Submission

Options Paper

A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia

by

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Glossary

AAT	the Administrative Appeals Tribunal
ASIC	the Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASIC Regulations	*Australian Securities and Investments Commission Regulations 2001*
bankruptcy	refers to the personal insolvency liquidation proceedings only
Bankruptcy Act	*Bankruptcy Act 1966*
Bankruptcy Regulations	*Bankruptcy Regulations 1996*
CALDB	Companies Auditors and Liquidators Disciplinary Board
COI	committee of inspection or committee of creditors
Controlling Trustee	if a debtor wishes to propose a personal insolvency agreement they must first appoint a controlling trustee under section 188 of the Bankruptcy Act. A controlling trustee investigates the debtor's affairs and convenes a meeting of their creditors
Corporations Act	*Corporations Act 2001*
corporations legislation	the Corporations Act, Corporations Regulations, ASIC Act, and ASIC Regulations
Corporations Regulations	*Corporations Regulations 2001*
fiduciary duties	registered liquidators and registered trustees are required to comply not only with their statutory duties, but also with their fiduciary duties under the common law. At common law, a trustee must: • act justly, with a high duty of care, reasonable prudence and diligence, demonstrating competence of a high order, honesty, independence and impartiality to a standard that commands and retains the confidence of the Court, of the creditors, the bankrupt and the community; • have regard to the interests of the creditors, the bankrupt and the community; • not act in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the interests of the creditors or without giving a real

	or genuine consideration to the exercise of the discretion; and • not have, or appear to have, a conflict between the interests of the practitioner and his or her duty
IPA	Insolvency Practitioners Association of Australia
IPA Code	Code of Professional Practice issued by the IPA
Harmer Report	the *General Insolvency Inquiry*, Report Number 45, completed by the Australian Law Reform Commission, in 1988
insolvency	except where the context otherwise provides, both personal and corporate insolvency
insolvency practitioner	collective term for both registered liquidators and registered trustees
ITSA	the Insolvency and Trustee Service Australia
Official Trustee	Official Trustee in Bankruptcy**.** The Official Trustee operates as the Government trustee in bankruptcy. In practice it administers the vast majority of bankrupt estates (the remainder are administered by registered trustees)
Options Paper	Options paper: a modernisation and harmonisation of the regulatory framework applying to Insolvency practitioners in Australia, Australian Government, June 2011
penalty unit	A term measuring the amount of a fine that may be imposed upon conviction of an offence. Currently one penalty unit is $110
Personal Insolvency Agreement	A personal insolvency agreement is a voluntary, statutory alternative to bankruptcy which is dealt with in Part X of the Bankruptcy Act
PJC Report	the *Corporate Insolvency Laws: A Stocktake*, completed by the Parliamentary Joint Committee on Corporations and Financial Services, in June 2004
registered liquidator	a natural person who is registered with ASIC to undertake the external administration of corporate entities
registered trustee	a registered trustee is a private practitioner who administers bankruptcies
Senate Committee	the Senate Economics References Committee
Senate Committee Inquiry	Inquiry initiated by the Senate Economics References Committee into 'the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business'
Senate Committee's	*The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, Senate Economics References

report	Committee, September 2010
TPC Report	the *Trade Practices Commission: Study of the Professions*, completed by the Trade Practices Commission, in 1992
Working Party Report	the *Report of the Working Party to Review the Regulation of Corporate Insolvency Practitioners* completed in 1997

Nature of Submission

This submission represents my personal views and does not purport to represent the views of RSM Bird Cameron Partners.

General Comments

EXISTING REGULATORY FRAMEWORK

The current regulatory framework applying to insolvency practitioners is not broken. A gap exists between the expectations of some stakeholders concerning the regulatory framework applicable to insolvency practitioners, the duties and responsibilities of insolvency practitioners and the costs of performing these duties and responsibilities.

