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Dear Ms O'Sullivan

**Bank Accounts for Bankrupts**

ICAEW is pleased to respond to your request for comments on *Bank Accounts for Bankrupts*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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## ICAEW REPRESENTATION

### BANK ACCOUNTS FOR BANKRUPTS

**Memorandum of comment submitted in February 2012 by ICAEW, in response to The Insolvency Service consultation paper Bank Accounts for Bankrupts published in November 2011**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Bank Accounts for Bankrupts* published by The Insolvency Service on 17 November 2011, a copy of which is available from this [link](#).

## WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.

## MAJOR POINTS

### Support for the initiative

5. This is an extremely important issue that needs to be addressed because a significant proportion of bankrupts are unable to get a bank account, and the depth of the problems this causes in those cases is very significant.
6. We therefore believe these issues should be prevented by introducing measures to improve access at the earliest opportunity, although in our view banks that do not provide accounts for bankrupts should be encouraged (not forced) to do so.
7. We also note that, while it is very rare for a trustee to pursue a bank under s307 Insolvency Act, it is very important to avoid any legislative changes that could prevent recoveries for creditors and thus make realisation of assets more difficult (for instance, under a s307 action).

## RESPONSES TO SPECIFIC QUESTIONS IN THE CONSULTATION DOCUMENT

### Option 1 – do nothing

**Q1: How are people with debt relief orders treated? If they are subject to the same bank policies as undischarged bankrupts, we would welcome information to explain this policy.**

8. No comment.

**Q2: Is locality an issue for undischarged bankrupts? For example with online facilities available, how many bankrupts are prevented from accessing accounts purely because of their bankruptcy?**

9. We believe a significant proportion of bankrupts are unable to open a bank account and are forced to use someone else's account eg that of a spouse (see also our more detailed comments at Q3 below). This does not seem to be related to geographical location.

**Q3: We would welcome information on the scale of the issue, which might include number of affected individuals from debtor representatives, numbers of new applicants to the two current providers that previously banked elsewhere, numbers of applicants rejected by other banks because of bankruptcy. What evidence is there to indicate that there is a problem that needs to be addressed?**

**10.** We would estimate that 5-10% of bankrupts are completely without any banking facility, ie they have no friends or family whose accounts they can pass payments through. If you include all those who cannot get a bank account in their own name (but that use someone else's account, eg that of a spouse) it is probably nearer 30% to 50% of bankrupts. In our view, irrespective of the proportion of bankrupts affected, the depth of the problems it causes are sufficiently significant as to warrant remedial action at the earliest opportunity. It is not hard to imagine how difficult life is without a bank account, especially when you are not allowed credit.

**Q4: We understand that, provided money is not owed to the bank by the account holder, some banks may let bankrupts continue with their accounts on a discretionary basis. Is this the case?**

**11.** We have experience of banks allowing bankrupts to continue with their accounts, subject to there being no objections by the Trustee or Official Receiver, but we believe this is very rare. We note that some of our licenced insolvency practitioners have previously (in appropriate cases) suggested to the original bank that they have no objection to the account being left open to receive salary or benefits. However, in the most cases, it is already too late because the account will have been closed before the case is handed over by the OR. Where this is not the case, in most cases the bank will not agree to keeping the account open, either because of the type of account and/or because the policy of some banks is to close these accounts.

**Q5: What do bankrupts without access to bank facilities currently do?**

**12.** Bankrupts without bank accounts can very often manage by getting salaries or benefits paid into accounts of their spouse or other relatives or friends. Pre-paid credit cards are another way of surviving. It is much more difficult, however, for a self-employed bankrupt to manage, which seems to go against the principles of the Enterprise Act to encourage a fresh start. We note that using Money Shop etc to cash cheques is prohibitively expensive, for example, we are aware of a case where a bankrupt who is self-employed had been spending up to 10% of his gross turnover just on cashing cheques, costing him over £10k, which would have been far better spent on contributions to his creditors (which he was then able to do once the relevant insolvency practitioner helped him to get a bank account).

**Q6: Will the EU recommendation improve the situation for undischarged bankrupts?**

**13.** Undoubtedly, yes.

## **Option 2 – Promoting the current Market Providers**

**Q7: What is the qualitative impact upon the market of implementing this option, including upon the two existing providers and their customers?**

**14.** In our view, clear signposting of which banks currently provide accounts for bankrupts would certainly help to alleviate the problem for bankrupts. We defer to the banks to provide information as to the likely impact on their businesses.

**Q8: We understand that historically other banks offered basic accounts to undischarged bankrupts and if that is the case we would welcome information on the reasons why that changed.**

**15.** Only the banks concerned would be able to answer this question, but we suspect that it may be due to the fact that the type of small basic accounts (such as a bankrupt would have) are no longer profitable for banks.

**Q9: Presuming that there is a problem that needs addressing with undischarged bankrupts and their access to banking facilities, would this option solve the problem?**

16. Clearly promoting existing providers would help, but it would not solve the problem as the existing providers could easily change their policy.

