Options paper; a modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia

IPA Response

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Introduction

In this submission, we highlight a number of key areas where we believe there is either substantial opportunity for reform, or where we believe that some of the options put forward in the Paper are particularly inadvisable. These key areas are a selection of those canvassed in the Options Paper.

In the Appendix to the submission, we address and respond to each question asked in the Options Paper, and comment on each option put forward in the discussion.

We believe that Australia's insolvency laws are sound and compare favourably with relevant overseas jurisdictions. At the same time, there are areas of the law that may be improved and this Association has been active in promoting reform including in many areas raised for consideration in the options Paper. In particular, we refer to the IPA's assistance in the Insolvency Law Advisory Group process leading up to the 2007 corporate insolvency reforms by which independence and remuneration provisions were strengthened; the ideas contained in our 2008 submission to CAMAC, many of which appear in the 2010 Corporate Insolvency Reform Package section of the paper; and the IPA's acknowledged input to both the recent Senate Inquiry and the 2010 Productivity Commission Report, whose recommendations for reform and alignment we see reflected in the Government's Options Paper.

We also believe that the quality of insolvency practitioners in Australia is high, and that the rigorous standards required of them are reached in the majority of cases. The qualifications and experience required of the profession are extensive. We believe that the proposed reforms present the opportunity to move further down the path of co-regulation of the insolvency profession. The circumstances of the sector are conducive to increased co-regulation and the IPA has demonstrated its willingness and capacity to assume high standards and to show leadership through the development of its Code of Professional Practice and by our continually evolving member discipline and quality assurance programs.

In particular, we believe that increased co-regulation is appropriate in the areas of practitioner registration, complaints handling and discipline and in insolvency education and the maintenance of professional capability and currency.

The IPA acknowledges the importance of the role of the regulators, in particular in maintaining confidence in the conduct of insolvency administrations. We consider that their statutory powers are adequate, and we do not think that there is evidence of any level of misconduct in the profession that would call for their powers to be significantly extended. However we do recommend that their powers and authority be made clearer in some areas and that there be an alignment of regulatory processes between the corporate and personal insolvency regimes.

The IPA fully supports changes to the regulatory framework to ensure the prompt identification of practitioners who are not complying with expected standards, and the facilitation of appropriate and swift remedial action.

The profession is already, and necessarily, highly regulated. The remedy for those infrequent occasions when a practitioner breaks the rules (whether laws or professional standards) is not to create more rules, but to improve the effective enforcement of those that are already in place.[1]

[1] Australian Government 2007, *Best Practice Regulation Handbook*, Canberra, p 2

Across all areas canvassed in the paper, we support alignment, wherever possible and practical, between the corporate and personal insolvency regimes. This support extends to matters that have not been specifically addressed in the options paper, including meeting procedures, proofs of debt and dividend processes.

The registration, discipline and deregistration of practitioners

There are a number of components to ensuring the effective enforcement of the rules in relation to members of a regulated profession:

- the rules of entry to the profession should impose sufficient hurdles to ensure that only those with the necessary education, training, experience and fitness are admitted, and then that their capability and fitness are maintained. Rules of entry should not artificially limit competition, but nor should they artificially create an oversupply that impairs the viability of all participants;

- there should be effective deterrence against non-compliance with the rules, including regular observation and monitoring of compliance, and appropriate penalties for breaches; and

- there should be speedy, transparent and cost-effective processes to restrict or remove a participant for serious and or repeated breaches of the rules.

The insolvency profession is already highly regulated. We suggest that more rules will not force compliance by individuals who seek to avoid complying with the rules already in place. Rather, what is needed is improvement in current processes, and the better enforcement of existing rules, through activities such as the annual inspections currently undertaken by ITSA, attendance at creditor meetings and special focused projects such as the review of remuneration reports recently undertaken by ASIC. Visible regulator presence is, in our opinion, likely to be effective in ensuring compliance with the law and standards, as are processes that encourage self-reporting of incidents or compliance problems as they arise.

We believe that effective regulation, including an appropriate level of co-regulation is critically important in maintaining community confidence in the insolvency regime. The involvement of the IPA, as the professional body covering over 85% of registered insolvency practitioners, is also critical to maintaining public confidence, and the confidence of practitioners, in the regime.

Practitioner Registration processes

In this area, we strongly support:

- a panel interview process for the registration and de-registration of all insolvency practitioners;

- a requirement for registered practitioners to have completed both a suitable level of tertiary study of accounting and law subjects and a suitable course of insolvency specific post graduate education;

- a requirement for registered practitioners to maintain currency and good standing, and to be subject to appropriate professional and ethical standards and appropriate quality assurance reviews in order to maintain registration, which should be renewed at appropriate intervals;

- speedy, transparent and cost-effective processes for the independent handling of complaints about the conduct of practitioners; and

- safeguards to protect the natural justice rights of practitioners through all of these processes.

Current processes for practitioner registration and deregistration, particularly in relation to liquidators, would need to change to meet these elements of what we believe to be sound practitioner registration processes. In considering the extent and manner of these changes, we believe that the objective should be to aim for processes that are arguably best practice in the area of professional registration in Australia.

While we support the Government's view that responsibility for corporate insolvency must remain with ASIC as the body responsible for the whole of Australia's corporations law, we welcome the Government's review of the regulatory framework applying to insolvency professionals in Australia. We believe that in the context of that review, there remains scope to consider a model that would include an independent practitioner registration agency.

As just one example, we note the recent establishment of the Tax Practitioners Board, replacing a series of State based registration boards, which has responsibility for the regulation and discipline of tax practitioners and BAS agents, and which operates independently of the ATO, while the ATO of course retains responsibility for the administration of the Tax Act.

An independent practitioner registration body could also fulfil the complaints handling and dispute resolution requirement that has been identified and discussed in the Options Paper in relation to the establishment of an insolvency ombudsman.

Whatever the merits of establishing an independent registration body, significant changes to the practitioner regulation practices within current bodies should also be considered. Again as just one example, we note that in 2010, when ASIC assumed responsibility for the supervision of financial markets, it established the Markets Disciplinary Panel, which is a peer review body able to make decisions about issuing infringement notices and enforceable undertakings and to make these decisions independently of ASIC.

We see advantages in aspects of both this, and the independent registration body, model, both of which already operate in arguably comparable areas, and recommend that there be further investigation of the opportunities for improved practitioner registration that they appear to offer.

Whichever model is adopted, the IPA should continue to play an important role in the co-regulation of the profession through the ongoing development of professional and ethical standards (the IPA Code), the nomination of participants in registration and discipline panels and the sharing of general intelligence about issues confronting practitioners from time to time.

Complaints Handling and Dispute Resolution

In our submissions to the Senate Inquiry we recommended consideration of an ombudsman[2] or similar body or office to facilitate the speedy, cost effective and transparent handling of complaints against insolvency practitioners, and we note that this is one of the Options put forward in the paper.

For creditors, directors and other stakeholders in an insolvency, the ability to have a complaint heard and resolved, and to know the outcome of that process is critically important. For a practitioner, the knowledge that the complaint will be considered and dealt with promptly, independently and fairly is equally vital. For all parties, the avoidance of substantial and unnecessary expense is a key consideration.

We believe that an appropriate complaints handling and dispute resolution body should be statutory rather than private, and that it should be independent, in the interests of maximising the confidence that all parties can have in its deliberations.

While such a body needs to be independent, its composition should include representatives or nominees of the regulators and of the IPA on behalf of practitioners. The establishment of this body would represent another important step in the co-regulatory framework that already operates in the insolvency arena.

The Corporations Act and the Bankruptcy Act each allows decisions of practitioners to be disputed before the courts or in some cases before the regulators. There would need to be a clear statement of the types of decisions and conduct that would be the subject of dispute review by the agency, and what would remain subject to court review.

The Civil Dispute Resolution Act 2011 has now commenced operation and insolvency practitioners are generally subject to it in relation to their litigation in federal courts. It would support the purposes of that regime if there were some specialist complaints and discipline resolution agency that might serve to avoid a matter proceeding to litigation. The Act itself contemplates mediators and conciliators or appraisers who have professional expertise in the law involving the dispute; for example, in insolvency, in relation to disputes about voidable transactions, or remuneration. The fact that the agency would have insolvency expertise would instil confidence in and acceptance of the role of the agency with the profession and with creditors and other disputants.