This expectation gap has been highlighted as a result of the actions of a rogue insolvency practitioner. The actions of the rogue insolvency practitioner have been used by some to taint the reputation and standing of all insolvency practitioners and the regulators of insolvency practitioners. While some criticism may be warranted in regard to the timeliness of responses by the regulators to the complaints made against the rogue practitioner, ultimately, the existing regulatory regime dealt with the complaints made.

In many cases, complaints made against insolvency practitioners are the result of a lack of understanding of the insolvency process by the complainant. In some cases the complaint is made in an effort to exert pressure on the insolvency professional to modify his or her activities in a particular administration. In a small number of cases the complaint against the insolvency practitioner results in a finding that the insolvency practitioner has been engaged in wrong doing.

The existing regulatory regime works. Care should be exercised in considering imposing additional duties and obligations on insolvency practitioners. The additional duties and obligations must be balanced against the cost of compliance with these additional duties and obligations. The costs of monitoring compliance by the regulators should also be considered.

REMUNERATION

I note the claims in the Options paper of the community perception that the level of remuneration claimed by registered liquidators in a number of instances has been disproportionate to the funds available to creditors. I also note the reported concerns over alleged overcharging and over servicing contained in some submissions received by the Senate Committee.

Insolvency practitioners are already subject to significant scrutiny of their claims for remuneration from the assets of the estate under existing legislative provisions. The IPA Code requires detailed reporting and disclosure of activities performed and to be performed when approval of remuneration is sought by an insolvency practitioner. The IPA Code deals with the concerns raised in the Options paper regarding disbursements. The IPA Code also provides for capping of future remuneration.

The concerns of aggrieved stakeholders are likely to be capable of being addressed through education concerning the duties and responsibilities of insolvency practitioners. Remuneration is unlikely to have any direct relationship with the funds available for creditors. Regular and informed users of insolvency services offered little or no criticism of the remuneration of insolvency professionals to the Senate Committee.

The hourly charge out rates of insolvency professionals and their staff do not vary materially from the hourly charge out rates of other professionals with similar qualifications. An insolvency practitioner is required to maintain a team of qualified staff in order to be able to demonstrate the capability and resources to accept appointments as and when required. These staff costs, along with other operating costs of an insolvency practice must be recovered in order for the insolvency practitioner to be able to conduct the administrations to which the insolvency practitioner has been appointed. Insolvency practitioners have little or no control over the timing and nature of appointments made by the Courts and limited control over the timing and nature of appointments made by directors and secured creditors.

Increased disclosure will result in increased costs. This tension must be addressed in any reforms proposed regarding the approval remuneration of insolvency professionals.

REMOVAL AND REPLACEMENT OF INSOLVENCY PRACTITIONERS

Creditors should be empowered to replace incumbent insolvency practitioners if confidence is lost in the insolvency practitioner. Empowering creditors to replace the incumbent insolvency practitioner will result in additional costs as the incoming liquidator will need to become familiar with the affairs of company.

The consideration of the replacement of an incumbent liquidator should be undertaken in a meeting convened by the incumbent liquidator. Subsection 73(5) of the Bankruptcy Act should be considered to provide for voting by creditors by written notice.

A majority in number and value should be required to pass a resolution of this nature.

The incoming insolvency practitioner should be required to put to creditors any resolution sought by the former insolvency practitioner for remuneration. A lien should be recognised over the assets under the control of former insolvency practitioner for remuneration and outlays. The incoming insolvency practitioner should recognise any lien claimed by the former insolvency practitioner. The lien should be capable of being disposed of if wrongdoing or negligence is established.

CONTROLLING THE DIRECTION OF THE EXTERNAL ADMINISTRATION

Creditors should not be empowered to direct an insolvency practitioner to act or not act in a certain way. The granting to creditors of this power will undermine the integrity of the insolvency process.

If it is decided to allow creditors to control the direction of the winding up, this power should be limited to prevent abuse of the process and should be subject to review by the Court on application of the insolvency practitioner.

A special resolution should be required to pass a direction of this type.