### **Option 3 – Voluntary Code for Banks**

**Q10: Is additional monitoring a necessary feature of providing basic bank accounts to undischarged bankrupts?**

17. Only the banks themselves know how they assess the potential risk, and we presume that their decision to monitor is driven by that risk assessment. In our experience, the risk is low. As an alternative to further monitoring by banks, we are aware that, as a condition of consenting to the opening of an account, some of our IPs request that banks send them duplicate statements, to enable monitoring to be carried out by the Trustee instead. Another alternative (if possible) would be to cap the maximum amount that could be paid into an account, which could prevent the account being used for the sale proceeds of an undisclosed asset or windfall. This would protect the bank, but would not necessarily protect the estate as such funds would be more difficult to trace.

**Q11: What purpose does it serve to ask about bankruptcy status on an application for a basic bank account with no credit facilities? Could it be discontinued?**

18. We anticipate that banks need a history of the customer, and so in our view they should be entitled to ask the question about bankruptcy status. We are not aware of how frequently bankrupts fail to disclose their status, or whether the banks rely solely on this 'self-reporting' or whether they carry out any further checks.

**Q12: Presuming that there is a problem that needs addressing with undischarged bankrupts and their access to banking facilities, would the introduction or amendment of a voluntary code solve the problem?**

19. As explained in the consultation paper, banks are not willing to sign up to a voluntary code, and we therefore do not think introduction of a voluntary code will solve the problem.

### **Option 4 – Guidance for Trustees**

**Q13: Presuming that there is a problem that needs addressing with undischarged bankrupts and their access to banking facilities, would the introduction of guidance for trustees solve the problem?**

20. We believe the risk of claims against banks by Trustees in respect of accounts opened post-bankruptcy may be mainly theoretical, and we suggest that the banks should be asked to provide evidence of this happening in practice. However, we note that a trustee has a duty to seek to recover funds for the benefit of the bankrupt's estate if they are legally permitted to do so and it is difficult to see how guidance could be constructed that provided comfort for the banks but did not conflict with such trustee duties.

### **Option 5 – Legislative change**

**Q14: Are you aware of any claims for loss or after acquired property made against banks and the result of those claims? (If you are responding as an insolvency practitioner it would be helpful if you could advise how many bankruptcy cases you dealt with in that year, what the costs of recovery were and what the value to creditors was, after costs of recovery.)**

21. As we mention above, we believe the risk of claims against banks may be mainly theoretical, and we would challenge the banks to provide evidence of this happening in practice

**Q15: Do you think that either of the suggested changes to s307 will make it more difficult for trustees to recover after acquired property? Is there anything that could be done to mitigate that?**

22. As mentioned above, we believe the argument being put forward by the banks is more theoretical than real. However, we can understand their concern, and in our view a simple change to s307 (option 5b) requiring Notice of Claim to be served upon the person in whose possession or under whose control the after-acquired property is, in addition to the bankrupt, would be a better way to give the banks the protection they need.
23. By making the law clearer (and fairer), we believe that the proposed change (ie under option 5b) will actually make it easier for a Trustee to recover after-acquired property as well as removing the risk to the bank.

**Q16: The risks to banks in option 5a seem negligible. What is your view?**

24. Option 5a will reduce the (already small) risk to banks, but not eliminate it entirely as it leaves open the possibility of a difference of opinion about good faith.

**Q17: We have stated that the risks to estates in option 5b are likely to be negligible. What is your view?**

25. As stated at Q15 above, we believe that option 5b would eliminate the risk.

**Q18: Presuming that there is a problem that needs addressing with undischarged bankrupts and their access to banking facilities, would option 5a or 5b (or both) solve the problem?**

26. We would support the implementation of both option 5a and option 5b. However, the banks need to consider this question.

**Q19: If you have a preference between options 5a and 5b please explain why. If you are responding as a bank, would either option 5a or 5b cause you to change your current policy in regard to offering bank accounts to undischarged bankrupts?**

27. As mentioned above, we would support implementation of both options. If only one is to be implemented, we would support option 5b because currently it is the serving of the Notice of Claim upon the bankrupt which vests the property in the Trustee (and back dates it to when he acquired it). If a bank operates a bank account for an undischarged bankrupt, whether or not they have notice of the bankruptcy, they should not be liable to the Trustee for that after-acquired property until they have been given Notice of Claim.
28. As things currently stand, the banks are theoretically liable for transactions which took place before they know that the money belongs to the Trustee rather than the bankrupt, hence the earlier mention of the need for monitoring of accounts. The Trustee is required to write to the bank anyway to claim the after-acquired property, so one suggestion that might be explored could be to provide that the bank's liability does not commence until they hear from the Trustee, rather than at some earlier time when they were not aware of the s307 Claim. Then there would be no need to argue about whether or not the bank acted in good faith.

## **RESPONSES TO SPECIFIC QUESTIONS IN THE IMPACT ASSESSMENT**

### **Option 2 – Promoting the current Market Providers**

**Q1: What is the quantitative impact upon the market of implementing this option, including upon the two existing providers and their customers?**

29. It is difficult to assess the quantitative impact as no-one really knows the value of funds lost by banks because of the actions of a trustee to recover property for the estate. We presume that the two existing providers assess that risk themselves but it is entirely possible their attitude could change if they are approached by greater numbers of applicants.

**30.** We have not commented on the remaining questions in the impact assessment, which appear to be directed at the banks.

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