



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BusLaw: GULb1214456

22 November 2016

The Manager
Corporations and Schemes Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear Sir/Madam,

Insolvency Practice Rules 2016

I refer to the consultation on the exposure draft Insolvency Practice Rules 2016 and other legislative instruments.

The Law Society of NSW appreciates the opportunity to provide comments on the proposed Rules. The Law Society has reviewed the submissions made by the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia in relation to the consultation documents ("LCA submission"). We endorse the LCA submission.

We have a number of other concerns, particularly relating to disciplinary committees. While our comments are particularly directed at the draft Insolvency Practice Rules (Corporations) 2016, where relevant, the comments are also intended to apply to the draft Insolvency Practice Rules (Bankruptcy) Rules 2016.

Time Limits

Rule 50-70

The Law Society welcomes the change introduced in rule 50-70 from the absolute 60 days' time limit¹ to the proposed "best endeavours" requirement. However, we believe that a time period of 120 days would be more realistic.²

¹ *Bankruptcy Regulations 1996*, Reg 8.34.

² See D Castle, *Insolvency Law Reform – the ten-year plan*, *Insolvency Law Bulletin*, Vol 17 No 4, 57.

There is also some inconsistency between a committee being convened under section 40-50 of the *Insolvency Law Reform Act 2016* ("Act") and having a matter referred to it by the Australian Securities and Investments Commission ("ASIC") under section 40-50. As each ad hoc committee will be separately convened for each matter, logically the convening or formation of the committee and the referral of a matter to it will be simultaneous. Because in many cases the 60 days' time period will be inadequate, the date on which that time period commences will be very important. It should be standard ASIC procedure to ensure that a matter is only referred to a committee under section 40-50 after the committee has been convened and has held at least an initial meeting to arrange its own practices and procedures.

The Law Society is also concerned with the brevity of the period for response in rule 70-1. The Law Society supports the Law Council's position in relation to multiple requests. The time limit is unnecessarily short when compared to the time limit provided for under the *Privacy Act 1988* for requests for personal information. The Law Society submits that 5 days is not a reasonable time and if a time limit must be stipulated it ought to be 15 business days.

Natural Justice

Rule 50-45 and EM paragraphs 32, 33 and 36

While the Law Society agrees with the statement in paragraph 32 of the Explanatory Memorandum ("EM") that "it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to afford natural justice", the provisions of paragraphs 32, 33 and 36 of the EM are important requirements of natural justice and procedural fairness and should be embodied in the Rules, as well as in the EM.

Constitution of the committee

Rules 50-25 and 50-27

Under these rules, a committee must be "reconstituted" if the Australian Restructuring Insolvency & Turnaround Association ("ARITA") member or the ministerial representative is in breach of his/her obligations. There is no such requirement if the chair, being the ASIC representative, is in breach of his/her obligations. This is inconsistent with reg 8.05 of the *Bankruptcy Regulations 1996* ("Regulations"), where the Inspector General may terminate the appointment of any member (including the member appointed by the Inspector General) in breach of his/her obligations. We suggest that an additional rule be added, in similar terms to rule 50.27, permitting ASIC (or the Minister) to remove the member of a Part 2 committee appointed by ASIC, in similar circumstances to those set out in rules 50.25 and 50.27.

Committee Proceedings

Rule 50–55

Some decisions can be made by a committee “on the papers” without a meeting, as stated in paragraph 38 of the EM. However rule 50-55 is potentially open to abuse, if for any reason, two committee members make a decision without notifying or involving the third member. The only safeguard presently provided against potential abuse is the requirement under rule 50-75(4) that all reports must be signed by each member of the committee. While reg 8.05 J of the Regulations permits a majority of the members of the committee to pass resolutions without a meeting, there is an implication that all three members are given the opportunity to sign that document.

We suggest that a provision in rule 50-55 should be added to the effect that a decision without a meeting can only be made with the written consent of all three members of the committee.

Confidentiality

There is no provision in the Rules requiring the confidentiality of committee proceedings. It is obviously desirable for committee proceedings to be kept confidential and we suggest the inclusion of a rule similar to reg 8.32 of the Regulations.

Interviewing Liquidators

Rule 50-67

The Law Society submits that this rule should not be limited to situations where the committee is proposing to cancel the liquidator’s registration. It is contrary to the principles of natural justice not to interview the liquidator in every matter, and will present practical difficulties.