COMMUNICATIONS AND MONITORING

Creditors representing 25% or greater in value of creditor claims should be entitled to require the insolvency practitioner to convene a meeting of creditors the cost of which should be borne from the administration.

Circulating resolutions, voting by written notice (see subsection 73(5) of the Bankruptcy Act) and resolutions without meetings (see section 64ZBA of the Bankruptcy Act) should be considered to reduce

the costs associated with the convening and conduct of creditor meetings and meetings of committees of inspection.

Communication with creditors should be permitted via access to the insolvency practitioners web page and electronic communication should be facilitated by the legislation.

REGISTRATION PROCESS FOR INSOLVENCY PRACTITIONERS

An MBA should not be recognised as an alternative to the current accounting prerequisites required for registration.

Completion of an approved post graduate insolvency course should be a prerequisite for registration.

Applicants should be interviewed by a panel as part of the registration process.

Registration should be renewed every three years and the applicant should demonstrate compliance with continuing professional education requirements and maintenance of appropriate insurance whilst previously registered.

A minimum of 5 years experience in the conduct of insolvency administrations on a full time basis over the past 10 years should be a prerequisite for registration. Continuing experience should be a prerequisite for renewal of registration.

General Submissions

A Single Regulator

The government has indicated it will not be accepting a recommendation made in the Senate Committee's report for the transfer of the corporate insolvency arm of ASIC to ITSA.

The option paper canvasses the desire of the Senate Committee for a greater harmonisation of the Regulatory Systems for Corporate and Personal Insolvency. The current divergence can be most effectively dealt with by the creation of a single regulator responsible for the registration and regulation of corporate and personal insolvency practitioners.

The new independent body should deal with the registration and regulation of both personal and corporate insolvency practitioners including the Official Receiver and/or Official Trustee. It should be capable of acting on referrals from ITSA, ASIC, the Court or a creditor. The body could assume responsibility for:

a) Registration or licensing of insolvency practitioners

b) Approval of insolvency education programs

c) Approval of insolvency practice standards

d) Monitoring performance of insolvency practitioners

e) Monitoring compliance with insolvency practice standards

f) Investigation of complaints against insolvency practitioners

g) Prosecution of disciplinary action against insolvency practitioners

h) Deregistration or removal of licence from insolvency practitioners

ASIC and ITSA should maintain responsibility for all other current activities relating to insolvency administrations.

Performance Standards for Insolvency Practitioners

Schedule 4A of the Bankruptcy Regulations contains performance standards for Trustees (including Controlling Trustees). Similar performance standards should be developed and incorporated into the Corporations Regulations for corporate insolvency practitioners.

IPA Code of Professional Practice ("the Code")

It is recognised that not all corporate and personal insolvency practitioners are members of the IPA. The IPA Code deals with independence, remuneration, communication with creditors and many other matters relating to the conduct of insolvency practice. The code has received positive judicial comment since its adoption by the IPA. The provisions of the IPA Code are mirrored in APES 330. The Code should be complied with by all corporate and personal insolvency practitioners in the conduct of their practices. The Code should be afforded statutory recognition in the Bankruptcy Regulations and the Company's Regulations. Accounting Standards issued by the professional accounting bodies were afforded recognition in a similar manner before the establishment of a statutory body responsible for their development was established.

An alternative would be to establish an independent body similar to the Financial Reporting Council who would be responsible for the development of insolvency practice standards.

Reducing the Cost of Insolvency Administrations

Coercive Notices

The level of compliance by company officers and other persons to the demands of liquidators for the delivery of company books and records and the preparation of reports as to affairs is very low in both voluntary and compulsory windings up. Costs are unnecessarily incurred in following up persons to provide this essential information. The Bankruptcy Act provides for the Official Receiver to obtain information and evidence from any person and a statement of affairs from the bankrupt via the issue of coercive notices pursuant to Section 77C and Section 77CA. Similar provisions are required for use by corporate insolvency practitioners to assist them in complying with their duties in a cost effective manner.