We believe that a complaints handling and dispute resolution body should be funded by a combination of current activities and resources transferred from ASIC and ITSA, and in part through the proposed annual registration fees paid by practitioners.

Insolvency Practitioner Remuneration Framework

Insolvency practitioner remuneration is a matter that excites many views and opinions. Any insolvency commences with money having been lost, and many stakeholders hold expectations that their lost money in particular should be able to be recovered and the better part of it returned to them.

[2] The term "ombudsman" was not intended to be definitive or prescriptive about the specific structure or formation of the body charged with this set of responsibilities. Rather it is used as indicative of the kind of activities that would be encompassed, and to identify the importance of independence as a characteristic.

These are not realistic expectations, nor do they form the basis of criteria by which the appropriate cost of providing insolvency services should be judged.

Many stakeholders also appear to hold the view that because the administration of an insolvent company or estate did not succeed in providing a return to them, that there was little of value provided by the work of the practitioner. The fact that these views may be widely held does not make them correct.

1. No efficient price setting

The Options Paper correctly identifies a number of impediments to competitive price setting mechanisms for the provision of insolvency services. Some of the following discussion in the Paper then seems to assume that because of those impediments, it must follow that the prices charged are higher than they would otherwise be, or than they should be.

In the absence of other restraints, this would be a reasonable expectation. But there are significant other restraints, in the form of extensive regulation on the accounting for, approval of and taking of remuneration by a practitioner for work performed.

The Options Paper presents the argument that the lowering of barriers to entry to insolvency practice would lead to the entry of a significant number of new providers and that this in turn would lead to the price of insolvency services being lowered.

The assumption that there are a significant number of aspiring new entrants requires examination. In particular, we note that in New Zealand, where there is no practitioner regulation and therefore no barriers to entry, the experience remains that for the most part[3], it is those with accounting qualifications who take insolvency appointments, not legal practitioners or management consultants.

It is also important to note that there is a significant resource commitment required to maintain expertise and currency in the insolvency field. Practitioner firms must maintain this highly specialised expertise throughout all phases of the business cycle, in effect maintaining a standing army of practitioners through times of economic growth when insolvency activity is low in order to be able to meet the increased demand that occurs in an economic downturn.

No evidence has been put forward to show that the prices charged in the insolvency sector are higher than they would be in a more competitive market. To the contrary, there is evidence that the hourly rates of practitioners and their staff are on a par with the rates charged by similarly qualified and experienced professionals operating in similarly sized and located firms in non-insolvency areas.

2. Concern about over-servicing

There are also concerns expressed in the Paper that even if insolvency practitioner rates are comparable to those in significantly more competitive markets, services may be overprovided. Again, no evidence is put forward of any frequent occurrence of this alleged activity .

Practitioners are only entitled to claim remuneration for work that is both necessary and properly performed[4]. Necessary work includes a minimum amount of activity in any appointment, regardless of the level of assets. Necessary work beyond the minimum is determined by the size and complexity

[3] Excluding those who take a single appointment, for example over the small business of a relative or friend, rather than those whose main occupation is as an insolvency practitioner.
[4] IPA Code of Professional Practice, 2nd Edition, Principle 10

of the matter, the apparent existence of preferences or other voidable transactions, offences that may have been committed, and the extent of the impediments placed in the path of practitioners in their attempts to administer and finalise the appointment.

At all times, the practitioner must refer to the requirements of the relevant aspects of insolvency law, to professional and ethical standards and to their commercial and professional judgement in determining the extent of the work beyond the minimum that is required in any particular matter.

There is no direct relationship between these factors that lead to increased work being necessary, and either the level of assets in an administration or the likelihood of a return to creditors.

The requirement for work to be properly performed ensures that the work must be done by personnel of an appropriate level, or if done by more senior staff than required, at an alternative appropriate hourly rate. It also requires the time charged to be commensurate with the efficient performance of the tasks involved.

If there is, either generally, or in any particular case, evidence of over-servicing, then this is behaviour that breaks the rules already in existence. The appropriate remedy is the enforcement of those rules, rather than the introduction of new ones.

3. Concern about cross-subsidisation

The options paper takes as given that cross-subsidisation occurs in the provision of corporate insolvency services, and suggests that to the extent it occurs it is a matter for concern.

It is the case that insolvency practitioners incur higher levels of write-offs in their formal appointments than would be acceptable in the provision of related professional services areas such as audit, tax or general accounting.

While practitioners' fee rates would be expected to be set taking this, along with many other factors, into account, IPA members report that the higher level of fee write-offs they experience is also accommodated through a combination of:

- Undertaking investigating or forensic accounting, restructuring and workout assignments where write-offs would be low, and premiums may be charged;
- Achieving higher levels of staff utilisation than in comparable accounting practice areas – this refers to the number of hours worked by each staff member;
- Increased practice leverage – this refers to the ratio of less senior staff to principals; and
- Seeking to minimise write-offs by driving efficiency in the allocation and supervision of tasks in an administration.

To the extent that there is cross subsidisation, we do not see that this is necessarily a major cause for concern. In personal insolvency, the government recognises that creditors in bankrupt estates with surplus assets cross subsidise, through the realisations charge, the administration of those estates without sufficient assets.

4. The value of services provided

There are suggestions that the only appropriate measure of value of the services provided in an insolvency administration is the level of return to creditors, and that the best judges of value in any particular matter are the particular creditors or stakeholders in that matter.

The responsibilities of a practitioner in an insolvency administration are far broader than the financial interests of the creditors in that particular administration. They include regulatory and public interest duties and a responsibility to the proper maintenance of the regime as a whole. This is well recognised by the obligations and duties imposed on practitioners by the law, and is also referred to by the courts.

Creditor Empowerment and Involvement

The Options Paper suggests that the core problem of creditor involvement is that creditors who wish to exercise their powers in an insolvency are prevented from doing so either by the law, or by the obstruction or non-cooperation of practitioners.

The fact is that in very many cases creditors make a perfectly rational and commercial decision to accept and write-off their loss and not to expend the time and resources required to be further involved in the insolvency. Even the Australian government, in the form of the ATO, a major unsecured creditor in the majority of insolvency administrations, picks and chooses the insolvency administrations in which it will participate.

1. Replacement of practitioners

We support reforms to allow creditors to replace an incumbent insolvency practitioner at any time during either personal or corporate insolvency appointments. A special resolution should be required for this power to be exercised. To ensure that the right to replace an insolvency practitioner is not abused, the insolvency practitioner should also have the right to challenge such a resolution by application to the Court (for example, where creditors may seek to remove a liquidator to prevent him or her from taking action against them to recover preferences).

On replacement, an insolvency practitioner should have the same rights of lien to protect their remuneration as a Voluntary Administrator currently has; unless the Court orders otherwise, for example, due to findings of professional negligence.

2. Direction of practitioners by creditors

The responsibilities of practitioners are set out in the Corporations Act and Bankruptcy Act. Unlike accountants in other areas of practice, or legal practitioners, their responsibilities are not determined by the person or entity that appoints them. There is no client in an insolvency administration. Rather there are a range of stakeholders in the process. It is the fiduciary duty of the practitioner independently to look after the interests of creditors, as significant stakeholders in the process, but they are not appointed to do creditors' bidding.

While we recognise the role of creditors in providing guidance to an insolvency practitioner on the direction of an administration, we do not agree with creditors having the power to pass a resolution, other than in relation to specific limited areas, that binds a practitioner.

In addition to their power to approve remuneration, and the proposed power to remove a practitioner, creditors could be given further powers to pass resolutions on:

- the extension or abridgement of time, or
- dispensation with certain notice or other procedural requirements.

We do not support giving creditors the power to direct a practitioner in the exercise of their professional judgement in an administration. We would support empowering creditors to pass a vote of no confidence in a proposed course of action, which would require the practitioner to obtain court approval or directions in order to pursue that course. A no confidence vote should only be available in areas where more than one course of action is lawfully and ethically available, and could not be used where a practitioner had a duty to adopt or not adopt a particular course.

