The Institute of Chartered Accountants in Australia

3 August 2011

Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
Parkes ACT 2600

Insolvency@treasury.gov.au

Dear Sir/Madam,

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

The Institute of Chartered Accountants in Australia (Institute) welcomes the opportunity to provide comment on the Options paper: a modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia (Options paper).

The Institute is the professional body representing Chartered Accountants in Australia. Our reach extends to more than 70,000 of today's and tomorrow's business leaders, representing some 57,000 Chartered Accountants and 13,000 of Australia's best accounting graduates who are currently enrolled in our world-class postgraduate program. Our members work in diverse roles across commerce and industry, academia, government and public practice throughout Australia and in 108 countries around the world. Insolvency is one area of public practice where the Institute provides support to members who practice in this field. It is important to note that a large percentage of Registered Liquidators are members of the Institute and have been through the postgraduate professional program known as the CA program.

The Institute is a founding member of the international accounting coalition called the Global Accounting Alliance (GAA), which provides reciprocal arrangements with ten of the other leading accounting bodies in the world. The Institute is the only Australian accounting body within the alliance. The GAA represents more than 775,000 members world-wide and includes professional accounting organisations from America, Canada, Hong Kong, England/Wales, Ireland, Scotland, Japan, Germany, New Zealand and South Africa.

The Institute notes that the Options paper examines possible reforms to the insolvency profession following last year's Senate Inquiry. As we noted in our submission to that Inquiry, we consider that the current law and regulatory environment applicable to insolvency practice is sufficiently detailed. However, we also noted that the Insolvency profession, like all professions, should be subject to continual independent review, be clearly accountable and respond to the changing conditions in the business environment.

Customer Service Centre
1300 137 322

NSW
33 Erskine Street
Sydney NSW 2000
GPO Box 9985
Sydney NSW 2001
Phone 61 2 9290 1344
Fax 61 2 9262 1512

ACT
L10, 60 Marcus Clarke Street
Canberra ACT 2601
GPO Box 9985
Canberra ACT 2601
Phone 61 2 6122 6100
Fax 61 2 6122 6122

Qld
L32, 345 Queen Street,
Brisbane Qld 4000
GPO Box 9985
Brisbane Qld 4001
Phone 61 7 3233 6500
Fax 61 7 3233 6555

SA / NT
L29, 91 King William Street
Adelaide SA 5000
GPO Box 9985
Adelaide SA 5001
Phone 61 8 8113 5500
Fax 61 8 8231 1982

Vic / Tas
L3, 600 Bourke Street
Melbourne Vic 3000
GPO Box 9985
Melbourne Vic 3001
Phone 61 3 9641 7400
Fax 61 3 9670 3143

WA
Ground, 28 The Esplanade
Perth WA 6000
GPO Box 9985
Perth WA 6848
Phone 61 8 9420 0400
Fax 61 8 9321 5141

We view this Options paper as well as the earlier Senate Inquiry as part of the continual independent review. In determining our responses to the proposals outlined in the Options paper, we have considered the five drivers of insolvency quality. These are:

1. The culture within an insolvency firm
2. The skills and personal qualities of insolvency practitioners and staff
3. The effectiveness of the insolvency process
4. Factors outside the control of insolvency practitioners
5. The reliability and usefulness of insolvency reporting

We consider it important for any reforms, to both the corporate and personal insolvency regulatory frameworks, to support these five drivers. Whilst there is uniqueness to the insolvency profession, as a regulated community key themes from experiences across the accounting profession can be used to deliver quality to the insolvency profession.

We have provided our detailed comments on the proposed options and responses to the discussion questions in appendix one to this letter in relation to the areas of our specific expertise. We highlight the following three key points in particular.

Standards for entry into the insolvency profession

As noted above, a key driver of quality in the profession is the skills and personal qualities of registered liquidators and trustees and their staff. Therefore, we support reforms to widen the entry standards but not weaken them as this would lead to reduced quality. We support the changes to permit concurrent study of accounting and legal studies as well as giving equal importance to both accounting and legal studies. We consider that a sound technical knowledge of accounting and the legal framework are both equally important for insolvency practitioners. We do not support proposals which would allow other qualifications such as legal practitioners or those holding an MBA to be eligible without the minimum level of accounting education, insolvency specific training and insolvency experience. We consider these to be important to ensuring the ongoing quality of insolvency practitioners.

Funds handling and records keeping

We support the alignment of accounts reporting requirements between personal and corporate insolvencies. We specifically recommend that Treasury adopt their Standard Business Reporting (SBR) for lodgement of accounts reporting. This Treasury initiative is designed to improve and simplify data capture. SBR can be used to gain better data to aid analysis on corporate insolvency whilst not significantly increasing the burden for practitioners. We consider that this would improve the reliability and usefulness of reporting on the insolvency industry.

Discipline and deregistration

We note that it is critical that the CALDB process operates effectively, efficiently and focuses on important matters. Therefore, we are supportive of improvements to the efficiency and effectiveness of the CALDB. However, we note that the options paper has not dealt with the use of enforceable undertakings (EU) to resolve disciplinary matters. We note that EUs lack the transparency and proper accountability of a CALDB tribunal or Court. Further, we consider that the CALDB should be reserved for dealing with auditors and insolvency practitioners who have made serious breaches of the Corps Act.

We recommended to the Senate Inquiry, that an open and independent process be considered as part of the reforms to the insolvency industry to deal with matters of a certain size. This process would deal with these matters more transparently than an EU and in a more timely manner compared to the CALDB tribunal.

If you would like to discuss any aspect of this submission, please contact please contact me at the Institute on 02 9290 5598 or at lee.white@charteredaccountants.com.au

Yours sincerely,

Lee White FCA

Executive General Manager - Members

CONTENTS

APPENDIX 1 5
Overall comments 5
1. Standards for entry into the insolvency profession 6
2. Registration process for insolvency practitioners 9
3. Remuneration framework for insolvency practitioners 12
4. Communication and monitoring 15
5. Funds handling and record keeping 17
6. Insurance requirements for insolvency practitioners 19
7. Discipline and deregistration of insolvency practitioners 20
8. Removal and replacement of insolvency practitioners 24
9. Regulator powers 26
10. Specific issues for small business 29
11. 2010 Corporate insolvency reform package 31
APPENDIX 2 - Institute disciplinary procedures 32
APPENDIX 3 - The Institute's Quality Review Program 36

APPENDIX 1

OVERALL COMMENTS

In determining our responses to the proposals outlined in the Options paper, we have considered the five drivers of insolvency quality. These are:

1. The culture within an insolvency practice
2. The skills and personal qualities of insolvency practitioners and staff
3. The effectiveness of the insolvency process
4. Factors outside the control of insolvency practitioners
5. The reliability and usefulness of insolvency reporting

We consider it important for any reforms to both the corporate and personal insolvency regulatory frameworks support these five drivers. Whilst there is uniqueness to the insolvency profession, as a regulated community key themes from experiences across the accounting profession can be used to deliver quality to the insolvency profession.

In relation to the options paper itself, we consider that it could have been better presented and structured for its intended purpose. The numbering only related to pages and paragraphs. The result is that the questions raised in the paper have no logical numbering, only a paragraph number which loses context when it's referred to outside the paper. Further the key sections of the paper have not been numbers for ease of reference. We have numbered the sections in our response as indicated in the contents page earlier and retained the paragraph numbers for the questions to enable reference back to the options paper.

