bankrupt [or creditor] to seek to review approved remuneration. There is a long accepted policy of creditors having the authority to fix remuneration in insolvency. We suggest that the regulations should require the Inspector-General to take a 'gate-keeping' role to ensure that only valid and arguable reviews are allowed. This is important given that there is to be no fee or costs for a bankrupt to apply to review remuneration.

6. Although these are issues more for the regulations, we wish to foreshadow that there should be set criteria which have to be met before a review can proceed. These criteria could include whether the trustee has had the remuneration approved by the processes stated in the IPA Code of Professional Practice, including an IPA remuneration report. That is not to say that mere compliance with IPA Code would preclude a review, but that it be one factor. We would like the opportunity to formulate this and other issues when the regulations are being considered.

7. Section 167 is perhaps not clear whether the matters to be prescribed in the regulations are exhaustive, that is whether s 167(1)-(4) list the only matters which the regulations may prescribe. It may be wise to add "or other regulations necessary or convenient to be prescribed for carrying out or giving effect to this Act".

8. Section 167(5) is satisfactory as it stands, but we suggest the right of recovery should be stayed while there is a review under s 167(6) pending.

9. Section 162(4) requires the Inspector-General to give written notice of his or her decision as to the amount of the trustee's remuneration. We suggest that *reasons* for the decision should also be required, and words should be added to make that clear. That also applies to decisions under s 167, that reasons should be required. This is so in particular given there is a right of appeal to the court: s 167(7). Written and publicised reasons of the Inspector-General may assist in developing some guidance on remuneration claims.

Offences

10. There is a requirement for an annual return to be lodged by trustees – s 170A (and s 185LEA, as to debt agreement administrators) – which formalises an existing requirement that trustees have had to attend to for some time. The IPA supports the collection of data on personal insolvencies and we would be interested to have input in relation to the information that is collected. At the same time, we would want to assess what work is required of a trustee in preparing and lodging this return, as the time cost would not be a necessary item of remuneration in an estate.

11. There is a penalty for non-compliance of 5/1 penalty units. We suggest you clarify whether the penalty goes to the non-lodgment of the return itself, or whether the penalty attaches to each estate that may, inadvertently, be omitted from the return. For example, if a trustee omits four estates on his return, out of one hundred estates, we do not think a penalty of four times 5/1 penalty units should be imposed.



\$10,000 limit

12. We have made earlier submissions earlier on the increase in the minimum amount of a petition to \$10,000 and we maintain our views against that. We note that not only is the petition amount increased to \$10,000 (ss 44, 244), but also the same amount is set for a bankruptcy notice to issue (s 41). We simply point out that there is not a necessary legal connection between the two processes (*ASIC v Forge* [2003] FCAFC 274) and an increase in the amount for petitions does not necessarily require the same increase for notices.

Drafting and other comments

13. Section 52(1A) requires the creditor who obtained the sequestration order to give a copy to the Official Receiver within 2 days. In this age of electronic communications, we think there should be a requirement, or arrangement, for the court to immediately convey the making of the order to the Official Receiver, for entry on the NPII. There is a reasonable expectation that the record is immediately accurate, well within two days, certainly in relation to the serious change of status that bankruptcy involves.

14. The Courts' Bankruptcy Rules in fact refer to a search of the NPII being done "no earlier than the day before the [sequestration] hearing", with which the requirement in s 52(1A) should be compared. The Courts' Rules also require that "within 2 days after the entry is stamped" the creditor must give a copy of the order to the trustee and the Official Receiver. The sequestration order may not be stamped until a day after the order is made – rule 4.08(b). Compliance with section 52(1A) may not always be possible within these time frames.

15. We note also there is no requirement for the sequestration order to be notified and given to the trustee, which is obviously vital notice to be given. This is left to the Courts' Rules – rule 4.08 and rule 4.10 – for which there is apparently no penalty imposed for breach.

16. The same comments are made in relation to s 244(14), 245(3) etc. See the Courts' Bankruptcy Rules at rule 11.04.

17. A section 77C notice can require the bankrupt to "give" the Official Receiver a statement of affairs, presumably if the bankrupt has not complied with s 54. The obligation under s 54 is to "make out and file" the statement of affairs with the Official Receiver and to "furnish" a copy to the trustee. Is this difference in wording intended? See also s 267(1)(d).

18. In section 265(5)(b), the wording "incurs any debt or liability by fraud" is used – this differs from s 153 which refers to "a debt incurred by means of fraud ...". Is this difference intended?

19. Finally, there are known drafting errors in the *Bankruptcy Act*. For example:

- the relation back provisions in s 115;



- the discrepancy between the antecedent transaction provisions made applicable by s 231(3) to relation to personal insolvency agreements, and those made applicable by s 188A(4); and
- the deficiency in s 121 revealed by the High Court in *Peldan v Anderson* [2006] HCA 48.

20. Given this is a general bankruptcy law amendment Bill, we suggest that any such errors that are not contentious be fixed in this Bill.

21. Also, given that the remuneration provisions are being revised in the Bill, there is an opportunity to legislatively confirm the practice of creditors approving future remuneration of a trustee. This is common practice which has been acknowledged as well established by the courts: see *Wenkart v Pantzer* [2008] FCA 478 at [55]. It is preferable that such an important aspect of claiming remuneration be clearly stated in the law. In any event, we assume that none of the changes in the Bill would disturb that practice.

Earlier IPA submissions

22. We did provide a submission of 12 June 2009 on the proposals for change that lead up to important aspects of this Bill. While the Bill does not adopt the proposal to reduce the period of bankruptcy, about which we had expressed concerns, it does implement the threshold increase to \$10,000 for a creditor to pursue bankruptcy proceedings. As we said in our June submission, and in these comments (paragraph 12), we do consider that amount to be too high. Its impact will need to be monitored and the IPA may wish to raise this issue again in the future. For the record, we also refer to our earlier submissions on remuneration (4 July 2008) and offences and penalties (19 October 2007) that have been made by the IPA as part of the consultation process leading to this Bill.

23. Please contact the IPA's Legal Director, Michael Murray, on 9080 5826 if we can assist explain or clarify further. We would be pleased to be kept informed of the progress of this Bill and, as we have indicated, to be involved in the preparation of the regulations.

Yours sincerely

Mark Robinson

President

Insolvency Practitioners Association