In the final analysis, we recommend that it is sufficient if creditors have the power to remove a practitioner who fails to fold the confidence of the majority of creditors.

Our experience is that many creditors choose not to be involved in the insolvency process. Furthermore, in SMEs and personal insolvencies there is usually a significant number and/or value of related party creditors, and therefore a significant risk of the insolvency process being distorted if creditors are empowered to give binding directions to practitioners.

3. Improved communication with creditors

Timely and cost-efficient provision of information to creditors is an essential requirement for them to be able to exercise their rights and attend to their responsibilities. A great deal of information must already be provided to creditors and it is not necessarily the case that increased volume or frequency of information will improve the ability of creditors to exercise their rights.

We do believe that there are impediments to this objective in the form of requirements for paper based communication with creditors, and for the holding of physical meetings to pass certain resolutions.

We support the removal of these impediments and confirm that the IPA Code (Principle 4) requires members to communicate with affected parties in a manner that is accurate, honest, open, clear, succinct and timely in order to ensure their effective understanding of the processes, and their rights and obligations.

Any increase in the volume or frequency of information to be provided to creditors will result in increased administration costs. One would have to be sure that a problem of inadequate or infrequent communications exists before embarking on reforms that increase that level of communication, and the costs of administration.

Electronic communication with creditors and others should reduce the costs of such communications. Further, it would allow practitioners to communicate more frequently with creditors as it would be much simpler to post a short update to a website than to physically mail such an update to creditors. A clear example of cost savings is the publication by ITSA on its website of bankruptcy meetings, at a cost of $275. Comparable costs by way of newspaper advertisements required in corporate insolvency are $2,000.

We recommend the efficiency of currently required communications be increased by allowing greater use of electronic communications before any reforms mandate an increase in the communication required.

4. **Committees of Inspection**

We believe that significant improvement can be made in relation to a number of Committee of Inspection (COI) processes. We recommend:

- Removing contributories from COIs in liquidations. The company is insolvent, therefore contributories' interests should be put behind those of creditors;
- Allowing electronic communication with all COIs;
- Allowing the passing of resolutions by all COIs by paper or electronic circulating resolution – subject to the same rules as for director resolutions, ie 100% of those eligible to vote are in favour.

There may also be scope for giving COIs, or creditors generally, increased authority to approve certain actions of the IP. At present, this is confined in corporate insolvency to remuneration, and to the entry into certain agreements. There may well be other authorities, presently dealt with by the courts, that can be delegated to a COI – for example an extension or abridgement of time, or dispensation with certain notice or other procedural requirements. At present, for example, a practitioner whose meeting is one day out of the stipulated time limits is required to make an application to court to remedy the error. It may be appropriate for the COI to be able to do so.

We do not support granting creditors generally, or COIs in particular, increased power to direct an insolvency practitioner in an administration.

The IPA strongly supports changes to allow for electronic communication with creditors and the provision of information online. Allowing these methods of communication has scope for cost reductions in administrations as well as improving the flow of information to creditors. We have discussed the benefits of electronic communication previously in this submission.

Specific issues for small business

We believe that there is scope to increase the efficiency of administration of small insolvent corporations in certain circumstances in order to save cost and to increase alignment between the personal and corporate insolvency regimes. As with all proposed reforms, care is required to ensure that streamlined or simplified processes do not increase opportunities for abuse of process by those so minded.

1. **Waiving practitioner independence requirements for certain small business insolvencies**

We believe that there is merit in having one insolvency practitioner responsible for both the corporate and personal insolvencies that arise from the collapse of small businesses where the directors' and company's financial affairs are intertwined. To prevent abuse of this process, strict limits on the size of assets and/or liabilities that can be dealt with by one appointee, without having to seek court approval, will have to be set.

2. Streamlined administrations for certain SME corporations

Although not discussed as part of the Options Paper, we support the creation of a streamlined insolvency process for certain small insolvent corporations.

In the last decades the rules governing the administration of bankrupt estates, including those of unincorporated businesses, have been simplified in a number of areas, including:

- holding of meetings;
- periodic lodgement of accounts;
- on-line advertising of appointments;
- availability of circular resolutions; and
- streamlined processes for the transfer of estates between practitioners.

We believe there is scope to mirror a number of these simplifications in relation to the insolvent administration of small incorporated businesses, subject to protections against abuse of process.

3. Administration of assetless small to medium corporate insolvencies

Currently there is no process for an assetless insolvent corporation to be wound up in the absence of a director or creditor able and prepared to indemnify the practitioner's remuneration. In the case of a court liquidation, practitioners are required to conduct the administration with no prospect of remuneration.

We recommend the establishment of a fund to have practitioners wind up small assetless corporations, on the basis of a set fee available either to all providers, or to a panel of willing providers[5], and with the ability for the practitioner to apply to the current assetless administration fund if their work identifies the likelihood of offences.

This scheme could be funded via a levy imposed at the time of initial company registration, or by a small annual fee charged on every corporation. The large number of corporations at any time means that the annual fee could be very low and still provide adequate funds for the operation of the scheme.

There are very low barriers to the formation of a corporation in Australia, and every corporation in the economy benefits from the health and reliability of the insolvency regime. While the frequency of insolvent administration is very low, any corporation has the potential to enter the insolvency regime at some future point. It is therefore reasonable that the costs of administering assetless insolvent corporations be born equally by corporations across the economy.

An alternative approach would be for ASIC to administratively deregister such companies without a formal insolvency process. In our opinion, this option would encourage poor corporate behaviour. By ensuring that a company is left with no assets in the event of insolvency, a director might seek to avoid any investigation into the failure of the company and any possible breach of duties.

[5] As an example, under the regime operating in Hong Kong, practitioners bid for work of this kind quoting a fixed fee for the administrations they would undertake.

The recommended approach ensures that a minimum level of investigation is done which can lead to further applications for funding in the event that offences or recoverable transactions are identified.

Such initial funding to wind up these companies would also:

- Ensure protection of employees' rights by allowing employees to access the GEERS scheme (or any such replacement arrangement);
- provide a deterrent to poor corporate behaviour by directors, though this needs to be supported by a proactive corporate regulator; and
- assist ASIC to identify directors who should be banned from continuing in such a role.

Appendix

This appendix details our response to each of the questions posed and the options offered in the Options Paper. We have attempted to give concise responses to the questions raised, in particular if the policy reason behind them is explained in our submission. In the case of other questions, we consider that a more substantive discussion is required – for example as to the extent of legal powers of a committee - and we have suggested that in relation to those they need to be subject of further targeted consultation, or more specific consideration and submission.

1 Standards of entry

Option One: maintain the current standards for entry. **Yes with some changes.**

Option Two: expand the scope for insolvency entrants. **No.**

Option Three: alignment of standards for entry. **Yes.**

Discussion questions[1]

80. Are there any concerns with changing the academic requirements to remove the greater emphasis placed upon accounting skills over legal skills, while retaining a minimum level of study in each? No. The formal qualifications required of an IP should include the successful completion of tertiary study in accounting and law, in total of at least 3 years, together with completion of a tertiary level course in insolvency, such as the Insolvency Education Program offered by the IPA, or an equivalent program.
81. Should the gaining of a Masters in Business Administration meet the qualification requirements for registration, if it did not otherwise meet legal and accounting study requirements? No. An MBA is a generalist degree and an MBA qualified applicant may not have the minimum accounting and law requirements that we consider necessary.
82. Should a minimum level of actual experience in insolvency administration remain a mandatory requirement for registration as a practitioner? Yes. Prior practical experience in insolvency administration should be required for registration.
83. Should the experience requirements for registered liquidators be reduced to two years of full-time experience in five years? No. We consider that in most cases 5 years experience in conducting insolvency administrations under the supervision of a registered liquidator is required. There should be some discretion to allow less than five years based on individual cases.