We also note that the options paper has not canvassed views specifically on the proposed reform options. It has only requested feedback via the discussion questions. We have, however, indicated our preferred option prior to the discussion questions. Overall, we recommend that Treasury consult further on specific reforms arising from this Options paper prior to the drafting into the legal framework.

We have also provided some information in Appendix 2 on the Institute's disciplinary procedures and in Appendix 3 on the quality review process.

1. STANDARDS FOR ENTRY INTO THE INSOLVENCY PROFESSION

Reform options

Option One: maintain the current standards for entry

Option Two: expand the scope for insolvency entrants

Option Three: alignment of standards for entry

We broadly support Options One and Three, with some changes. Further we support the adoption of some other specific reforms that are included in the other options as we consider they will improve the quality of register liquidators and trustees. These relate to the amendments suggested in Option two (paragraphs 67 and 68) to remove the discrimination between accounting and legal studies in the academic requirements and to include a requirement for at least one year of insolvency specific courses.

We are concerned at the proposals in paragraph 69 to allow Australian legal practitioners and those holding MBAs to be eligible without a minimum level of accounting education or insolvency experience. We consider accounting education, insolvency specific training and insolvency practical work experience to be important to ensuring the ongoing quality of insolvency practitioners.

We note that the requirement to be a member of a professional accounting body for registered liquidators was removed some years ago. However, due to the relatively small size of the profession the impact of this change to new registrants is still taking effect. Prior to making significant changes to widen the eligibility for registrations, Treasury may wish to consider whether the entry standards are a significant barrier to entry to the insolvency profession. There may be other more significant factors that are influencing the decisions of those who are considering entering the profession rather than just the entry standards. Further, whilst there are concerns regarding limited competition in the provision of insolvency services, we question whether there is sufficient work to support a larger sector.

Discussion questions

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?**

    We have no concerns with the proposal to allow both three years accounting and two years legal studies as well as three years legal studies and two years accounting as the academic requirements as outlined in paragraph 67.

    We do note that presently the significant majority of all insolvency firms within Australia operate in effect within the accounting industry. This is reflective of the fact that many of the staff obtain a graduate diploma in accounting (and possibly law), undertake the CA postgraduate program (or other alternative), then specific insolvency courses such as the Insolvency Education Program offered by the Insolvency Practitioners Association (IPA) and importantly obtain relevant practical experience along the way.

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, we do not support the gaining of a Masters in Business Administration (MBA) as sufficient qualification requirements for registration alone. We consider that this should still be accompanied by a minimum level of legal and accounting study requirements, insolvency specific education and also a minimum level of experience in performing insolvency administration tasks.

Whilst we support proposals to broaden entrants to the profession, we consider that this should not be achieved by a reduction in the appropriate skills and experience of the registrants. We consider a driver of quality for insolvency practitioners to be their skills and therefore a thorough understanding of the legal framework and technical competence in the accounting standards.

One of the key roles of the Registered Liquidator is to investigate the insolvent position of an entity and this requires an inherent understanding of financial and management accounting entry and reporting. As part of the investigation aspect, knowledge of Australian taxation laws is important when analysing the entity's position. Further, as can also be the case sometimes, a Registered Liquidator is required to trade-on an entity (for example in a Voluntary Administration or Receivership) and their accounting skills obtained enable proper forecasting and reporting to be undertaken. Such aspects are important in ensuring that Registered Liquidators have the appropriate skills to give stakeholders confidence in the work being undertaken.

We also note that there can be a significant variation in the quality of an MBA. If this proposal should ultimately be adopted, we recommend that a list is created of acceptable MBAs from accredited Institutions as well as an approval process for courses outside those lists, for example, from overseas institutions.

82. **Should a minimum level of actual experience in insolvency administration remain a mandatory requirement for registration as a practitioner?**

Yes, we consider that relevant industry experience is important due to the complexity of administrations and the processes that are required to be undertaken.

83. **Should the experience requirements for registered liquidators be reduced to two years of full-time experience in five years?**

The existing requirement is five years (of which three must be at a senior level) full time experience in ten years. As noted in our response to question 82, we consider experience to be very important. We consider that the current experience requirements are appropriate and do not require amendment. If a reduction is to be implemented, we consider the reduction to two years full time experience in five years could be too significant. This could have a negative impact of the quality of registered liquidators.

A proposed alternative would be to combine the reduction in experience with the proposed registration requirements imposed by Australian Securities and Investments Commission (ASIC) in question 85 below. Therefore registrants with limited work experience would have conditions imposed on them by ASIC on their first couple of years as a registered liquidator to restrict the type and size of appointments they can accept. However, as we note below, there may be unintended consequences of introducing such conditions.

84. **Should new market entrants be required to complete some form of insolvency specific education before practicing as registered liquidators or registered trustees?**

Yes, we consider that insolvency specific education is important for registrants, such as that offered by the IPA. However, we note that the experience, skills and personal qualities of insolvency practitioners are also key drivers of quality in the sector.

85. **Should ASIC be empowered to impose requirements on a registered liquidator as a condition of the registration? What types of conditions should a regulator be empowered to impose upon a new registered liquidator's registration?**

Yes, we consider that it is appropriate for ASIC to have powers to impose requirements on a registered liquidator as a condition of the registration in certain limited circumstances. We concur with the examples provided in paragraph 79 that include restrictions on the size and type of appointments, joint appointments and minimum training and professional development requirements. We also consider that the restrictions on size and type may also work from large to small, as insolvency practitioners with experience in and registration for publically listed entities may not necessarily be efficient at undertaking small/medium sized entities (SME) insolvencies.

We note that a proposed condition relates to an independent review. If the registered liquidator is a member of a professional accounting body, ASIC may wish to consider requesting the registered liquidator to undergo a quality review by their professional accounting body within a certain period of time. The review would be conducted under the auspices of the bodies' Quality Review Program. Please refer to Appendix 3 to read more about our Quality Review Program.

However, we consider that registration conditions should only be used if the registrant does not have the relevant experience to take on all such engagements. As noted in question 83, we note that the introduction of such conditions may also have unintended consequences. These could include the stratification of registrations, which the proposed removal of the official liquidators' registration is intended to remove. It also has the potential to lessen competition in the market. We also note that in official liquidations, the practitioner does not know the size and scale of the liquidated entity until they are appointed. This could make it difficult for any practitioner under such conditions to seek such work.

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?**

As noted in our response to question 144 below, we consider that the Insolvency and Trustee Service Australia (ITSA) interview process is a very efficient way of determining an applicant's eligibility. Therefore we support the cross registration of trustees and liquidators with both training and work experience in the new area as proposed in paragraph 75.

87. **Is further formal training necessary to ensure that practitioners that wish to transition between the two professions are able to fulfil their statutory obligations?**

Yes, we consider that practitioners should not only satisfy the formal training requirement but also the practical experience element.

2. REGISTRATION PROCESS FOR INSOLVENCY PRACTITIONERS

Reform options

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

Option Two: adoption of committee structure in corporate insolvency

We support option one in this proposal. We consider that the proposed enhancements are the most suitable steps to take for reform in this area. The committee structure would involve unnecessary process and additional cost and we do not consider it would increase the quality of the registrants.

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, we consider that an interview as part of the registration process may have significant benefits and would strengthen the registration process. In our submission to the Senate Inquiry we noted that 'an interview would require the applicant to respond to a range of practical questions, so that they can demonstrate they have the necessary understanding of the legislation to deal with the varying issues that may arise'. Further an interview would enable the applicant's communication skills to be assessed, as these are important for practitioners. This would enable the regulator to assess the skills and personal qualities of insolvency practitioners, a key driver of quality in this sector.

