THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

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Our ref: ICAEW Rep 19/10

Your ref:

Maria Isanzu
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Dear Ms Isanzu

Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy

The Institute of Chartered Accountants in England and Wales (ICAEW) is pleased to respond to your request for comments on the *Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* consultation.

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

Yours sincerely

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THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW REPRESENTATION

ICAEW REP 19/10

REFORMING DEBTOR PETITION BANKRUPTCY AND EARLY DISCHARGE FROM BANKRUPTCY

Memorandum of comment submitted in February 2010 by the ICAEW, in response to the Insolvency Service's consultation on *Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* published in November 2009.

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INTRODUCTION

1. The ICAEW welcomes the opportunity to comment on the consultation paper regarding *Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* published by the Insolvency Service.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

4. The Institute's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and the Institute is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing nearly 700 practitioners. The Institute'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 Institute licence holders.

MAJOR POINTS

5. We strongly support the proposal to repeal of the early discharge provisions.

6. We also welcome the initiative to speed up the process in a debtor's petition. In our experience the delay in getting such a matter heard before the court has increased to an unacceptable level in certain areas, causing real hardship for a large number of debtors (and causing disparity between different courts – for example Brighton and Eastbourne). In contrast a creditor's petition is often heard in a much shorter time. However we have a number of reservations over the implications and practicalities of the proposals. In particular, the fact that the petitioner is submitting the petition online may mean (s)he is not as aware of the severity of the procedure and its consequences as if (s)he had been required to appear in court to account for their actions, there is a danger that the procedure could be wrongly perceived as a less serious or onerous option and thus could increase the likelihood of debtors petitioning in error or haste without fully understanding the consequences.

7. We note that it is proposed that DMs are a centralised function, rather than being allocated to any particular court. This flexibility will assist the pool of DMs in coping with fluctuating demands (given the proposed 2 day turnaround). However, if there is no mechanism for a court number to be allocated to this administrative determination, this could cause difficulties or complications under the EU Regulations where, if there are creditors and/or assets elsewhere in the EU, the bankruptcy may not be recognised and main proceedings (and therefore control) might pass to another jurisdiction to the detriment of local creditors. We would urge the Insolvency Service to ensure that this consideration is addressed.

8. A centralised function would also mean DMs may not have potentially useful local knowledge (although this may not matter if they are carrying out a simple s268 assessment with no discretion to recommend other procedures. As we explain below, we consider it is important for DMs be given the same powers as the Courts to refer debtors under s274 IA86 in cases where, despite the guidance notes pop-ups planned for the on-line system, debtors proceed

with a bankruptcy petition where an IVA is apparently a better course of action for them and/or for creditors.

9. We also note that, in a large number of cases, the information provided online will be incomplete, meaning there is likely to be a 14 day period during which the DM seeks further information. This potential period of delay does not occur under the current system (as the petition is dealt with on a same day basis by the courts), and this is further reason for a court number to be issued (to prevent creditors taking action to recover debts during this period), or consideration needs to be given to introducing a moratorium for this period or some other means of protecting the state.

10. Also, the practicalities need to be considered. For example, those in financial difficulty are likely to be unable to make online payments, as they are likely to be overdrawn and ineligible for credit. Currently, petitioners take cash to the court, and (if fees are going to need to be submitted online) consideration needs to be given as to how such payments can be facilitated eg using 'payzones' in Post Offices.

11. Also, the interaction with existing procedures needs careful consideration. For example, IVAs often take a long period of time to terminate (and the IP report is often then filed with IS a week later) and so perhaps the petitioner should be required to produce a scan/copy of the certificate of termination.

RESPONSES TO SPECIFIC QUESTIONS

Q1. What skills and experience do you think it is appropriate that a Decision Maker should have in order to make bankruptcy orders administratively?

12. This will depend on the level of discretion DMs are given and whether they are permitted to recommend other procedures (see also Q17 below). If this is the case, then the DM should be at least AOR level (rather than examiner level), and ORs should be rotated in and out with a maximum of 3 months as a DM, due to the repetitive nature of the workload and due to the need to have recent OR or IP experience. However, if DMs are not to be given such discretion, then "Decision Maker" is perhaps a misleading title as they are merely making as assessment of (in)solvency, ie interpreting s268 IA86 and COMI. In this case, a grade E examiner or equivalent junior clerk could carry out this function.

Q2. Should the Decision Maker role sit within The Insolvency Service or elsewhere?