[1] The numbers used in this section refer to the relevant paragraph numbers in the Options Paper

84. Should new market entrants be required to complete some form of insolvency specific education before practising as registered liquidators or registered trustees? Yes. Insolvency-specific study should be required. We suggest that the mix of a minimum three year tertiary study (accounting and law) with appropriate post graduate insolvency study such as the Insolvency Education Program offered by the IPA.
85. Should ASIC be empowered to impose requirements on a registered liquidator as a condition of registration? What types of conditions should a regulator be empowered to impose upon a new registered liquidator's registration? No. If a person has completed the required tertiary and insolvency specific education and has at least five years of practical experience we do not think that any conditions would be necessary. If a person does not meet the criteria for registration, they should not be registered. Once a person is registered, they should be registered to undertake all corporate insolvency administrations.
86. Should a registered trustee face more streamlined entry requirements than those that exist for a standard applicant for registration as a registered liquidator, and vice versa? Yes, but only in respect of overlapping requirements. If a person has met these requirements for one registration, then that should be taken as satisfying the same requirements for the other registration. Applicants would need to prove on a standalone basis that they have met the experience requirements specific to the registration they are seeking – that is, appropriate corporate insolvency experience when seeking registration as a liquidator and appropriate personal insolvency experience when seeking registration as a trustee.
87. Is further formal training necessary to ensure that practitioners who wish to transition between the two professions are able to fulfil their statutory obligations? No. The insolvency specific training that we suggest, referred to above, should cover both corporate and personal insolvency and would be sufficient for either or both registrations that a practitioner may seek to obtain.

2 Registration process for IPs

***Option One:* enhance ASIC's and ITSA's current registration processes.** **Yes.**

***Option Two:* adoption of committee structure in corporate insolvency.** **Yes.**

Discussion questions

144. Should an applicant seeking registration as a registered liquidator or registered trustee be required to be interviewed as part of the registration process? Yes. There is benefit in an interview process by a panel that includes an IP. While not infallible, an interview is more likely to determine an applicant's suitability than a paper-based application.
145. Should an applicant seeking registration as a registered liquidator or registered trustee be required to sit an exam as part of the registration process? No. Rather, we support the requirement for all applicants to have completed specialised insolvency study that will have examination components which the applicant will need to have passed. There could be an option for a further exam but we anticipate that it would be used infrequently – see for example *Bankruptcy Act* s 155A(1A).
146. Should a general 'fit and proper' person requirement be imposed for the registration of both personal and corporate IPs? Yes, the same fundamental standards should apply for both types of registrations. Furthermore, if it is proven that a person is not fit and proper for one type of registration, they should no longer meet this requirement in respect of the other type of registration. RG186 External Administration: Liquidator registration includes detail of what ASIC considers when determining an applicant's status as fit and proper (refer RG186.21). This could form the basis of a common standard for both registrations.
147. If the process for the registration of liquidators is aligned with the process for the registration of registered trustees, what differences should be maintained between the two registration processes? There should be no significant differences between the two processes. However, experience requirements should be specific to the registration sought, as we say above, that is, appropriate corporate insolvency experience when seeking registration as a liquidator and appropriate personal insolvency experience when seeking registration as a trustee.
148. Is it appropriate that the current fee for registration of liquidators be increased to reflect the amendments to registration processes? Yes. It is reasonable to charge a fee commensurate with the process undertaken, however that does not mean that the fee would necessarily cover the full cost of the registration process.

149. Should the official liquidator role be maintained?

No. The position of official liquidator used to indicate greater experience. Due to changes in ASIC's registration process, there is no longer necessarily an experience difference between registered and official liquidators. A registered liquidator can administer Part 5.3A administrations and creditors voluntary liquidations which are often more complex than court appointed liquidations.

There has never been a similar division in personal insolvency.

It follows that the separate provisions in Chapter 5 of the Corporations Act that apply to voluntary and compulsory liquidations should be amalgamated. There is no particular need for this division and it does not apply in bankruptcy.

150. What other aspects of the current Bankruptcy Act committee system might be amended?

This requires further targeted consultation and more detailed submissions, if required. However, briefly, the applicant should, based on the application submitted, meet the minimum requirements for registration; only then should a Committee be convened to conduct the interview process. We support the use of a Committee made up of a mix of regulators and practitioners.

151. If registration of a registered liquidator is for a defined period, what conditions should be required to be met for renewal of the registration to occur?

Practitioners should be required to renew their licence periodically, say every three years, with payment of a licence fee. This renewal should involve a negative vetting component – that there has been no serious outcome from any audit or review of the practitioner by a regulator or professional body in that period. It should also require a positive certification that certain CPD requirements have been met and that insurance is and has been maintained and is suitable. Consideration could be given to requiring a practitioner to confirming the solvency of the practitioner's insolvency business, and any other businesses.

152. Should the renewal process include a fee? Should the fee be commensurate merely with the administrative cost for completing the renewal or should the revenue raised by the fee be used to fund additional oversight of the insolvency market? Should the renewal fee be determined with reference to the numbers and nature of the administrations to which the practitioner is appointed?

We would support a higher fee if the funds are used to conduct regular compliance inspection reviews of all registered liquidators (ie every registered liquidator reviewed at least once every two years). A regular review process is already conducted by ITSA of all registered trustees.

Registration and renewal fees could also contribute to the cost of an independent complaints handling and dispute resolution body if one is to be established.

3 Remuneration framework for IPs

Option One: status quo with potential conflicts of interest addressed. **No.**

Option Two: address the issue of disbursements. **Not necessary.**

Option Three: aligned enhancements. **Yes, in terms explained below in response to the discussion questions.**

Discussion questions

233. Should the Corporations Act be amended to include a provision that aligns with the Bankruptcy Act prohibition upon practitioners making any arrangement whereby a benefit is received, either directly or indirectly, in addition to the remuneration to which he or she is entitled? Should such a prohibition be clarified to provide that this extends to charging disbursements with a profit component that may benefit, directly or indirectly, the practitioner?

No. It is already unlawful for an IP to classify what is properly remuneration as a disbursement and thereby seek to avoid the creditor approval process. However, as an alignment issue, we consider there should be some prescription against a practitioner taking a benefit whether in the form of remuneration or not, outside the formal approval process.

Care needs to be taken in the drafting of any such prescription. The bankruptcy section may well exist as a matter of policy because there is a government trustee that takes appointments to assetless bankruptcies. In corporate insolvency, a practitioner will not generally take an administration without some guarantee or payment of their fees; common and long-established practice includes third party payment to the company by the directors or another party before an IP consents to being appointed.

There are other issues about this on which we can provide more particular submissions if required; for example, assetless administration fund payments, and GEERS / FEGS payments are particular examples of external payments that should not be the subject of prescription.

234. Are the current requirements for the provision of information to creditors to assist them in assessing costs appropriate? Should this information be provided in a standard form? Should these requirements be aligned between corporate and personal insolvency?

Both the Bankruptcy Act and the Corporations Act require creditors to assess and approve a practitioner's remuneration. Both Acts require details of the claim to be provided to creditors. Creditors have the authority and power to assess and approve or not approve the remuneration sought. The IPA Code and APES 330 both provide instructions and guidance to practitioners in relation to remuneration and disbursements to support the requirements of both the Corporations Act and Bankruptcy Act. This includes a suggested 'remuneration report' template. The Senate Report endorsed this IPA template and approach in its recommendation 16. We believe that professional standards are the appropriate place to set this detail of guidance, although we support the remuneration guidance given by ITSA which in itself refers to the IPA Code.

We agree that there should be an alignment of the laws in relation to the remuneration requirements between corporate and personal insolvency as much as possible; the IPA Code already seeks to align the requirements expected of its members in both areas. The recent bankruptcy changes to remuneration assessments involve the Inspector-General taking an important role in resolving remuneration disputes or approvals. There may be potential for ASIC, or a dispute resolution body, to assume this role.

235. What could be done to address concerns about cross subsidisation?

We do not believe that concerns about cross-subsidisation are well founded. We address this issue in the body of our submission on page 6.