The Regulations, on which the Rules are based, mandates an interview by the committee of the trustee where the committee has been convened “to consider whether a trustee should continue to be registered” (reg 8.30(1)). This is very similar to the language used in section 40-40(1) of the Act in relation to ASIC giving a show cause notice. Such a notice is only given where ASIC seeks “a written explanation why the liquidator should continue to be registered”. Under the new regime, the show cause notice under section 40-40 of the Act triggers the whole process of “disciplinary action by committee”.

It will be difficult, if not impossible, for the disciplinary committee to know before completing its enquiries whether “it is proposing to decide that the liquidator’s registration should be cancelled” (rule 50-67(1)(b)). On referral by ASIC to a committee (section 40-50)³, many possible “decisions” are open to the committee under section 40-55⁴, including cancellation. It is necessary for the committee to interview the liquidator sooner rather than later, before considering what other information it requires and what other persons (if any) it needs to interview. Unless this rule is amended or deleted, all prudent committees may find it necessary to resolve at the outset to interview the liquidator, as a matter of natural justice, because the current proceedings may result in cancellation.

³ *Insolvency Law Reform Act 2016*.

⁴ *Ibid*.

It was noted at paragraph 111 of the Insolvency Practice Rules Proposal Paper (November 2014): "It is proposed that the current rules for registration and disciplinary Committees in the Bankruptcy Regulations be replicated in the IPR's." However, we note that this limitation, which does not exist in the Regulations, is included in the Rules.

Disciplinary Action

Rule 5.5

The Law Society, like the Law Council, considers that this rule should be amended to exclude referrals to a disciplinary committee under section 40-50 of the Act.

Such referrals are part of a disciplinary process which may result in continued registration of the liquidator under subsection 40-55(1)(a), rather than in any sanction being imposed. While paragraph 9 of the EM states that where a party is found to be innocent the disciplinary committee can amend the register, reputational damage may have occurred which cannot be remedied.

Register of Liquidators

Rule 15-1(f)

We consider that there should be a presumption that at the expiration of 5 years, the record of the disciplinary action should be removed from the register, except in the case of the most serious matters. It is appropriate for the most serious matters to remain on the register, but less serious matters should be removed after this period.

Conditional Registration

Rule 20–5(2)

This rule requires that every liquidator must comply with the continuing professional education requirements, if any, of his/her relevant professional body. Although 80% of liquidators are said to be members of professional bodies (EM paragraph 14), membership is not mandatory. We consider that ten hours of verifiable professional education should be specified as a condition on registration of every trustee, whether a member of a professional body or not.

Material Personal Interest

Definitions, Rule 5-15 and linking to 50-40

The Law Society supports the inclusion of a definition of "material personal interest".

Professional Standards – Bankruptcy

Rule 42

In general terms, the Law Society suggests that the profession and the general public would benefit from the standards in rules 42-170 to 42-190 applying to all trustees. General application of these provisions would provide consistency for the administration of bankrupt estates.

Rule 42-30(2)

While the Law Society acknowledges that this rule is reproduced from the Regulations, we suggest that this opportunity ought to be taken to amend this rule to acknowledge the importance of a trustee's investigations and the necessity in some circumstances not to disclose the results of every investigation that he or she undertakes. The Rules, as presently drafted, require a trustee to disclose as soon as practicable, the results of any investigations or enquiries. If strictly interpreted, this may require a trustee to disclose, before commencing proceedings, the outcomes of information gathering processes that would otherwise be considered privileged for the purpose of intended litigation, or sensitive for the purpose of enforcing a provision of the *Bankruptcy Act 1966*. The Law Society suggests clarifying how the rule would apply in these circumstances.

Review of Third Party Costs

Rule 65-20 (Bankruptcy) and 90-50, 55 and 90-65 of the Corporations and other Legislation Amendment (Insolvency Law Reform) Regulation

We note that these rules provide the Inspector General with an unfettered discretion to review and assess third party costs, include the trustee's legal costs.

There are already frameworks in each jurisdiction for dealing with disputes about legal costs. In NSW, the relevant framework is the *Legal Profession Uniform Law*. We query whether this is necessary in addition to those existing frameworks.

Corporations and other Legislation Amendment (Insolvency Law Reform) Regulation

Rule 8.35(1)(f)

The reference to the Insolvency Practitioners Association of Australia should be to the Australian Restructuring Insolvency and Turnaround Association.

Rule 8.35(2)

The reference to the Insolvency and Trustee Service Australia should be to Australian Financial Security Authority.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, by email at liza.booth@lawsociety.com.au or phone (02) 9266 0202.

Yours faithfully,



Gary Ulman
President