13. See also Q1, and Q17 below. IPs are capable and have relevant experience, and so there could be a panel of IP licence holders, but they would charge a fee (we think in the region of £100 including VAT) and so, if the procedure is to be self-financing, the IS needs to assess whether such IP fees could be absorbed whilst retaining an appropriate level of fee for petitioners.

Q3. What links should there be between the Decision Maker and other bodies?

14. DMs should be accountable to some form of regulation and one assumes that in addition to the Court should be ultimately responsible to the Secretary of State via Insolvency Service and, if appropriate, their RPB.

Q4. Would a requirement on debtor applicants, to confirm both that the consequences of bankruptcy have been read and understood and that they still want to submit the application, be sufficient to ensure that those who apply for their own bankruptcy appreciate the seriousness of taking this step?

15. We acknowledge that online boxes could be used to try to ensure that petitioners have read the explanatory text. However, there is no guarantee that petitioners will have actually read this information (even if they tick the box) and so there is a danger that this online procedure could

be seen as a less onerous mechanism than the current court route, and so every effort needs to be taken to underline the seriousness of the procedure and its implications. Therefore, we believe that (following online petition, with no court appearance) the first dealing with the OR should be a face to face (rather than telephone) meeting, at which the bankrupt is required to account for themselves and answer for the debt that they have possibly recklessly/carelessly/fraudulently built up, with the OR being more assertive and reinforcing the severity of the situation, if appropriate.

Q5. Would information about other debt relief mechanisms, provided as part of the application process, be enough to ensure that debtors have sufficient opportunity to consider whether opting for bankruptcy is the right decision for them?

16. We believe every opportunity should be taken to encourage debtors to make informed decisions and to avoid unnecessary bankruptcies. Therefore, we would support (for example) pop up boxes asking if the petitioner has considered a DRO if debts are less than £15,000, or County Court Administration Order if debts are under £5,000.

Q6. Should debtors be encouraged to consider alternative debt resolution procedures before submitting an application for bankruptcy?

17. Yes, see Q5 above. However, we acknowledge that this should be by way of providing leaflet-type information during the online application process, rather than advice.

Q7. Is there a need for the Decision Maker to be given power to direct someone into an alternative debt relief mechanism2?

18. In addition to the powers of the Court under s274 IA86, it is not uncommon for debtors to be referred informally by Court staff to a selection of local IPs where it is apparent that bankruptcy may be inappropriate. By doing so a considerable amount of Court and OR time is saved, as well as debtors and creditors being better served by the insolvency process. An absence of power for DMs to make similar referrals to alternative mechanisms would result in the failure of the principal objective of “securing better access to bankruptcy by debtors for whom other forms of debt relief are simply not appropriate”, whilst at the same time failing to achieve the secondary goal of avoiding unnecessary wastage of time and resources of the Courts and the Official Receiver.

Q8. Should there be any exemptions or remissions of the application fee?

19. No. In particular, we do not think there should be an exemption for those on unemployment benefits.

Q9. If yes, how would you suggest that the cost of any fees forgone could be met in order to keep the application process self-financing?

20. N/A

Q10. Do you think that there should be differential pricing of a bankruptcy application, according to whether it is made electronically or on paper?

21. No. The same fee should apply across electronic and paper applications as there are still a significant proportion of the population without internet access. Also, (unlike for instance a routine filing like a tax return), a bankruptcy petition is a one-off application and therefore there will be less perceived advantage in becoming familiar with such an online procedure.

Q11. Should there be a facility to enable debtors to make their bankruptcy applications on paper forms?

22. Yes. See also our general point above about those in financial difficulty making online payments.

Q12. Should there be a facility to enable payment to be made on line at the same time as the application form is submitted?

23. Yes.

Q13. Is a maximum of 10 days an appropriate period of time to allow between receipt of acknowledgement of the application and payment of the fee that covers both the cost of administering the application and the deposit?

24. We do not really see the benefit of this 'cooling off' period. It seems just to create confusion for the debtor and additional work for the DM, and we note there are often times when creditor pressure is such that delay is detrimental both to debtors (in terms of stress and mental illness) and the general body of creditors (where either debtors give in to pressure, and give their assets to those who shout loudest, or the more informed creditors utilises the delay to secure charging orders etc). It could simply be replaced with a clear statement that the petition is not submitted until it has been completed and paid for, with a reminder not to leave so long between completion of the data and filing in case the data becomes out of date.

Q14. If you have answered "no" to the previous question, what period do you consider appropriate and why?