236. What could be done to address concerns about inappropriate use of disbursements?

We do not believe that there is an issue in respect of inappropriate use of disbursements, that is, moneys paid by a practitioner for external services – for example, search fees, newspaper advertisements, or legal costs. It has not been reported as an issue in either of the regulators' most recent reviews of the profession.[2]

The IPA Code provides detailed guidance about what are disbursements and what is remuneration and requires detailed reporting on disbursements with any remuneration reports. ITSA's regulatory guidance to practitioners guidance adopts this.[3]

Creditors should not be able to prevent a practitioner being reimbursed for properly incurred disbursements incurred during the conduct of an administration. The IP would otherwise be out of pocket.

If there is an issue, the appropriate resolution is enforcement of the current law and professional standards.

237. Should all fee approvals be required to be subject to a cap set by creditors in an external administration or bankruptcy? Is it unreasonable to expect that an IP go back to the creditors in order to seek an increase on the initial remuneration cap?

The IPA Code requires the setting of a 'cap' on all prospective fee approvals. This generally accords with the case law. If a member exceeds the cap, they are required to convene a meeting of creditors for further consideration and approval.

A cap that is set does not necessarily have to be in respect of the conduct of the whole administration. A decision may be made to set a cap to achieve a particular goal or milestone, or for a particular period of time with an intention to always return to creditors for the approval of further remuneration. This may particularly be the case in larger administrations. It would also be appropriate to seek further remuneration in instances where matters become apparent that alter the extent of work required in the administration.

A cap on the level of future remuneration approved must be differentiated from a fixed fee. A fixed fee, in accordance with the IPA Code, is a set fee for the conduct of a particular set of tasks (this could include the whole administration or a particular aspect of the administration) which cannot be changed.[4]

The IPA would not support a requirement for a practitioner to provide a pre-appointment cap or to be required to have a cap approved by creditors soon after appointment. It would be unreasonable to require, for example, a court appointed liquidator to convene a meeting after appointment to pass such a resolution where there would be uncertainty as to whether there would be sufficient funds available in the liquidation to pay the practitioner's remuneration or the cost of holding the meeting.

Practitioners should continue to have the right to seek approval of remuneration retrospectively where a cap is obviously not required. Only where approval of remuneration is sought in advance should a cap be required.

238. Should a group of creditors (or a single creditor) that successfully challenge an IP's remuneration, receive an increased priority in relation to the savings that may result?

No. The law requires remuneration to be approved by a resolution (majority) of creditors. If, despite that approval, a single creditor or a minority of creditors wishes to challenge the

[2] ASIC's report of December 2010; ITSA's latest quarterly report of 31 March 2011.

[3] IGPD 18 - Trustee Remuneration Notifications

[4] IPA Code 15.2.3

approved remuneration, and succeeds before the court, the suggestions seems to be that the court should have the power to give that group access to the funds thereby returned to the administration, in priority to the majority.

We do not see that this option is necessary or desirable. It appears to be based on the policy under s 564 and 109(10) of encouraging creditors to fund external recoveries, but the policy issues here are quite different.

The option contradicts the existing remuneration challenge provisions recently introduced in bankruptcy and we are not aware of it being raised as a useful reform in the consultations leading up to those law changes.

239. Should a registered liquidator, under any circumstances, be able to exercise a casting vote on a motion regarding his or her remuneration or removal?

We will deal with each aspect of this question separately as there are different issues to be considered.

Remuneration

In most circumstances, No. However, in *Williams as liquidator of C & D Global Protection Pty Ltd*,[5] the Queensland Supreme Court held that in a situation where the vast majority of creditors (99.9%) were in favour of the remuneration the liquidator should have used the casting vote to approve her own remuneration and saved the significant cost and time of seeking court approval. The Court rejected the earlier view of the NSW Supreme Court in *Krejci as liquidator of Eaton Electrical Services*[6], where that Court said that the use of a casting vote to approve remuneration was always a breach of the liquidator's fiduciary duties. The Queensland Supreme Court said that each case has to be determined on its merits.

The IPA Code accordingly states that "except in very limited circumstances, a Practitioner should not use the casting vote in relation to any resolution determining or fixing the practitioner's remuneration".[7]

We suggest that the case law and IPA Code adequately deal with this issue.

Removal

As the law currently stands, if a resolution is put to a meeting to remove an incumbent practitioner and that resolution is 'hung', by the practitioner not using his or her casting vote, the resolution will fail. This is effectively the same result as if the practitioner had used his or her casting vote against the resolution.

There are circumstances that we are aware of where practitioners are of the view that if the creditors are not satisfied with them, they will use their casting vote to remove themselves and have another practitioner appointed in their place.

If the power to use the casting vote is removed then IPs will in no circumstances be able to vote to pass a resolution to remove themselves. The result will then be that all hung resolutions of this nature will fail giving the same result as if the casting vote had been cast against it. We see no benefit in making such a change.

[5] [2010] QSC 224, Wilson J
[6] (2006) 58 ACSR 403, Barrett J
[7] IPA Code 24.7.4

4 Communication and monitoring

Option One: maintain the status quo. **No.**

Option Two: align creditors powers to effectively monitor administrations. **To an extent, in terms explained below in response to the discussion questions.**

Option Three: controlling the direction of a winding up. **No.**

Discussion questions

302. What amendments should be made to provide creditors with more information or power to monitor the progress of a winding up, administration or bankruptcy? Please see page 8 in the body of our submission.
303. Should creditors have largely the same rights to information and tools to monitor a liquidation, administration, bankruptcy or controlling trusteeship? Yes, but care has to be taken not to impose significant increased mandatory reporting requirements on liquidators; for example the reports required in a bankruptcy to notify creditors of the bankruptcy and to report on the likelihood of a dividend. The most significant and fundamental difference between personal and corporate insolvency is the presence of a government funded trustee (ITSA) to handle assetless bankruptcies. Private trustees are not required to undertake bankruptcies of assetless individuals. There is no similar body for corporate insolvencies and so the cost of winding up assetless companies is currently born by registered liquidators. We are reluctant to support any additional obligations being imposed on liquidators (ie further mandatory reporting) without allowance being made for the cost of such obligations through wider funding of assetless administrations.
304. Are there any impediments to IPs communicating with creditors electronically? At the moment, the law makes it too difficult to communicate with creditors electronically. There are provisions that allow this, for example s 600G of the Corporations Act and Reg 16.01 of the Bankruptcy Regulations but these are of limited application and are inconsistent and not comprehensive. The courts are increasingly allowing practitioners to notify creditors and interested parties by electronic means. Practitioners should be given the power to provide information to creditors via a website unless a creditor specifically requests a paper copy of the document be sent to them. This is particularly important with large reports, including section 439A reports in voluntary administrations, general reports on the progress of administrations and remuneration approval requests.
305. If the statutory frameworks are aligned, are there any modifications necessary to account for the practical differences between the bankruptcy and corporate insolvency frameworks? Care has to be taken not to impose significant increased mandatory reporting requirements on liquidators; for example the reports required in a bankruptcy to notify creditors of the bankruptcy and to report on the likelihood of a dividend. The reasons for this is explained above, the lack of a government liquidator, or financial assistance, in corporate insolvency. Section 545 of the Corporations Act recognises this burden by providing that a liquidator is not liable to incur any expenses in relation to the winding up of a company unless there is

sufficient available property, other than lodgement of reports and documents with ASIC. We are reluctant to support any additional obligations being imposed on liquidators without allowance being made for the cost of such obligations either through wider funding of assetless liquidations.

306. Would support from at least 25 per cent of creditors be an appropriate threshold in corporate insolvency for requiring a creditors meeting to be held? Given the larger numbers and quantum of claims, would a lower threshold (for example, 10 per cent) be more appropriate? What rules should apply in relation to who bears the costs of holding a meeting of creditors?

25% in value would be an appropriate threshold for requiring a meeting to be held at the cost of the administration. Consideration needs to be given as to how this cost could potentially reduce the funds available to creditors if misused. Further, in assetless administrations a liquidator should not be forced to bear this cost personally.

307. If liquidators are required to provide all information reasonably requested by a creditor regarding a liquidation or administration and creditors have improved powers to require the calling of meetings, is there any need for default annual meetings, written updates or creditors' meetings at the completion of a winding-up? Could these requirements be amended to a requirement for the practitioner to raise the option of having such updates and meetings with creditors (for consideration and voting) as a default reporting arrangement?