Further, we note that based on the numbers of entrants to the profession, this is unlikely to be a significant burden for the regulator.

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, we consider that whilst an exam as part of the registration process may have benefits and would enable ASIC or ITSA to assess the ability of the registrant in relation to their technical skills, the interview would be our preferred proposal. The benefit of the interview process, which enables the regulator ask specific questions of the applicant and assess their communication skills, makes it more valuable to the registration process and improving the quality of the profession.

146. **Should a general 'fit and proper' person requirement be imposed for the registration of both personal and corporate insolvency practitioners?**

Yes, we consider that this requirement is important and should be maintained for corporate insolvency practitioners. We also consider that it would enhance the registration requirement for personal insolvency practitioners.

Further, we note that ASIC currently checks with the Institute as to whether a particular member is in good standing prior to registering them as a liquidator and we recommend that this practice continue.

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?**

We have no specific recommendations in relation to this question aside from noting the different experience requirements which would be expected.

148. **Is it appropriate that the current fee for registration of liquidators be increased to reflect the amendments to registration processes?**

We consider that it is appropriate for the registration fee for corporate insolvency liquidators to be increased to reflect any approved amendments to the registration process. However, we consider the personal insolvency fee to be certainly adequate and would not expect that to increase. We would also expect any revised corporate insolvency registration fee not to exceed the existing personal insolvency fee, particularly if a fee is associated with the registration renewal beyond a basic administration fee.

We also recommend Treasury look at the current fee for the Registered Company Auditor (RCA) registration process as a comparison. We note that the registrations of insolvency practitioners and company auditors have similarities from the perspectives of quality and process.

149. **Should the official liquidator role be maintained?**

No, we support the reform in this area to streamline the registration. However, as noted in our response to question 85, ASIC may impose certain restrictions on new registrants that could include court appointments. In our submission to the Senate Inquiry we recommended that official liquidators should have to demonstrate additional court experience as part of their registration process. This could be incorporated into the ASIC restrictions. We also note that in practice, voluntary administrations and certain voluntary liquidations can have the same, if not greater, complexities than court liquidations.

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

We have no specific suggestions in relation to other amendments. We recommend that Treasury undertake further targeted consultation on this question.

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?**

We support the renewal of the practitioners licence periodically with the payment of a licence fee. We propose that conditions might include: the level of significant and/or recurring complaints that have been upheld by the regulator; no concerns regarding any quality review by the professional body or independent review by the regulator; compliance with any registration restrictions and certain levels of insolvency specific training and work experience. We consider a rating system for complaints to be important, like that used by ITSA. This would ensure that minor or one-off complaints do not prevent re-registration.

We note that, in keeping with the professional nature of the Chartered Accountant designation, members of the Institute are expected to keep abreast of current business practice and maintain a timely focus on developments in their area of employment. Members are obliged to undertake training and development and are required to achieve a minimum of 120 qualifying hours (at least 90 of formal plus up to 30 hours of technical reading) over a rolling three year period. At least 20 hours (including no more than 10 hours of technical reading) must be completed annually. If the member is a registered liquidator, at least 40% of the total minimum training and development hours must be dedicated to training relevant to that registration.

Further, we recommend that Treasury review the Registered Company Auditor (RCA) renewal form and process for guidance on what additional information could be provided as part of the renewal process.

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?**

Whilst, we do not have any specific concerns with the fee proposals suggested above, we suggest that Treasury review the RCA renewal process to ensure consistency. Currently the audit inspection program is carried out without additional cost to RCAs and further the registration process involves only an administration fee for paper returns, with free registration for those doing it online.

3. REMUNERATION FRAMEWORK FOR INSOLVENCY PRACTITIONERS

Reform options

Option One: status quo with potential conflicts of interest addressed

Option Two: address the issue of disbursements

Option Three: aligned enhancements

We do not support option three in these proposals. We consider, as the paper highlights, that given the differences between corporate administrations this would not be an effective reform. We support option one, maintaining the status quo. As noted in our response to question 239, we do not consider that the casting vote should be removed. However, we support the proposal in paragraph 219 that the practitioner should publish the reason for the way they have exercised their casting vote.

We note that there are some frameworks in place that members of the professional accounting bodies and members of the IPA are required to comply with. These frameworks deal with remuneration and disbursements amongst other aspects. Treasury may wish to consider whether compliance by registered liquidators with these frameworks might be an alternative approach to reforms in this area.

The Accounting Professional and Ethical Standards Board (APESB) have published a professional standard APES330 *Insolvency Services.* This standard includes a number of requirements for members of public practice operating in the insolvency environment and specifically includes a section on professional fees and expenses. Further as we noted in our submission to the Senate Inquiry, the IPA has published a Code of Professional Practice for Insolvency Practitioners detailing best practice to be followed when requesting approval of remuneration.

We are confident that market forces, coupled with the approval and review processes, will ensure that insolvency practitioner remuneration continues to be appropriate for the work performed and risks assumed by the practitioner in performing that work. In addition, the Australian Competition and Consumer Commission (ACCC) has wide powers to ensure that all professions do not engage in anti-competitive behaviour and that fair price competition continues to exist in the market place for professional services including insolvency services.

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?[1] 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?**

Yes, we support this amendment. We note that under the IPA Code there are disclosures that should be made about remuneration and benefits. However, we recommend that care is taken

1 Section 165 of the Bankruptcy Act.

when drafting such a provision due to the differences between personal and corporate insolvencies. This specifically relates to the differences in handling assetless administrations.

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?**

Yes, we consider that the current requirements for the provision of information to creditors to be appropriate. We support the provision of information to creditors in a standard form. As the Senate Inquiry indicated, the templates set out in the IPA code form a suitable standards form. However, we do not consider that the requirements for corporate and personal insolvency should be aligned.

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

We have no specific recommendation in relation to this question.

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

We have no specific recommendation in relation to this question.

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

We do not consider that changes to the current system are needed. However, if any change is introduced to seek subsequent approvals, we consider that such a change should not involve additional costs to creditors of the process.

We support the continued disclosure by insolvency practitioners of sufficient details of their remuneration to creditors. We note that the IPA Code of Conduct includes a recommended format in section 23 of a remuneration report to creditors. This outlines the main areas of work and the breakdown of fees across those areas and also the split between the different levels of staff performing the work. Whilst we recognise that the application of this is limited to IPA member, we consider that such guidance could be issued by ASIC, in line with the IPA code, for application by all registered liquidators.

Further, we support the continued provision and enhancements of guidance issued by ASIC for used by creditors. Such guidance can be used to fully inform creditors about the remuneration of practitioners and how the fees can be questioned and challenged. The information provided should be positioned as a toolkit to assist creditors to better understand the process and provided to them as part of the insolvency process.

We consider that if the practitioners provide the appropriate disclosures of their remuneration and creditors are well informed about what the remuneration pays for as well as how to challenge it, then the market forces will maintain reasonable levels of remuneration.

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

No, we do not consider that this is appropriate. However, we support changes which would reduce the cost to challenge the remuneration, whilst retaining a suitable cost level to minimise any abuse of the process.

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?**

Yes, we consider that there may be certain very limited circumstances when this is appropriate for both remuneration and removal. This is consistent with the IPA Code of Conduct.

The Options paper states in paragraph 212 that the code prohibits the use of the casting vote in all circumstances. However, we note that the Code actually states in paragraph 24.7.4 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.

The Code provides examples of case law in the footnote of both appropriate uses of the casting vote and also where its use was in breach of the liquidator's fiduciary duties.