25. No period should be necessary.

Q15. Should the application form automatically expire if payment is not made within a specified period of time?

26. Yes. The petitioner's information will become out of date and so we would suggest the application should lapse after a period of, say, 30 days.

Q16. Have we suggested any powers for the Decision Maker that you think are unnecessary? If so, which powers and why might they be unnecessary?

27. No.

Q17. Are there any additional powers that the Decision Maker should have? If so, what powers and why do you think these are necessary?

28. DMs should have the option to refer a debtor to an insolvency practitioner to consider an individual voluntary arrangement (as is currently available to the court under sections 273 and 274 of the Insolvency Act 1986) and/or to put the debtor forward for a debt relief order, if appropriate. The petitioner may not have sat down and discussed their application with an IP or other expert, and therefore (despite the information 'pop ups' on screen) the application may not be appropriate.

Q18. Within what set period of time should a debtor be required to provide further information, after which time the application will be deemed withdrawn? Please provide reasons for your choice.

29. Very often the answers to requests for further information give rise to further questions. It would be prudent therefore to give a period of 7 days to respond so that there is time for a follow-up question but that if any question remains unanswered after 14 days from the application then it should be deemed withdrawn.

Q19. Should the Decision Maker have a general power to stay a bankruptcy application? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.

30. We believe that the DM should have the power to stay a bankruptcy application but only to be used in exceptional circumstances where there would otherwise be a manifest unfairness. To give a general power, especially without a moratorium (see Q21 below), without such a restriction would be likely to result in unnecessary complications.

Q20. Should the Decision Maker have the power to appoint a trustee? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.

31. No.

Q21. Do you think that assets may be at risk in the period between a bankruptcy application being accepted and a bankruptcy order being made?

32. Yes. If there is to be a gap of maybe 26 days (10 for paying, 14 for queries and 2 for the DM's decision) between the application and the bankruptcy order we believe that consideration should be given to the granting of an automatic moratorium to prevent enforcement action by creditors, or at least having an equivalent provision as in Compulsory liquidation backdating the commencement of the bankruptcy to the date of the application.

Q22. In order to ensure that assets at risk are protected, should the Decision Maker have the power to appoint an interim receiver in the period between a bankruptcy application being accepted and a bankruptcy order being made?

33. No. The best way to protect assets would be to minimise the time between the application and the making of the order (see Q13-Q14).

Q23. If you have answered "no" to the previous question, can you describe a better way of ensuring that such assets are protected?

34. A moratorium would protect assets from creditors. Debtors would have to be barred from making more than, say, one application in any 12 month period (similar to Interim Order applications) to prevent abuse. The application should contain a declaration that no such previous application had been made. It should be a BRO matter if a debtor were to dispose of assets or incur further liabilities during the period. (Back dating the commencement of the order to the date of the application might be a simpler alternative.)

Q24. Do you agree with the duties we have outlined for the Decision Maker?

35. Yes, subject to s.274 IA86 etc powers – see Q7 above.

Q25. Have we suggested any duties that you consider are unnecessary? If so, which ones and why?

36. No.

Q26. Are there any other duties the Decision Maker should have? If so, what are they and why do you think they are necessary?

37. See Q7 & Q24.

Q27. Do you think that two working days, from when an application is deemed to have been submitted, is an appropriate period of time within which to require the Decision Maker to make a decision?

38. Yes.

Q28. Do you think that the two working days within which the Decision Maker is required to make a decision should be stayed if the Decision Maker stays his or her consideration of a bankruptcy application pending receipt of further information and/or evidence?

39. No. The 2 working days should commence when the DM has received a completed application i.e. when any queries have been answered within a maximum 14 days.

Q29. Should failure to respond to a request for further information be treated as the application being withdrawn by the debtor?

40. We think it would be useful for a question to be included in the online form asking whether a previous application has been made and subsequently withdrawn/lapsed (and why).

Q30. Would 14 days be sufficient time to give to the debtor to ask the Decision Maker to review his/her decision? If not, why? How long do you think it should be?

41. Yes, 14 days is sufficient. However, there should be recourse to the courts to appeal the review decision although it is not clear whether this would be an appeal or a fresh application, given the proposed administrative nature of the DM assessment.

42. Yes, we strongly support the proposal to repeal of the early discharge provisions.

Q32. If you do not think that early discharge should be repealed, what specific benefit do you think there is in keeping early discharge? Please provide figures if you can.

43. N/A.

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