4th June 2009

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The General Manager
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email:consumercredit@treasury.gov.au

Dear Sir,

NATIONAL CONSUMER CREDIT PROTECTION BILL 2009 ("Bill")

I write in relation to the above Bill.

By way of background, I am an insolvency practitioner (registered liquidator) and have looked at the Bill from the prospective of an insolvency practitioner reviewing the affairs of or who is appointed to administer the affairs of a corporation which has as part of its business *credit activity* within the meaning of that term as defined in the Bill.

The Bill has only come to my attention in the last few days and so, I have not had an opportunity of looking at the Bill in great detail but I believe it important to flag my concerns at an early stage so that perhaps the matter can be looked at sooner rather than later. The section numbers referred to below are the numbers used in Exposure Draft (27/04/2009).

My concerns are two fold:

1. Firstly, what is the effect of the Bill on the realisable assets of a corporation that is or ought to be licensed once it becomes insolvent?, and

2. Secondly, what obligation is there on an insolvency practitioner to be licensed under the Bill in order to deal with and collect amounts due to a corporation (the subject of an insolvency appointment) under the terms of credit contracts that are regulated by this legislation.

The Corporation.

The legislation needs to be mindful that in restructuring insolvent corporations the availability of funds such as pre-appointed debtors are of significant importance in obtaining the best outcome for all the stakeholders of that corporation. Accordingly any uncertainty as to the enforcement or delay in collecting in those claims will substantially prejudice the prospect of a favourable outcome.

The insolvency practitioner.

The critical steps as I perceive it from an insolvency practitioner's point of view are as follows:

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1. Assume that the corporation in administration engages in *credit activity* and is licensed (or ought to be licensed) pursuant to the Bill. For the purpose of this letter “administration” is any form of insolvency administration under the Corporations Act.

2. Section LIC205 provides that ASIC may suspend or cancel a persons licence if that person is insolvent (LIC205 (1) and LIC205 (2) (a)). As I understand it, this procedure can be invoked by ASIC without a hearing and on its own motion. There appears to be no power for ASIC to reinstate a cancelled licence.

   It is not clear to me from the Bill as to whether it is incumbent on ASIC to suspend or cancel the licence of the corporation that becomes insolvent but this may be the case. The appointment of an insolvency practitioner is by definition an admission of insolvency.

3. Accordingly, subject to the attitude of ASIC upon the appointment of an insolvency practitioner it is likely that the corporation would then be unlicensed and therefore unable to undertake any further *credit activity*.

4. Section LIC75 provides both civil and criminal penalties for engaging in *credit activities* without a licence.

   Accordingly in the absence of the insolvency practitioner having his or her own licence (which of itself may not be sufficient) any steps to exercise the rights of a credit provider is a *credit activity* and therefore a breach of the Bill.

5. Section REM157 of the Bill gives the court power to make orders in relation to unlawful *credit activities*.

   In particular the Bill provides that if a person contravenes Section LIC75 (the requirement to hold a licence) the court has the power to make a number of orders including the power to grant an order refusing to enforce any or all of the terms of the credit contract.

6. I have particular concerns in relation to an insolvent practitioner who is appointed as a “mortgagee in possession” of the debts of a licensed credit provider.

   I note that pursuant to Section DEF9, that an assignee of the rights of a credit provider are engaged in a *credit activity* and therefore are required to be licensed under the Bill.

   In the absence of a licence there will be no ability for the mortgagee in possession to get in the assets of the insolvent corporation.

7. The National Credit Code set out in Schedule 1 to the Bill includes as a regulated credit contract, to which the Code and the Bill apply, a contract for the purchase, renovation or improvement of residential property for investment purposes.

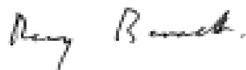
> In these circumstances is a registered builder or developer that sells property to investors required to be licensed under the Bill? If so, then upon the happening of an insolvency event to that registered builder/developer and the consequent loss of any licence, how is it that an insolvency practitioner can be certain as to enforcement of those outstanding contracts? If there is no such certainty, the insolvency practitioner is unlikely to continue with an ongoing rehabilitation of the company.

Accordingly, it appears that there are a number of “hurdles” promoted by the Bill which will prevent an insolvency practitioner from getting in the assets of the insolvent corporation for the benefit of creditors of that corporation.

Please let me have a response to my concerns as to whether you see them as real or merely perceived.

For the sake of completeness I have forwarded a copy of this letter to the Insolvency Practitioner’s Association of Australia.

Yours faithfully,



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