In relation to the removal of a practitioner, we note that if the vote on that resolution is 'hung' without the practitioner using their casting vote, the resolution will fail. This is the same result as if the practitioner had used their casting vote against the resolution. However, practitioners may decide to use their casting vote to pass such as resolution as they are of the view that the creditors are not satisfied with them.

4. COMMUNICATION AND MONITORING

Reform options

Option One: maintain the status quo

Option Two: align creditors powers to effectively monitor administrations

Option Three: controlling the direction of a winding up

We support the principles behind option two, being the alignment of creditor powers in corporate insolvency to those in personal insolvency. We further support that these changes may also result in the existing requirements for annual creditor meetings and specific communications being removed. This would avoid duplication of effort and any unnecessary administrative burden and costs on insolvency practitioners and creditors.

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?**

    We support the alignment of provisions between creditors in a personal bankruptcy and creditors in a corporate insolvency.

303. **Should creditors have largely the same rights to information and tools to monitor a liquidation, administration, bankruptcy or controlling trusteeship?**

    We generally consider that this is appropriate.

304. **Are there any impediments to insolvency practitioners communicating with creditors electronically?**

    None that we are aware of, assuming standard procedures are in place and creditors are permitted to opt out of electronic communication, to receive hard copy mailed communications instead.

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?**

    We have no specific recommendation in relation to this question.

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?**

    We have no specific recommendation in relation to this question.

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 consider that, as suggested, the existing requirements could be amended so that the practitioner could agree on the reporting arrangements with the creditors.

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

No, we don't consider this is necessary and it could limit the ability of the insolvency practitioner or trustee from performing their role effectively.

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?**

We have no specific recommendation in relation to this question.

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, we don't consider that this type of reform is necessary nor useful.

5. FUNDS HANDLING AND RECORD KEEPING

Reform options

Option One: maintain the status quo with minor enhancements to funds handling

Option Two: alignment with enhancements

Option Three: increase penalties

We broadly support the proposed alignments and enhancements outlined in Option two. Further, we recommend that Treasury look to implement its own Standard Business Reporting (SBR) program for accounts reporting by registered liquidators. We consider that this would improve the reliability and usefulness of reporting on the insolvency industry.

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?**

We consider that further alignment in this area is appropriate. As noted above, we broadly support the range of proposed alignments outlined in Option two.

384. **If aligned rules on accounts reporting are introduced, what should be the content, form and frequency of the accounts required?**

We support the statement in paragraph 370, that annual returns lodgement should remain unchanged. We consider that reforms to the accounts reporting should enable lodgement in the form of electronic data, for example through the Treasury's Standard Business Reporting (SBR) program. This would enable more useful data to be collected on corporate insolvencies and allow for greater data analysis.

SBR is the means whereby the 'report once, use often' goal can be brought about. Appropriate tagging of the information will enable the automatic generation of a variety of financial reports. There are already studies demonstrating significant cost savings for governments and businesses as a result of SBR (or more commonly known as XBRL) overseas, in, for example, Singapore, the Netherlands and the US. We are still to see a great move to SBR in the Australian environment, although it is likely to only be a matter of time once software is upgraded and the use of SBR and the benefits achieved is more widely communicated. There will however be set up costs, such as upgrading to an appropriate software and training users. However, for insolvency practitioners with a number of administrations to report on, there is likely to be reduced administration in the long term.

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?**

We have no specific recommendation in relation to this question.

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 insolvency practitioners, in what circumstances should the regulators be able to issue an account freezing notice to a bank?**

We have no specific recommendation in relation to this question.

387. **Should the issuing of an account freezing notice require an application to the Courts? For how long should a freezing notice have effect?**

We have no specific recommendation in relation to this question.

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 note that the paper doesn't provide details of the numbers of breaches recorded in these areas. We recommend that Treasury review the numbers of breaches in these areas to determine whether there is a widespread problem which requires a greater deterrent.

Should the research indicate that the penalties need to be increased due to high numbers of breaches, we would support a review of the penalty levels; however we have no specific recommendation in relation to the specific levels for each breach.

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

We consider that increasing the penalties is likely to result in greater attention. However we recommend that the revised levels are considered in relation to other penalties that exist in the Corporations Act for similar requirements for auditors and company officers.

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

We have no specific recommendation in relation to this question.

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

We have no specific recommendation in relation to this question.

392. **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?**

We note that the paper doesn't provide details of the numbers of breaches recorded in these areas. We recommend that Treasury review the numbers of breaches in these areas to determine whether there is a widespread problem which requires increasing the penalty to removal.

Further, we consider that there are distinct differences between late lodgement, non-lodgement and false lodgement of accounts. We do not consider that late lodgement should be a statutory basis for removal. In the event of false lodgement or non-lodgement, we would expect there to be an investigation and depending on the specific circumstances, this could result in removal.

6. INSURANCE REQUIREMENTS FOR INSOLVENCY PRACTITIONERS

Reform options

Option One: increasing severity of penalties for breach

Option Two: required notification of lapsed insurance policies

Option Three: establishment of a fidelity fund

Option Four: mandated periodic checking of insurance cover

We support option four, which seeks to align the registration renewal proposal with the checking of insurance cover. As part of the registration renewal process, practitioners could be required to include evidence of their current Professional Indemnity Insurance cover.

Discussion questions

424. **Is there a benefit for insolvency practitioners, creditors or other stakeholders in aligning the insurance requirements for liquidators and registered trustees?**

There does not appear to be any benefit in alignment here.

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?**

A breach for corporate insolvency is currently a strict liability offence, with the possibility of cancellation of the practitioner's registration. As noted in paragraph 422, there is only limited evidence of insurance lapses, which we consider indicates the current penalties are sufficient.

426. **Should a fidelity fund be established? If so, how should such a fund be operated and funded?**

No, we concur with the comments in the options paper that the cost of the implementation of this option would be expected to be considerable. Because there are a relatively small number of practitioners in the industry, the cost impact on these practitioners would be significant where the funding model for a fidelity fund relied on a levy on practitioners, as is usually contemplated. Such a levy would inevitably result in price increases in the delivery of insolvency services. The costs of this option are likely to significantly outweigh any benefits because such a fund would not prevent dishonest or fraudulent behaviour occurring. The fidelity fund option would likely deliver no better outcome than the existing insurance arrangements while being costly to set up and administer.

427. **What other reforms might be put in place regarding insurance requirements?**

We have no specific recommendation in relation to this question. However, we note the comments in paragraph 414 relating to insurance industry concerns regarding the availability of run-off cover for insolvency practitioners. It is important both for practitioners and in the public interest that the standards set for insurance for insolvency practitioners represents insurance which is readily available at affordable rates.

7. DISCIPLINE AND DEREGISTRATION OF INSOLVENCY PRACTITIONERS

Reform options

Option One: enhanced status quo

Option Two: alignment of disciplinary frameworks for practitioners

Option Three: enhance the powers of the Court

We support option one, enhancing the current situation. We support the Senate Committee's view that the CALDB should remain, but agree that enhancements are needed to streamline the process and improve the transparency.

As we noted in our submission to the Senate Inquiry, we expressed concerns regarding the use of enforceable undertakings (EU) in the disciplinary process. The options paper has not addressed the use of the EU as a means of resolving disciplinary matters. We consider that it is important that the use of EUs is included as part of the reforms. As we note below, the main concern surrounding EUs is the lack of transparency around the process

ASIC can deal with a breach of the law by a registered auditor or liquidator in one of the following three methods under the ASIC Act and Corps Act.

