27 October 2010

Mr Hamish Hansford
Committee Secretary
Senate Legal and Constitutional Committee
By email: legcon.sen@aph.gov.au

Dear Mr Hansford

Civil Dispute Resolution Bill 2010

The Insolvency Practitioners Association (IPA) makes this general submission on the Bill and is grateful for the opportunity to do so. The IPA is the peak professional body representing company liquidators and trustees in bankruptcy, and lawyers, financiers academics and others practising in or otherwise interested in insolvency law and practice.

The IPA had previously met with the chair of NADRAC during its inquiry into this reform and subsequently discussed the Bill with representatives of the Attorney-General's Department. The IPA's focus has been in relation to the impact of the Bill on proceedings routinely commenced by insolvency practitioners in the course of performance of their duties under the *Corporations Act* and under the *Bankruptcy Act*.

Background of insolvency litigation in federal courts

In that respect, trustees in bankruptcy conduct personal insolvency litigation in the Federal Court and in the Federal Magistrates Court, as well as the Family Court where family law and bankruptcy issues arise; and registered liquidators conduct their litigation in the Federal Court and the State and Territory Supreme Courts in relation to corporate insolvency issues. We use the term 'practitioner' to encompass both.

Federal courts are therefore a significant forum for insolvency proceedings to be heard.

In addition, it should be noted that insolvency practitioners are generally 'officers of the court' and are subject to supervision by the courts in the way they conduct litigation and the administration of insolvencies. Other the other hand, practitioners are also able to obtain the assistance, and protection, of the courts in the conduct of their administrations. Insolvency practitioners therefore have a rather unique position compared with commercial and other litigants in federal courts and particularly in relation to certain types of litigation.

Insolvency proceedings that may not be suitable for mediation

In that respect, the IPA alerts the Committee to the fact that there are numerous types of proceedings that are routinely commenced by or taken against an insolvency practitioner in the federal courts that we consider are not appropriate for pre-litigation

alternative dispute resolution. These generally fall within the categories of proceedings where the law requires the practitioner to apply to the court for approval of a course of action proposed by the practitioner; or proceedings where declarations from the court are necessary, for example in order to ascertain the validity of an insolvency practitioner's appointment; or proceedings where directions to the practitioner from the court are needed; or proceedings where the practitioner's remuneration must be approved by the court. Other instances include applications by practitioners for extensions of time or for dispensation with legal requirements.

In such cases, there may well be parties opposing the orders that are sought by the practitioner but with whom mediation is not really possible or permitted. As examples, applications may be made under section 1321 of the *Corporations Act* by a dissatisfied party to appeal against a decision or omission of a liquidator; under section 445F to terminate a deed of company arrangement and liquidate the company; and under section 447C for declarations in relation to the validity of an administrator's appointment. In some cases, a liquidator may need court approval for some course of action to be taken, for example to compromise a claim of over $100,000 – s 477(2A) – or to have the court approve the remuneration claimed by the liquidator: s 473. Practitioners may also apply to the court for 'directions' in relation to their proposed course of conduct, which may be contested. Orders are often sought by administrators under s 447A of the Corporations Act to alter the legal requirements in order to facilitate Part 5.3A restructurings.

There are parallel requirements and situations litigated by trustees in personal insolvencies under the Bankruptcy Act.

There are also other "pre-insolvency" proceedings that may not be suitable for mediation as such. These include applications by creditors to the court for an order to wind up a company or to bankrupt an individual. While to some extent these are simply another type of commercial litigation, creditors who take those proceedings are regarded by insolvency law as bringing proceedings on behalf of all creditors, and other creditors may formally support them or substitute. Mediating such a claim may not always be appropriate. In this respect we have read the submission of the Federal Court of Australia of 22 October 2010 which refers to the Court's concern that the Bill 'may operate in relation to insolvency proceedings such as' these creditors proceedings. However the Court does not go on to address what we have raised above about proceedings brought by insolvency practitioners, as opposed to creditors, which we consider are the more significant in the context of this Bill.

In these sort of cases the concept of mediation with affected parties is not really in issue; it is the court which must give the direction to the practitioner, or decide to set aside a defective deed, or decide upon the amount of remuneration claimed, or to decide to extend time, or whether to bankrupt an individual or wind up a company.

The Bill, regulations and practice notes

In that respect, the IPA's reading of the Bill is that it adopts a comparatively 'light touch' to the requirements for pre-litigation alternative dispute resolution. We note that the Explanatory Memorandum says that the Bill "*does not require parties to take any particular specific step – the most appropriate steps to take depend on the circumstances of the particular dispute. The Bill is deliberately flexible in allowing parties to tailor the genuine steps they take to the circumstances of the dispute. ... The genuine steps statements provide additional information for the court about attempts that have been made to resolve the dispute. Based on this information, the court can make orders and directions under its existing case management powers, and consider compliance with the requirement and the extent of any steps taken in awarding costs*".

We would therefore anticipate that the Bill if enacted would be able to accommodate the varied circumstances involving insolvency practitioners. Courts would have regard to the position of liquidators and trustees in relation to the types of applications we have mentioned, both roles being 'officers of the court' in relation to the conduct of their litigation. We would also expect that regulations to be made under the Bill, and practice statements issued by the relevant federal courts, will address any practical difficulties that may confront insolvency practitioners as a result of the Bill's implementation.

Accordingly, the IPA does not at this stage wish to make any particular submission on the detail of the Bill beyond the issues which we have raised here. If the Committee however wants further clarification or explanation of our comments we would be pleased to assist. We can provide case law or legislation references in support of our comments on the law if needed.

Other insolvency proceedings where mediation is appropriate

We do say that in relation to many court actions by practitioners, for example for recovery of moneys or assets, the Bill will provide a useful regime and in that respect we support it. Funds are necessarily limited in any insolvency and as the Bill would appear to assist practitioners recover moneys for creditors more cost effectively and efficiently, it is supported by the IPA. There is in any event a general legal obligation on practitioners to conduct administrations and pursue claims with regard to costs and time involved. The Bill would serve to provide focus for that obligation of practitioners in their litigation claims for recovery of moneys or assets, as well as requiring the other parties to the litigation to respond in like terms.

We trust these comments are of assistance. Please contact me on or if you or the Committee wishes to discuss any aspect of our submission.

Yours sincerely

Michael Murray
Legal Director