



Our Ref: MM:AW

Direct Line: 9926 0256

3 August 2010

The Bankruptcy Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Sir,

Re: Exposure Draft of Bankruptcy Regulations

The Law Society of New South Wales' Business Law Committee (Committee) represents the interests of solicitors who practice in the area of business law.

The exposure draft of amendments to the Bankruptcy Regulations have been reviewed by the Committee. The comments below have been prepared by the Committee's Insolvency sub-committee.

General Observations

The approach taken in these proposed regulations would be applicable in assisting with accountability in large and complex bankrupt estates. In the vast majority of bankrupt estates the additional administrative burden and the subsequent costs to creditors far outweigh any discernible benefits.

8.12C Remuneration claim notice

- (2) The requirement to give notice 14 days after the fixed amount being reached is impracticable. This would require trustees to closely continually monitor the time incurred in relation to each estate where there is a fixed fee. This notice period becomes even a shorter period if it is taken into account that the notice period is calculated upon when the notice should have been received by the bankrupt and creditors not when it is sent. There is also the time in preparing the report and notice once it is realised that the fixed amount has been reached.

The notice period should be at least one month after the fixed amount being reached.

- (4) The contents of the notice will in most cases be a repeat of the original information provided when seeking approval of the remuneration fixed amount. This can be voluminous. It would be more effective and more informative for the bankrupt and creditors to have this information provided on an exception basis. An explanation will need to be provided if the average hourly rate incurred is 25% greater than the budgeted average hourly rates set out in the documentation seeking approval of the fixed amount; or if the total remuneration for a particular

category of task exceeds 25% of the budgeted remuneration for that category set out in the original documentation seeking approval of the fixed amount.

The remuneration of most bankrupt estates is anecdotally around \$8000 plus \$800 GST. The requirement for a second round of remuneration reporting adds to the costs of the administration of the bankrupt estate with no discernible benefit for the bankrupt or creditors. An exception reporting system would provide more meaningful information without the same amount extra administrative burden.

8.12D Payments to third parties — notices

- (2) It is proposed that the details of the work performed should be included in the notice to the bankrupt and creditors. There is the issue of whether disclosure of these details where there is reference to contemplated litigation would amount to a waiver of legal professional privilege.
- (4) The requirement to issue the notice to the bankrupt and creditors within seven days of receiving the claim is impracticable. During the course of the bankruptcy there are numerous third parties who are engaged to provide the services. The net result could be numerous notices having to be sent out to the bankrupt and creditors. This is at a cost to the estate without any significant benefits.
- (6) The proposed sub regulation (6) which says that the notices may be sent out with the notices for proposed regulation 8.12C is not consistent with the "must" in the proposed sub regulation (4).

It would be preferable that the requirement to send out the notices of claims by third parties should be limited to when the proposed 8.12C notices are sent. It would also be more informative for the bankrupt and creditors to have a list of third parties, a brief description of the services provided and the amount claimed. The bankrupt or creditors would then have 14 days to request copies of the relevant bills and invoices. They then have a further 14 days after receipt of the documentation to require its review.

The trustee in bankruptcy is personally liable for debts incurred in the administration of the bankrupt estate. If a subsequent review determines that these costs were not properly incurred by the trustee in bankruptcy then it is the trustee in bankruptcy who bears the burden of not being reimbursed out of the bankrupt estate. The way the proposed regulations are drafted it could be suggested that service providers would not be paid until the process of issuing notices to creditors about the amounts claimed had been completed. Any such implication may hinder the efficient administration of bankrupt estates.

- (8) Some guidance is required as to what is meant by 'routine' services. Most services that are necessary for the administration of a bankrupt estate could be described as routine. The minimum threshold of \$100 is impracticably low. It is unclear whether it deals with each individual claim (invoice) or refers to the cumulative total of the value of services provided by a particular party.

Subdivision 7 Review by Inspector-General 8.12L; How review to be conducted

- (2)(a) The proposed regulations provide in conducting the review, the Inspector-General will not be bound by legal technicalities, legal forms or rules of evidence.

It should be made clear that this is not intended to exclude the application of the principles of natural justice.

8.120 Decision of Inspector-General

There may be situations where the Inspector General initially finds there are grounds for conducting a review but after having conducted the review it is found that the remuneration and costs claimed are appropriate. Significant costs may be incurred by the trustee in complying with the requirements of the review.

The Inspector General should be required to decide whether under all the circumstances it is fair and just that the trustee be entitled to be paid all or part of his or her remuneration in connection with complying with the requirements of the review and be entitled to reimbursement of costs incurred in connection with complying with the requirements of the review.

Schedule 4A - Performance Standards For Trustees

A further paragraph should be added to the existing Part 1 of the performance standards. This should make it clear that the performance standards must be applied and read subject to the provisions of section 19 of the *Bankruptcy Act 1966*. This will reduce the scope to misinterpretation of the performance standards resulting in trustees administering an estate not as efficiently as possible by incurring unnecessary expense and not exercising powers and performing functions in a commercially sound way. This can occur when the performance standards are applied in isolation.

If you have any queries in regard to this submission, please contact Andrew Wilson, Executive Member, Business Law Committee by phone to (02) 9926 0256 or by email to Andrew.wilson@lawsocnsw.com.au

Yours faithfully,



Mary Macken
President