1. refer the matter to the Companies Auditors and Liquidators Disciplinary Board (CALDB)
2. an enforceable undertaking (EU)
3. court action – either criminal or civil

Under methods one and three, the practitioner being investigated receives natural justice, transparency and accountability in the context of well-tested legal principles applied by experts.

The CALDB directly notifies the Institute, pursuant to s.1296 (1B) of the Corps Act, of their decision and the reasons for the decision. This can be used by the Institute in its own disciplinary procedures. Likewise, once court action is completed, the Institute can use the judgement where appropriate to found a disciplinary hearing when it becomes a matter of public record.

An EU provides no detailed description of the evidence which has been tested. Typically ASIC expresses its concerns about the accountant in the EU and the accountant does not admit or disagrees with the concerns. This is in contrast to a court of law or a tribunal (CALDB) where ASIC evidence is tested. Nor does an EU only arise from investigations where the professional typically admits guilt or breach of law. ASIC and practitioners are defaulting to use EUs to avoid the lengthy and costly legal process involved in CALDB referrals (their length and complexity being linked to the submissions and amended submissions filed by ASIC) or court cases. They may also be preferred by some professionals as they may limit the adverse publicity and hence protect the reputations of partners and their firms.

However, there is a lack of transparency and accountability in the EU process and members have expressed some concerns in this process. The EUs do not contain a full description (or a copy) of the evidence ASIC relied upon. As an EU does not usually provide any admittance of guilt or breach by the member, the EU, in the absence of the actual evidence relied upon cannot be used by the Institute to subsequently discipline their members.

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?**

We support the proposals in paragraphs 488 and 490 to provide transparency around the committee's processes through the publication of documents and give the power to deregister a trustee who is no longer 'fit and proper'. However, we note this would need to be aligned with changes to the registration process as noted in question 146.

We note that it is critical that the CALDB process operates effectively, efficiently and focuses on important matters. Therefore referrals should not be made to the CALDB for inconsequential matters as this might negatively impact how the CALDB process is perceived. The CALDB should be reserved for dealing with auditors and insolvency practitioners who have made serious breaches of the Corps Act. Minor breaches relating to administrative matters should be dealt with by other means, including the use of an EU (as noted above) or an alternative open and independent process.

We recommended to the Senate Inquiry, that an open and independent process be considered as part of the reforms to the insolvency industry to deal with matters of a certain size. This process would deal with these matters more transparently than an EU and in a more timely manner compared to the CALDB tribunal. We consider the EUs should be reserved only for matters where the practitioner has admitted guilt.

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?**

Whilst alignment would result in consistent outcomes, we don't consider that there is evidence that this would result in improved outcomes. We recommend that reforms are considered to improve the outcomes and not to seek alignment for consistency alone.

509. **If a Committee structure is adopted for registered liquidators:**

- **Should there be any amendments to the framework that underpins the current personal insolvency committee system?**

  As noted above, we support amendments to provide transparency in the process through the publication of documents and the power to deregister a trustee.

- **Should the statutory framework for the committee system currently in the Bankruptcy Act be replicated in the Corporations legislation?**

  No, the framework should be considered specifically for application to the corporate environment. We recommend broad consultation on the development of such a framework for corporate insolvencies.

- **Should ASIC be statutorily required to provide a show-cause notice to the practitioner before establishing a committee?**

  Yes. We consider this is appropriate.

- **Should the committee consist of a member of ASIC, a member of the IPA, and an appointee of the Minister?**

We recommend that all committee members are appointees of the Minister. ASIC has the role of regulator and therefore we do not consider it appropriate for ASIC to also sit on the committee. We note that members of both the Institute and the IPA could be considered. It may also be appropriate to use members of the CALDB on the committee given their experience and expertise in this space.

- **Should there be a time limit for decisions by the committee? Should it be aligned with the current time limit for bankruptcy?**

  We consider that a time limit is appropriate but that different time limits will be appropriate depending on the nature and focus of the particular investigation.

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:**

- **Should a statutory timeframe be introduced for decisions by the CALDB?**

  We support the introduction of a statutory timeframe for CALDB decisions. However, as noted above we consider that this might be through a range as the appropriate timeframe is likely to vary depending on the nature and focus of the particular investigation.

- **Are there any powers that the CALDB currently has that should equally be conferred upon a Committee under the Bankruptcy Act or vice versa?**

  We have no recommendations for this proposal.

- **What, if any, other reforms should be made in respect of the transparency of Board and Committee hearings and decisions?**

  We support increased transparency in both processes through the publication of documents, evidence and reasons behind the decision. We consider that the proposal in paragraph 487 that the Corporations Act might be amended enable the CALDB to restrict the publication for commercially sensitive information would deal with the concerns in this regard. We consider a similar limitation could be included for the Bankruptcy Act.

- **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?**

  We support this proposal.

- **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 support this proposal but would expect any mechanism to enable the Committee or Board the discretion to accept any explanation for failures if they consider them reasonable and acceptable.

- **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'?**

We support the proposal in paragraph 490 to give the Inspector General the power to seek to deregister a trustee who is no longer 'fit and proper'. However, we note this would need to be aligned with changes to the registration process as noted in question 146.

511. **If the regulatory frameworks are amended to expand the powers of ASIC and ITSA to discipline insolvency practitioners directly, what minor breaches should those powers extend to?**

We consider that this is appropriate. We recommend that such minor breaches might include administrative matters such as late lodgement or non-lodgement of documents.

512. **Would the suggested amendments to enhance the powers of the court breach considerations of natural justice?**

Yes, we consider these amendments may breach the considerations of natural justice. The public interest considerations should only be taken account to the extent that the liquidator must consider them in his role. As the options paper notes, insolvency practitioners operate in an environment where a business is in financial difficulty. There may be uncertainty, anger and stakeholders fearing financial loss. The practitioner becomes the public face of this failed company and the point of contact for the stakeholders. The practitioner can therefore become the target of negative feelings from stakeholders about the situation. The court should not be taking these negative feelings into account when dealing with a disciplinary matter.

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?**

We consider that in certain circumstances of serious allegations, it may be appropriate for registered liquidators and trustees to be directed to stand aside whilst the case progresses. However we consider that there should be further consultation of what these allegations should be. Further that whilst a Court may be empowered in these circumstances, it should be at the Judge's discretion whether it acts in each circumstance.

8. REMOVAL AND REPLACEMENT OF INSOLVENCY PRACTITIONERS

Reform options

Option One: enhanced status quo

Option Two: alignment

We support option one, being enhancements to the status quo. We consider the enhancements proposed are appropriate.

Discussion questions

568. **Should an initial creditors' meeting in a compulsory winding up at which creditors would have the right to replace or appoint a new liquidator be mandated?**

We support the alternative suggestion in paragraph 556, which suggests that creditors' approval is obtained through mailing out a notice to creditors and if approval is not obtained, a meeting would be held.

569. **If an initial creditors' meeting were mandated for court-ordered windings up:**

- **Should there be an exception for assetless administrations?**

  Yes, this would be an appropriate circumstance for an exception.

- **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?**

  Yes, refer our response to question 568 above.

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?**

No, we do not consider this is appropriate process for corporate insolvency. Further we note that there is no equivalent of the Official Trustee in corporate insolvency.

- **What effect, if any, would the potential for removal be expected to have on remuneration arrangements?**

  This would put greater focus on remuneration arrangements. As noted earlier, creditors have lost money in a corporate insolvency and so there are naturally negative feelings towards anyone who is getting paid during the process, as they may see that as 'their' money. The process could result in creditors choosing the cheapest registered liquidator, despite the fact that they may not have the necessary skills and experience to obtain the best value in the insolvency for the creditors as a whole.