We support the removal of the default annual meeting/written update and creditors' meetings at the completion of the winding up. It is more worthwhile and cost effective for the liquidator to report or hold a meeting when there is something to report or creditors need to make a decision.

If the final meeting is removed, consideration will have to be given to how a creditor's voluntary liquidation will end and deregistration of the company occur as this is currently triggered by the lodgement of the return relating to the final meeting.

308. Should the role of the COI be given greater prominence in the corporate and personal insolvency systems? If so, how might this occur?

There may be potential for the COI to have extended powers as an alternative to a practitioner seeking court approval of their decision. At present, the COI may approve certain agreements in corporate insolvency and may approve remuneration in both corporate and personal. For further comment, please refer to page 8 in the body of our submission.

309. Should the rules governing COIs be aligned between corporate and personal insolvency? Are there any specific aspects of COI law that should be otherwise reformed?

Where possible, there should be alignment between the two regimes.

A COI should have the power to approve remuneration. There should not be a need for the general body of creditors to delegate this power as there currently is in personal insolvency. The involvement of contributories should be removed from the COI process in liquidations. For further comment, please refer to page 8 in the body of our submission.

310. Should creditors be able to make a binding resolution on a liquidator? If yes, should there be any role for the Court to overrule that resolution (for example, where the Court believes that the resolution is not in the best interests of the creditors as a whole)? Should there be any limit on the type of areas that creditors are able to pass a binding resolution?

No. It is a fundamental principle in insolvency that the appointee has discretion to exercise their powers according to the law, relevant professional and ethical standards and their judgment. This is recognised in the legislation and has been strongly endorsed by the courts.

If this were to change, then it would be a fundamental shift in insolvency law. For further comment, please refer to page 8 in the body of our submission.

5 Funds handling and record keeping

Option One: maintain the status quo with minor enhancements to funds handling. **No.**

Option Two: alignment with enhancements. **Yes.**

Option Three: increase penalties. **No.**

Discussion questions

383. Should the rules governing record keeping, accounting, audits and funds handling in corporate and personal insolvency be aligned? If so, how should this occur? The IPA supports the alignment of the personal and corporate insolvency regimes wherever possible. The IPA particularly supports the proposals put forward in Option two. We do have concerns about the use of compound accounts particularly in corporate insolvency, however, we feel that this would be adequately addressed by the establishment of a threshold at which a separate account must be opened and maintained.
384. If aligned rules on accounts reporting are introduced, what should be the content, form and frequency of the accounts required? We support the option of allowing the regulators to determine when accounts should be provided. We are of the opinion that annual accounting would be sufficient. However, the provision of an annual accounting for every corporate and personal insolvency administration on the same day each year would impose a significant burden on IPs and their firms, and reporting may be more appropriate to be made annually on the anniversary of the appointment.
385. Are there other record keeping, accounting, audits and funds handling rules that should be mandated for personal and corporate insolvency, in addition to those that currently exist? This should be the subject of subsequent targeted consultation in which we would be pleased to take part.
386. If amendments are made to the personal and corporate law to align the powers of the regulators (in certain circumstances) to freeze the accounts of IPs, in what circumstances should the regulators be able to issue an account freezing notice to a bank? We question whether there is a problem which needs to be addressed though the provision of such a power in the absence of evidence of the problem being provided. Care would particularly need to be taken in situations where the business under insolvency administration was still trading or compound accounts are being used. We note that similar powers are proposed in the July 2011 Consultation Paper on Debt Agreements – options 11 and 12. There may be more need for these powers in relation to debt agreement administrators than for trustees in bankruptcy.
387. Should the issuing of an account freezing notice require an application to the Courts? For how long should a freezing notice have effect? Yes, account freezing is a very serious step and if implemented, we would agree with a

freezing notice requiring an application to the Courts. The Courts should have the right to set the period of time that seems appropriate with the regulator able to seek an extension if required. The July 2011 Consultation Paper on Debt Agreements has this as option 12.

388. At what level should the penalties that apply to breaches of the funds handling, record keeping, retention of books, and audit provisions in the Corporations Act and the Bankruptcy Act be set to provide a greater deterrent to potential offenders?

We are not aware that there is a widespread problem with non-compliance by practitioners in the areas of record keeping, retention of books and audit provisions that requires greater deterrence.

With the requirement to lodge regular accounts, ASIC and ITSA should be able to detect and take prompt action in respect of practitioners that are not lodging accounts on time.

389. Will increasing the penalties make practitioners more likely to pay greater attention to these requirements?

Again, we are not aware that there is a widespread problem with non-compliance by practitioners that requires higher penalties. We would object to criminal penalties being imposed.

390. Are there additional civil obligations and criminal offences that should be provided for in respect of these areas?

No.

391. If civil or criminal penalties are applied for the lodgement of inaccurate annual reports, under what circumstances should those penalties apply?

If ASIC and ITSA are monitoring lodgements of accounts and detecting the failure to lodge accounts in a timely manner, any problems with failing to lodge accounts should be detected and dealt with promptly.

There would have to be evidence of systematic non-compliance by a practitioner over a period of time on a number of administrations or wilful non-compliance notwithstanding regulator intervention and reminders to warrant such penalties.

Should late lodgement, non-lodgement or false lodgement of accounts be a statutory basis for removal? If so, by what process might removal take place?

Only false lodgement would be serious enough to be a basis for removal.

6 Insurance requirements

Option One: ***increasing severity of penalties for breach.*** **No.**

Option Two: ***required notification of lapsed insurance policies.*** **Yes.**

Option Three: ***establishment of a fidelity fund.*** **No.**

Option Four: ***mandated periodic checking of insurance cover.*** **Yes.**

Discussion questions

424. Is there a benefit for IPs, creditors or other stakeholders in aligning the insurance requirements for liquidators and registered trustees? Yes, where possible there should be alignment. The benefit of the professional indemnity insurance requirements set out in RG194 is that it is a scale which recognises differing sized practices. We agree with practitioners having to provide a certificate of currency with renewal of their registration.
425. If the criminal penalty for not complying with insurance requirements is increased, at what level should the penalty be set to provide a sufficient deterrence against breach? We would support an increase in the pecuniary penalty amount to reflect the severity of the offence. However deterrence is mainly served by the likelihood of detection, rather than the level of penalty. It is a matter for the regulators to review compliance. We agree that a practitioner should be able to have their registration removed if inadequate or no insurance is held and the practitioner fails to rectify the matter in a timely manner.
426. Should a fidelity fund be established? If so, how should such a fund be operated and funded? We do not support the establishment of a fidelity fund by the major accounting bodies for the reasons set out in the paper. Additionally, currently persons other than members of the major accounting bodies can become registered; thus they would not be covered by such a fund. Furthermore, if entry to the profession is widened further, this "gap" in coverage would only increase.
427. What other reforms might be put in place regarding insurance requirements? We support Option four, with renewal of registration being contingent on evidence of the practitioner currently holding insurance, as well as evidence of having held appropriate insurance for the entire previous period.

7 Discipline and deregistration of IPs

Option One: enhanced status quo. **No.**

Option Two: alignment of disciplinary frameworks for practitioners. **Yes.**

Option Three: enhance the powers of the Court. **Yes.**

The IPA has discussed the issue of regulation of practitioners in detail in its main submission and regard should be had to the proposals made in that submission.