- **Does the current scheme for the removal of a registered trustee provided sufficient and clear protections against abuses of process?**

As there are no reported cases of the Court preventing the change of trustees by a creditors resolution, it is difficult to determine whether the scheme provides sufficient and clear protection against abuses. It is possible that the process to stop the change is more difficult than the change itself and therefore the protections in this area are not actually effective.

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, we consider that aligning the rights of creditors and members in these instances is acceptable.

572. **Is there a need to facilitate the transfer of the books of the administration from an outgoing insolvency practitioner to his or her replacement? What barriers, if any, are there to the implementation of such a reform?**

Yes, we support the transfer of information from the outgoing practitioner to their replacement.

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?**

We have no recommendations for this proposal.

9. REGULATOR POWERS

Reform options

Option One: increase regulators powers in an aligned manner

Option Two: ombudsman

We support option one above, although we do not support all the specific proposals included in the option. We do not consider that the options paper provides evidence that the proposals in paragraphs 613 and 614 are required.

Discussion questions

624. **Are there unjustified divergences between the powers and roles of the insolvency regulators?**

No, we do not consider there are unjustified divergences.

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, we consider that there may be some circumstances where this is appropriate.

626. **If ASIC was to be empowered, what types of decisions should ASIC be able to review?**

We have no recommendations for this proposal.

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?**

We have no recommendations for this proposal.

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?**

Whilst we support greater flexibility, we also recognise that it is necessary for the insolvency practitioner to be afforded appropriate natural justice and also confidentiality in any investigations.

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?**

We do not support this aspect of the registration process reforms as noted earlier. It is not appropriate for those under delegation from practitioners to be required to sit an exam. The responsibility for the engagement sits with those who are registered.

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 insolvency practitioner?**

We have no recommendations for this proposal.

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

As noted in our submission to the Senate Inquiry, we recommend that ASIC conduct a regular inspection program of registered liquidators. We recommend that ASIC assess the Inspector-General's program for suitability and adaptability to the corporate insolvency profession. The Institute could also provide guidance to ASIC in this regard.

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

We support the sharing of information with the IPA for disciplinary purposes in addition to the accounting bodies.

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 was consistency between personal and corporate insolvency. The conditions should be the subject of further consultation but could include training and/or reporting requirements.

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

We support the establishment of an external dispute resolution scheme. We note that the Institute has recently created a national mediation service to deal with appropriate commercial or legal disputes between an Institute member and another person, such as the member's client. This service is voluntary and confidential. In the Institute's experience our mediation service provides a cheaper, faster and more flexible way to find a solution to a dispute, compared to litigation.

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

  If established, it should be a statutory body.

- **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?**

  Yes, it would be most effective for the body to hear disputes from both corporate and personal insolvency. We do not consider it necessary for it to be independent.

- **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?**

We have no recommendations for this proposal

- **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?**

  We have no recommendations for this proposal

- **Should the body have an explicit educative role?**

  We have no recommendations for this proposal

- **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?**

  We have no recommendations for this proposal

- **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?**

  We have no recommendations for this proposal

10. SPECIFIC ISSUES FOR SMALL BUSINESS

Reform options

Option One: clarify regulatory obligations of ASIC and ITSA

Option Two: expand the scope of the AA Fund

Option Three: amend Corporations Act to address phoenix activity

We support option one, the clarification of the regulatory obligations of ASIC and ITSA to enable them to adopt a cooperative approach outlined in option two.

Further, we raised the issue of the separate duties of ASIC and the NSW Office of Fair Trading (OFT) in our submission to the Senate Inquiry. Whilst this options paper has considered a wide range of proposals and reforms in relation to the Insolvency Profession, we note that this issue has not been considered. A liquidator registered by ASIC may be involved in external administration of both companies and co-operatives (such as clubs). However, we note that whilst complaints against the liquidator relating to company administrations are dealt with by ASIC, those made relating to co-operative administrations are referred to the OFT. ASIC is responsible for the registration of liquidators and has the skills and experience to investigate these complex matters.

We recommend that ASIC's role is expanded to deal with all complaints (with the exception of fee disputes) against registered liquidators, regardless of whether the complaint relates to work performed on a company, co-operative or other type of body. This would also avoid any duplication of work by government bodies, where a registered liquidator is investigated both by ASIC and the OFT.

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?**

We have no specific recommendations regarding reforms or improvements. However, we support a review of the current MOU between ASIC and ITSA to identify if any changes can be made to improve the cooperation between the two bodies in cases of interconnected personal and corporate insolvencies.

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 support registered trustees notifying ASIC of any corporate law breaches which may come to their attention during the personal insolvency process. However, we do not consider that it should not be an explicit requirement. We consider that further consultation is needed to determine whether the AA Fund is the appropriate source.

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 need further information on this proposal to understand the benefits to registered liquidators of taking out such a loan, given it would need to repaid in the future. A loan which

provides immediate temporary funding for the practitioner whilst they work to realise assets or funds from the administration would be beneficial, as this would be repaid from by the liquidator from the recovered assets. We consider that further consultation is also needed to determine whether the AA Fund is the appropriate source of such a loan.

677. **Should section 305 of the Bankruptcy Act also be expanded to provide for the funding of investigations into corporate law breaches?**

As noted above, we support registered trustees notifying ASIC of any corporate law breaches which may come to their attention during the personal insolvency process. However, we do not consider that it should not be an explicit requirement.

678. **What steps might be taken to improve efficiency in relation to related personal and corporate insolvencies while appropriately addressing conflicts of interest?**

We have no recommendations for this proposal.

679. **What other amendments can be made to assist creditors and directors of small corporates to better engage with the corporate insolvency system?**

We have no recommendations for this proposal.

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 consider that there is a potential case for automatic disqualification of directors after a company failure. We recommend further research is done in relation to information on directors responsible for repeated failures and the outcomes of liquidations in these circumstances. This research would be used to determine the appropriate thresholds, periods and repeats requested in the question. Further, in the interests of natural justice, we recommend that if a director is identified through this process, the disqualification be preceded by a requirement for the director to 'show cause' why they should not be disqualified.

681. **Should a registered liquidator be able to assign actions which vest personally in the liquidator? If so, should a registered trustee be likewise able to assign rights of action?**

We have no recommendations for this proposal.

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?**

We don't consider that automatic disqualification is appropriate, however we would expect this to be investigated and in certain circumstances this could result in disqualification. In the interests of natural justice, we recommend that if a director is identified through this process, the disqualification be preceded by a requirement for the director to 'show cause' why they should not be disqualified.

11. 2010 CORPORATE INSOLVENCY REFORM PACKAGE

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?**

We consider that the earlier reforms remain appropriate and no further review or alignment is required.

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)?**

We consider that the difference noted in paragraph 692 could be amended in the bankruptcy act to enable the Inspector General to take possession and transfer books in the event of a vacancy.

APPENDIX 2 - INSTITUTE DISCIPLINARY PROCEDURES

Professional Conduct function

The Institute has an obligation to ensure all members provide professional services befitting the Chartered Accountants designation. In alignment with the regulatory framework and the Accounting Professional & Ethical Standards Board (outlined below), the Institute's by-laws and standards demand the highest ethical, technical and professional standards of conduct and performance.