Discussion questions

507. Are there any reforms that should be made to either the Committee's or the CALDB's systems of disciplining practitioners to improve their operation? This should be the subject of a more targeted discussion and submission. The question is also partly addressed in our answers to the following discussion questions.
508. Do you think that aligning the disciplinary frameworks will provide for more consistent and improved outcomes for practitioners and other stakeholders between personal and corporate insolvency? Yes.
509. If a Committee structure is adopted for registered liquidators: *i. Should there be any amendments to the framework that underpins the current personal insolvency committee system?* *ii. Should the statutory framework for the committee system currently in the Bankruptcy Act be replicated in the Corporations legislation?* *iii. Should ASIC be statutorily required to provide a show-cause notice to the practitioner before establishing a committee?* *iv. Should the committee consist of a member of ASIC, a member of the IPA, and an appointee of the Minister?* v. *Should there be a time limit for decisions by the committee? Should it be aligned with the current time limit for bankruptcy?* In broad terms the system used by ITSA in personal insolvency works well, but there will need to be extensive consideration given to the finetuning of such a framework for corporate insolvency. More generally, any practitioner discipline committee should include a current practitioner nominated by the IPA. Any committee discipline process should provide for a show-cause letter. The committee membership may need to be broadened, for example to include an insolvency or administrative lawyer. Time limits should apply.
510. If a Committee structure is not adopted for registered liquidators, what specific reform options should be adopted under either the CALDB or Committee regimes? In particular: *i. Should a statutory timeframe be introduced for decisions by the CALDB?* *ii. Are there any powers that the CALDB currently has that should equally be conferred upon a Committee under the Bankruptcy Act or vice versa?* *iii. What, if any, other reforms should be made in respect of the transparency of Board*

and Committee hearings and decisions? *iv. Should a committee constituted under the Bankruptcy Act be empowered to summon a third party to appear at a hearing to give evidence and be cross examined?* v. *Should mechanisms be put in place to impose sanctions on practitioners or witnesses who fail to attend or provide books to a Committee or Board?* We address the broad question of practitioner disciplinary processes at some length in the body of our submission. We suggest that the wide range of concerns raised by many insolvency stakeholders about the current CALDB structure and process indicate that replacement may be preferred ahead of modification.
510v. Should the Bankruptcy Act be amended to provide ITSA with the express power to seek to deregister a registered trustee where the trustee is no longer 'fit and proper'? Yes, it should be consistent with the same standard for registered liquidators. *RG186 External Administration: Liquidator registration* includes detail of what ASIC considers when determining a liquidator remaining as fit and proper (refer RG186.85). This could form the basis of a common standard for both registrations.
511. If the regulatory frameworks are amended to expand the powers of ASIC and ITSA to discipline IPs directly, to what minor breaches should those powers extend? Late filing of accounts, documents etc; however the extent of the disciplinary actions that could be taken directly by the regulators would have to be limited and able to be challenged. We would like to give further consideration to this in any further consultation.
512. Would the suggested amendments to enhance the powers of the court breach considerations of natural justice? This appears to refer to the proposal that a court should be able to remove an IP on the application of the regulator or of a creditor, where the IP is subject to separate disciplinary proceedings. The court should be required to take into account 'public interest' considerations in making its decision. These considerations would need to be balanced against considerations of fairness to the IP and the financial impact on the administration. The court may take into account the fact creditors may be concerned about the IP's propriety where the IP is appealing a disciplinary sanction concerning an unrelated appointment. These are issues that the law often requires courts to determine. We consider there could usefully be a regime that allows this authority be given to the courts. We think it would rarely be used – for example, the existing powers of the court were not used by ASIC in its application to the NSW Supreme Court to have the registration of Mr Ariff cancelled.
513. Should the nature of the role of registered liquidators and registered trustees as officers of the court, as well as their inherent fiduciary duties, mean that it is reasonable to empower the Court to direct them to stand aside where there are serious allegations that have yet to be resolved? See above.

8 Removal and replacement of IPs

***Option One:* *enhanced status quo.* No.**

***Option Two:* *alignment.* Yes.**

Discussion questions

568. Should an initial creditors' meeting in a compulsory winding up have the right to replace or appoint a new liquidator be mandated? No. The appointment of a liquidator in a compulsory winding up by the court is very different to appointments in creditors' voluntary windings up and voluntary administrations where the appointee is selected by the directors. Where an appointment is made by the directors it is appropriate that creditors have the right to replace the liquidator at an initial mandatory meeting, which is exactly the position in a creditors' voluntary liquidation and a voluntary administration. In a court liquidation, the liquidator is nominated by the petitioning creditor and the appointment is made or endorsed by the court. The issue of independence from the directors is not the same. Creditors should have the right to replace the liquidator at any time during the course of the liquidation, but an initial mandatory meeting to specifically deal with this issue should not be required.
569. If an initial creditors' meeting were mandated for court-ordered windings up: *i. Should there be an exception for assetless administrations?* ii. *Should approval of the appointed registered liquidator be able to be obtained through a mail out? If confirmation/replacement of registered liquidations occurred by postal vote in court ordered liquidations, should this mechanism also replace the opportunity to replace a practitioner provided via initial meetings in other kinds of corporate insolvency?* We do not agree that a Court appointed liquidator needs to be approved by creditors for the reasons set out at section 568.
570. Should creditors in corporate insolvencies be generally empowered to remove a registered liquidator by resolution in the same way as under personal insolvency law? *i. What effect, if any, would the potential for removal be expected to have on remuneration arrangements?* ii. *Does the current scheme for the removal of a registered trustee provided sufficient and clear protections against abuses of process?* Please refer to page 7 in the body of our submission for a discussion on this issue.
571. If creditors are empowered to remove a liquidator in a creditors' voluntary winding up (subsequent to the first meeting), should members have any corresponding right in a members' voluntary winding up? Yes.
572. Is there a need to facilitate the transfer of the books of the administration from an outgoing IP to his or her replacement? What barriers, if any, are there to the implementation of such a reform? Yes, there may be a need to better facilitate this process, although this may not need to be a

matter of law. Issues of remuneration and personal liability may be factors against transferring over the whole file.

The IPA Code provides under Principle 8 that when dealing with other Members in transitioning or parallel appointments, members must be professional and co-operative without compromising their obligations in their own appointment.

573. Are any other amendments necessary to assist creditors to use any new power to remove a registered liquidator? What other administrative arrangements would be required to ensure a smooth transition from one registered liquidator to another?

That the new IP assumes no liability for the actions of the former; and that there be smoother remuneration approval arrangements.

On replacement, an insolvency practitioner should have the same rights of lien to protect their remuneration as a Voluntary Administrator currently has; unless the Court orders otherwise, for example, due to findings of professional negligence.

9 Regulator powers

Option One: increase regulators powers in an aligned manner. **Yes.**

Option Two: ombudsman. **Yes.**

Discussion questions

624. Are there unjustified divergences between the powers and roles of the insolvency regulators? The powers and roles of the insolvency regulators should be aligned as far as practicable.
625. Should a creditor in a corporate insolvency have any right to request that ASIC undertake a review of specified kinds of decision by a liquidator? Yes. This right exists in personal insolvency; there could usefully be parallel rights in corporate insolvency for a creditor to request the relevant regulator to undertake reviews of this kind.
626. If ASIC were to be empowered, what types of decisions should ASIC be able to review? If ASIC or ITSA were to be empowered, the types of decisions that could be considered for regulator review are decisions made in relation to the convening and conducting of meetings, in communications with creditors, and other procedural and process issues. Also, the Inspector-General in Bankruptcy has the role of determining remuneration claims; this should also be considered for ASIC. The Inspector-General can also review decisions made as to objections to discharge, and income contributions. There may be similar decisions in corporate insolvency that could be the subject of review. These decisions should be subject to court challenge.
627. The expansion of ASIC's current functions to include such a review power would have some cost. Given the Government's cost recovery policy how should any expansion of powers be funded? Any such powers should be funded in the same manner as ASIC's current insolvency monitoring and enforcement activity. We would not expect the application of the Government's cost recovery guidelines to result in an outcome in relation to increased review powers for ASIC that differs from that of ASIC's current compliance monitoring, investigation and enforcement activities.[8]
628. Should ASIC and ITSA be given more flexibility to communicate to a complainant (or creditors generally) information obtained by it in relation to the conduct of an external administration? Yes. Regardless of the final decision on the appropriate body with responsibility for handling complaints against IPs, increased transparency, and timely advice of the outcome of a complaint are fundamental to stakeholder and practitioner confidence in the complaints handling process.

[8] Australian Government Cost Recovery Guidelines, FMG4, Canberra, 2005

629. Should regulators be able to require a practitioner to sit an examination to test ongoing compliance with the knowledge or skills requirements for registration? Should such a power be extended to enabling regulators to require persons acting under delegation from practitioners to sit an examination?