Professional Conduct is the Institute's disciplinary arm that enforces these standards. It protects the integrity of the Chartered Accountants designation by investigating complaints and other issues relating to members' conduct. Where appropriate, matters are referred to the Professional Conduct Tribunal for determination, and the imposition of sanctions against those who breach the standards. It is necessary for the Institute to call members to account when issues of concern arise, in order to protect its own reputation and that of its members.

The approach of the Professional Conduct process is the protection of public interest and the reputation of the Institute, rather than to punish individual members.

The Institute is not a statutory authority, regulatory body, or a court of law. The Institute does not have legal power to order the payment of compensation or any other remedy seeking redress on behalf of the community, nor to punish offenders other than through membership-related sanctions.

Civil and criminal sanctions are the preserve of the regulators and the courts, which have wider powers, such as subpoenaing witnesses, compelling production of written evidence and providing financial compensation. The Institute investigates members who are the subject of adverse decisions by regulators and the courts, irrespective of whether a complaint has been lodged with the Institute.

Based on legal advice, the Institute's disciplinary process must not commence until the regulatory and court processes have been finalised. Following initial investigation, relevant cases are referred to the Professional Conduct Tribunal for determination.

The Institute's Professional Conduct function is a robust, transparent and integrated process, which delivers appropriate enforcement of standards, for the benefit of the general public and key stakeholders. Retaining respect and relevance in the eyes of Chartered Accountants is imperative to the Professional Conduct process. As always, the Institute strives to adhere strictly to the principles of natural justice, the Institute's by-laws and the law itself.

Regulatory framework in Australia

There is no single body responsible for regulating the accounting profession in Australia. The bodies that are involved in the regulation of the various arms of the profession, and other activities in which accountants may be engaged, are outlined in the following table.

Regulatory body	Who they regulate
Australian Securities and Investments Commission (ASIC)	> Auditors and liquidators – through the Companies Auditors and Liquidators Disciplinary Board (CALDB) > Financial planners > Company directors
Tax Practitioners Board	> Tax practitioners
Australian Prudential Regulation Authority (APRA)	> Auditors/trustees of superannuation funds > Directors and senior managers of insurance companies
Insolvency Trustee Service Australia (ITSA)	> Trustees in bankruptcy

The co-regulatory framework

Ethics is fundamental to the accountability of the profession and its mandate to self-regulate within the broader co-regulatory regime in Australia. The co-regulatory environment comprises the regulators, standard-setting bodies and the three professional accounting bodies; the Institute, CPA Australia and the Institute of Public Accountants.

Independent, national standard-setting bodies set benchmarks for members in terms of their required levels of technical skill and operation, as well as their professional conduct.

Leading with the code of ethics – *APES110 Code of Ethics for Professional Accountants* – the overarching professional standards are set by the Accounting Professional & Ethical Standards Board (APESB). In 2011, the APESB reissued APES 110 incorporating amendments to the international standard, *Code of Ethics for Professional Accountants,* issued by the International Ethics Standards Board for Accountants (IESBA). The purpose was to realign the standards after revisions to the IESBA code in 2009.

The code of ethics is important because the heart of the Chartered Accounting designation is a responsibility to act in the public interest. This is akin to a social contract that pledges ethical practice, underpinned by the principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.

The code of ethics is one of the standards and regulations that contain the mandatory ethical and professional requirements of all members of the Institute. These professional standards also require members to conform to additional technical standards set by the Australian Accounting Standards Board and the Auditing and Assurance Standards Board.

As with the technical standard-setting bodies, the Institute engages with the APESB and makes submissions on the development and review of standards, to ensure they align with best practice, relevant global standards and regulatory developments.

Professional Conduct Tribunal

The Institute's disciplinary process is fair, rigorous and independent. Serious breaches, including ethical breaches, of the Institute's by-laws and regulations are subject to independent hearings by the Professional Conduct Tribunal. If the member against whom a finding has been made, or the Institute President, is dissatisfied with the decision, he/she can appeal to a separate Appeal Tribunal.

Tribunal hearing outcomes are published in the printed and online versions of the Institute's *Charter* magazine, and in the Professional Conduct section of the Institute website. This helps educate other members, as well as demonstrating that the disciplinary process is transparent. In significant cases, the Tribunals may also publish reasons for their decisions.

Both Tribunals must meet strict professional guidelines when hearing cases, including a Code of Conduct. Under the Institute's by-laws, Tribunal members, who are appointed by the Board, comprise both senior members of the Institute and non-members to represent the public interest.

Institute members appointed to serve on the Tribunals represent all aspects of the profession, including large, medium and small firms, and members in finance, business and academia. When a panel is selected to hear an individual case involving technical issues, care is taken to ensure that at least one panel member has expertise in that particular area of practice or specialisation. Lay representatives were introduced around 20 years ago and come from a wide variety of business and professional backgrounds, including lawyers, company directors, stockbrokers and academics.

Range of Professional Conduct Tribunal sanctions

Sanctions are designed to reflect the impact of the member's actions on the reputation of the Institute and its members, rather than to punish the individual member. They are also determined by the facts of a particular case. The Professional Conduct Tribunal may impose one or more of a range of sanctions, including:

> Exclusion from membership of the Institute (removing the right to be a Chartered Accountant), which is the ultimate sanction. This is appropriate if the member has demonstrated that he/she is no longer fit and proper to be a Chartered Accountant and that continued membership would bring discredit on all other members and the Institute

> Cancellation of membership for a period of up to five years

> Withdrawal of the member's right to engage in public practice

> Imposition of fines of up to $100,000

> Reprimands and severe reprimands

> Imposition of other sanctions, such as remedial training or a targeted 'quality review' of the member's practice, focusing on the issue that gave rise to the disciplinary action.

The Institute's role

Under the Australian professional and regulatory framework any individual can provide accountancy services. A licence is required from a regulatory body to provide specific services, such as company audits or acting as a tax agent, but a professional membership is not mandatory.

If a member is excluded from membership of the Institute of Chartered Accountants in Australia, that individual can no longer use the Chartered Accountants designation, but can continue to provide accountancy services. Only action by the Australian Securities and Investment Commission

(ASIC) or the Tax Practitioners Board, which cancels their registration, will prevent individuals from practicing as company auditors, liquidators, or tax agents.

The Institute investigates members who are the subject of adverse decisions by regulators and the courts, irrespective of whether anyone has lodged a complaint with the Institute. Given the Institute is not a statutory authority, regulatory body, or a court of law, its policy regarding the timing of Professional Conduct investigations is based on independent legal advice. That is, the Institute awaits the completion of any investigation by a regulator, statutory body or commission, and any subsequent disciplinary or legal action, before taking disciplinary action itself.

The Institute does not have legal power to order the payment of compensation or any other remedy seeking redress on behalf of the community, nor to punish offenders other than through membership-related sanctions.

Professional Conduct co-operation and review

Within the co-regulatory environment, the Institute increasingly works with regulators and other stakeholders to uphold members' legal and professional requirements.

Compliance with the Institute's by-laws and technical and professional standards is extremely important for all members.

The courts, the Companies Auditors and Liquidators Disciplinary Board (CALDB) and the Institute all play a role in enforcing the spirit and the letter of *APES 110 Code of Ethics for Professional Accountants* and other standards issued by the APESB.

Co-operation and communication with regulators and other stakeholders continues to improve. The Institute regularly meets with ASIC, the Financial Reporting Council (FRC), the ATO and other bodies in relation to improving the co-regulatory framework and facilitating understanding of the inter-dependency between the regulators' and the Institute's disciplinary processes.

APPENDIX 3 - The Institute's Quality Review Program

You can read more about our quality review work at ***charteredaccountants.com.au/qualityreview***

Role of the Quality Review Program

The Australian accounting profession exists within a co-regulatory environment. This means the Institute works with other regulatory bodies to regulate and govern the work of Chartered Accountants in practice. The Program is a key feature of this co-regulatory environment, maintaining quality within the profession and retaining the Institute's position as a leading professional accounting body.

The Program's role is to assess whether our members in practice have implemented appropriate quality control policies and procedures in their accounting practices. The appropriateness of the opinions issued, or the advice provided, by members is not assessed during this process. By identifying any areas where quality control policies and procedures are not appropriate to maintain compliance with standards and legal requirements, we work with individual practices to remediate problem areas. Importantly, we also use knowledge gained from this process to promote continuous improvement throughout the accounting profession.

In the interests of transparency we report our findings to our members, the regulators and standard setters that we work with, and the general public. While individual practices are not identified, the trends, issues and results of reviews are summarised and reported on.

The Institute takes the view that non-compliance is preventable and works in three ways to promote continuous improvement:

- We work closely with members to remediate their policies and procedures
- We analyse review results in detail to direct Institute resources and services where they are most needed
- We use the results and issues arising from the Program to inform our advocacy with regulators.

The Program has been recognised as fulfilling the Institute's obligations under professional standards legislation in respect of the limitation of liability schemes. As part of these schemes' conditions, the Institute undertakes to monitor and improve the standards of professional work undertaken by members. As a result practitioners have been granted limited liability under professional indemnity insurance, subject to certain conditions.

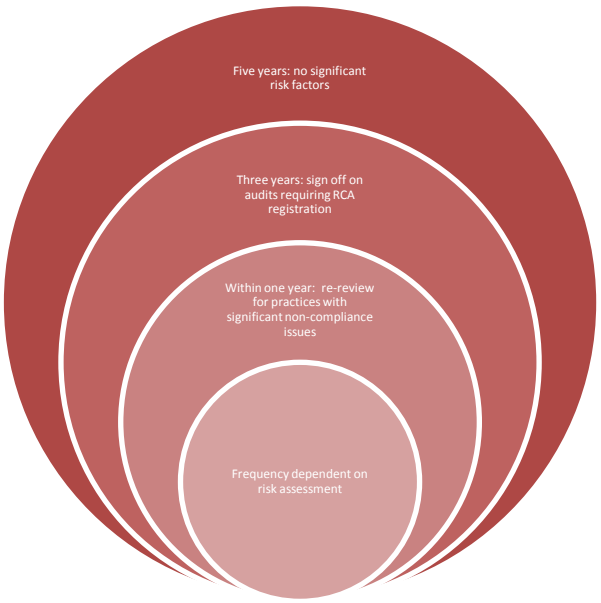
How are we evolving the Program?

As the Program matures, it needs to continue to develop to add value to practices and retain its world best practice status. This is imperative to maintain the trust and confidence of members and their clients, regulators and other stakeholders. In 2010, we released a thought leadership paper *Quality Review: past, present and future* outlining the Program's direction within our fundamental objective of adding value to reviews while minimising duplication. We have now refined our thinking and are implementing an innovative review approach for the major firms, and enhancing the Program's approach to the review of financial planning services and insolvency services.

Chartered Accountants who are liquidators and administrators are typically also members of the Insolvency Practitioners Association of Australia. To review these members effectively, the Institute and the IPA have committed to work cooperatively. Reviews will be conducted by specialist insolvency reviewers under the auspices of the Institute's Program, with technical input from the IPA. These reviews will be accepted by both bodies as satisfying the professional obligations of each body.

Who is reviewed?

The Program is a risk based model, both in the timing of reviews for practices and in the type of services reviewed within a practice.



Our Program aims to review practices at least once every five years. In most cases, this involves a reviewer visiting the practice and examining the practice's manuals and workpapers. A limited number of small practices are eligible for a self assessment review rather than a reviewer visit.

We aim to review practices that sign-off on audits requiring a registered company auditor (RCA) registration at least once every three rather than five years. Monitoring RCAs every three years was introduced to reflect the higher level of public accountability incumbent in these audits.

If significant non-compliance issues are revealed during a review of any type, the practice is reviewed within one year to ensure remedial action has been implemented by the practice.

Selection for a quality review is in no way a reflection on a practice; all practices are selected for a review. New practices are selected randomly for a first review with subsequent reviews every three or five years.

What happens in a quality review?

During a quality review, an Institute appointed reviewer visits a practice. He or she reviews the quality control policies and procedures that the practice has established by considering the practice's quality control system and examining how this is applied to individual engagements. This is achieved by covering the following elements of quality control, as set out in *APES 320: Quality Control for Firms* and *ASQC 1: Quality Control for Firms that Perform Audits and Reviews of Financial Reports and Other Financial Information, and Other Assurance Engagements*:

- Leadership responsibilities for quality within the practice
- Ethical requirements, including compliance with *APES 110: Code of Ethics for Professional Accountants*
- Acceptance and continuance of client relationships and specific engagements

- Human resources
- Engagement performance, including compliance with relevant standards and/or legislation
- Monitoring.

Reviewers do this by:

- Examining the practice's manuals, working papers and other documents to evaluate adherence to professional standards and regulatory requirements
- Selecting a cross section of recently completed engagement files to assess whether quality control policies and procedures are being implemented. Reviewers do not assess the appropriateness of the opinions issued, or the advice provided, by members.

In relation to insolvency engagements we assess whether the practice's quality control policies and procedures are being implemented in accordance with *APES 320* and *APES 330: Insolvency Services* (effective for insolvency services commencing on or after 1 April 2010).

Quality reviewers

All reviewers are experienced Chartered Accountants who work, or have worked, in public practice. They are selected because of their professional reputation and practice experience, and their expertise and experience is matched as closely as possible to the practice under review to enhance the efficiency and effectiveness of the review. Reviewers are appointed by the Institute with the consent of the practice being reviewed.

Limitations of the Quality Review Program

There are a number of limitations:

- For members in practice, and eligible for a review, a review is a mandatory requirement of their Institute membership. A review is conducted on a professional basis. It is not an investigation, as the Institute does not have legal power to seek information
- Our members provide us with information as to who their clients are. We cross reference this information to publicly available information for auditors of public listed companies and to ASIC Annual Statements for *Corporations Act* audits. For auditors of superannuation funds, the government has recently announced the establishment of a register, which we will refer to once established. For non-audit clients we are reliant on information from the practice as this information is not publicly available.
- Prior to reviewing a client's file, the practice is required to obtain written permission from the client. This is due to the duty of confidentiality owed by our members to their clients and we do not have the legal power to access information without the client's written consent. Accordingly, the practice is aware of the files that the reviewer will review prior to client consent having been obtained and the files becoming available for review. We encourage members to seek permission from their clients in the initial terms of engagement.

Disclaimer

The Quality Review Program is not an audit of the practice or files of any members of the Institute of Chartered Accountants in Australia. By conducting the Quality Review Program and reviewing particular members in the course of the Quality Review Program, the Institute is not certifying or representing that the work done or the opinions given by the member generally, or for particular clients or on particular files, is correct or of a high or any particular standard. The Institute expressly disclaims all liability for any loss or damage arising from any reliance upon the fact that the Institute conducts the Quality Review Program or has reviewed a particular member in the course of the Quality Review Program, or upon any annual reports, overviews, reports on particular members or practices, or other materials produced by the Institute regarding or in connection with the Quality Review Program.