No. If appropriate education and experience requirements are in place in relation to initial registration and maintaining competence and currency, there is no need for this requirement.

630. What powers might be appropriate to provide to regulators to facilitate (if necessary) the rights of creditors to call meetings and to ensure such meetings are held in a transparent manner — in particular in relation to the assessment of votes for and against the retention of the current IP?

The IGB has the authority to attend any bankruptcy meeting: s 12 Bankruptcy Act. ASIC should have a similar authority. A regulator's mere attendance at such a meeting may be enough although there may be potential for a regulator to play more of a role at meetings involving contentious issues.

631. Does section 536 of the Corporations Act, as currently applied by the Court, provide for the appropriate supervision of registered liquidators by ASIC?

No, it needs to be substantially re-worded, along the lines of s 179 Bankruptcy.

632. Should ASIC be able to share information with the IPA for disciplinary purposes?

Yes. ASIC, ITSA, and any future complaints handling authority should be able to share information in this way as we have separately recommended. We have also recommended some protection for the IPA in relation to the retention of this information.

633. Should ITSA and ASIC be empowered to impose conditions across the market? If so, what types of conditions should the regulator be empowered to impose?

Yes, if there were consistency between personal and corporate insolvency. These should be conditions in the nature of conditions listed in regulations, and not simply any at large. They could relate to on-going CPD, reporting, and other such requirements.

634. If a new Ombudsman or external dispute resolution scheme were established:

i. *Should the new body be a statutory body (for example, the Superannuation Complaints Tribunal) or a private body (for example, the Financial Ombudsman Service)?*

ii. *Should any new body have the ability to hear disputes in both corporate and personal insolvency? Should the new entity be independent of the two regulators?*

iii. *If the body is a statutory entity, what functions of ITSA or ASIC should be given to the new body? Should the body have power to obtain information or to inspect the records of an organisation relevant to the complaint? If the new body is privately run, what protections would need to be put in place to achieve this?*

iv. *How should the new body be funded? Should there be any charge to the complainant to investigate a complaint or should it be funded through an industry levy?*

v. *Should the body have an explicit educative role?*

vi. *Should the body have the right to deal with systemic issues or commence its own investigation? If the body is a private entity, what powers should it be given to achieve*

those objectives?

vii. *What types of disputes should the body be able to hear and deal with? Should the body be able to review remuneration? Should this be done through independent cost assessors?*

Please refer to pages 3-5 in the body of our submission for a discussion of this issue.

10 Specific issues for SMEs

Option One: clarify regulatory obligations of ASIC and ITSA. **Limited**

Option Two: expand the scope of the AA Fund. **Limited.**

Option Three: amend Corporations Act to address phoenix activity. **Yes.**

Discussion questions

674. Are any statutory reforms required to assist regulators to provide improved regulation in relation to interconnected personal and corporate insolvencies? Are improvements needed in relation to their capacity to share information and cooperate? If there is proper and adequate communications between the regulators, then either insolvency regulator would be able to regulate interconnected personal and corporate insolvencies, and share such information. However the IPA Code and ITSA currently place conditions on taking such interconnected personal and corporate appointments.
675. If the scope of the AA Fund is broadened to allow for the funding of registered trustees to investigate and report on corporate law breaches, which Corporations Act breaches in particular should be provided for? We do not think this is the correct question. If there is proper and adequate communication between the regulators, then either insolvency regulator would be able to investigate and report on law breaches, under the Corporations Act or the Bankruptcy Act.
676. Should the scope of the AA Fund be broadened to allow for loans to registered liquidators to properly carry out their fiduciary and statutory duties? We do not think this is the correct question. The question is whether there should be a government fund to allow for loans to IPs to properly carry out their fiduciary and statutory duties. If that fund were unconditional as to the outcome, it may assist the administration of assetless insolvencies. We assume the 'loan' would be repayable only if there were funds brought into the administration above and beyond the remuneration payable.
677. Should section 305 of the Bankruptcy Act also be expanded to provide for the funding of investigations into corporate law breaches? See our response to the question above.
678. What steps might be taken to improve efficiency in relation to related personal and corporate insolvencies while appropriately addressing conflicts of interest? The law can allow change to any issues of conflict of interest (independence). There may be merit in small interconnected personal and corporate insolvencies being handled as one by a single practitioner. Please refer to pages 9-10 in the body of our submission.
679. What other amendments can be made to assist creditors and directors of small corporates to better engage with the corporate insolvency system? Please refer to pages 9-10 in the body of our submission.
680. Is there a case for automatic disqualification of directors after a company failure? If so,

how many repeated failures should trigger disqualification? Should there be a threshold for failures to trigger disqualification (for example, where less than 50 cents in a dollar are returned to creditors)? Over what period must the failures occur? We believe that there is a strong case for a partially automatic process to disqualify a director who in involved in a number of corporate failures within a given period. Noting that directors are entitled to natural justice along with everyone else in the community, a process could be triggered when a threshold is reached that requires a director to show cause why they should not be disqualified. We recommend further consideration and discussion of what would constitute appropriate triggers requiring a director to show cause why they should not be disqualified.
681. Should a registered liquidator be able to assign actions that vest personally in the liquidator? If so, should a registered trustee be likewise able to assign rights of action? As a matter of principle, the same rights should apply to a trustee and liquidator. Generally, yes – and see *Owners of Strata Plan 5290 v CGS & Co Pty Ltd* [2011] NSWCA 168.
682. Should ASIC be able to automatically disqualify a director of an insolvent company who has not taken reasonable steps to ensure that the company has maintained its financial records? Yes, with a right of review to the AAT.

11 2010 Corporate insolvency reform package

11.1 Access to creditor lists

We have supported this in the past, in support of openness and transparency in the administration of an insolvency. We do not believe there is any valid basis for the current distinction drawn in this regard between Creditors Voluntary Liquidations and other liquidator appointments.

The IPA Code provides that a practitioner should provide a creditor with a list of all creditors on request.

We note that the privacy considerations have been raised in relation to a creditor's financial losses being made public and that these laws are presently the subject of parliamentary and community debate.

11.2 Replacing a liquidator

This amendment is appropriate in its current form.

11.3 Taking possession of and transferring books

It is appropriate for ASIC, and ITSA, to have the power to be able to take possession of books relating to a company in external administration and transfer those books to another external administrator in the event of a vacancy in the position of external administrator.

11.4 Electronic communication with creditors

We are of the opinion that the legislative amendment to allow use of websites to communicated with creditors is essential to the improved efficiency of corporate insolvency administrations.

11.5 Lodgement with ASIC of declarations of relationship

We support the lodgement of Declarations of relationships (DIRRI) with ASIC. The fact that the Bankruptcy Act does not require a DIRRI should not be an inhibition to the introduction of this requirement for corporate insolvencies.

11.6 Provisional liquidator's remuneration

This amendment is appropriate in its current form.

11.7 The publication of external administration notices

We are of the opinion that the legislative amendment to allow use of the internet to publish external administration notices in corporate insolvencies is essential to the improved efficiency of corporate insolvency administrations. Furthermore, it will ensure alignment with the Bankruptcy Act.

11.8 Postal voting by creditors

Whilst the recommended amendment is a significant improvement, we recommend that the Bankruptcy Act model be used and that postal voting be used for all kinds of resolutions in corporate insolvency administrations, rather than for a specific few.

11.9 Lodgement of a report as to affairs

This amendment is appropriate in its current form.

Discussion questions

712. In accordance with the principle of alignment set out earlier in this paper, should any of the earlier announcements be reviewed and or modified to more closely align with personal insolvency law? The proposals were in fact based on bankruptcy law in any event; but they should be reassessed to ensure that other proposals dealt with in this paper do not change them.
713. Alternatively, is it appropriate that the personal insolvency framework be amended to align with the changes discussed above (where necessary, through introducing affected corporate insolvency mechanisms not currently present in personal insolvency law)? It is a matter of reviewing both bankruptcy and corporate and extracting the best from both. Generally, bankruptcy has the more streamlined processes to which corporate should adapt.