Review of the voidable transaction provisions

The recovery of voidable transactions of any kind is an extremely costly process. The provisions should be reviewed to reverse the onus of proof to the beneficiary of the voidable transaction and provide for additional rebuttable presumptions capable of being relied upon by the insolvency practitioner. Alternatively unfair preferences could be replaced by an expanded void disposition provision. Transactions occurring within 3 months of the commencement of the administration could be void. The cost of prosecuting the recovery of many transactions cannot be justified under the present regime.

Remove Personal Liability

Insolvency practitioners are liable for GST as representatives of incapacitated entities. Administrators pursuant to Subdivision A, Division 9 of Part 5.3A of the Corporations Act are made personally liable for certain debts incurred by the company in the conduct of the administration.

The imposition of personal liability on an administrator leads to increased costs in conducting administrations. Consideration could be given to imposing personal liability only in circumstances where administrators have not acted in a proper manner.

Personal liability for GST imposed on representatives of incapacitated entities is responsible for additional costs being borne by insolvency administrations in determining the extent of the liability often in the absence of co-operation from directors of insolvent companies or insolvent individuals.

An Insolvency Act?

The Senate Committee's report and the Options paper support the alignment of the provisions of the Corporations Act and the Bankruptcy Act. One method to overcome the current and future legislative divergence between the personal and corporate legislative insolvency regimes would be to establish a working party to consider the consolidation of the personal and corporate legislative insolvency regimes into one piece of legislation. The working party could also consider what if any responsibilities would be maintained by ASIC and ITSA for supervision of insolvency practitioners and whether a new body is required.

RESPONSES TO REFORM OPTIONS AND DISCUSSION QUESTIONS

STANDARDS FOR ENTRY INTO THE INSOLVENCY PROFESSION

Reform options

Option One: maintain the current standards for entry

Response: Supported

Option Two: expand the scope for insolvency entrants

Response: Not Supported

Option Three: alignment of standards for entry

Response: Supported

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?

Response: There should be no change made to the academic requirements for registration as either a Liquidator or Trustee. The role performed by an insolvency practitioner can be equated with that of a Chief Operating Officer or Chief Financial Officer of a corporation. The person is required to be numerate and be capable of preparing, interpreting and at times, compiling accounting information. In addition, the person is required to have commercial skills and be capable of recognising and seeking appropriate external assistance as and when the task requires. Most persons who seek to be registered as either Liquidators or Trustees have not only completed an undergraduate accounting degree. In most cases they have completed the professional entry requirements of either the Institute of Chartered Accountants in Australia or CPA Australia. The insolvency skills and commercial skills of insolvency practitioners are developed both through their academic training and their practical work experiences whilst under the supervision of experienced insolvency practitioners.

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?

Response: A Masters in Business Administration should not be recognised to meet the requirements for registration. The quality and content of Masters in Business Administration courses in Australia and overseas vary greatly and any attempt to recognise a Masters of Business Administration as an alternative to the legal and accounting requirements currently required will reduce the quality of insolvency practitioners.

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

Response: **Actual experience in insolvency administration is an essential requirement for registration as an insolvency practitioner. The skills required by an insolvency practitioner are developed under the supervision of experienced insolvency practitioners as an individual is promoted through the insolvency practice. I consider the existing requirements imposed by the Bankruptcy Act to be too generous and support the maintenance of ASIC's position which is for at least the equivalent of 5 years full time over the last 10 years of employment to be spent in insolvency practice**

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

Response: **No**

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

Response: **All persons seeking to be registered as either registered liquidators or registered trustees should have successfully completed an insolvency specific post graduate education program before applying for registration. The Insolvency Practitioners Association of Australia presently offer the insolvency education program which is run in conjunction with the Queensland University of Technology in Brisbane. The program requires the completion of 2 semesters of part time external study and attendance at 8 workshops conducted for the IPA by experienced insolvency practitioners. I would recommend this course as a pre-requisite for registration.**

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?

Response: **Registered liquidators should be either registered or not registered. The imposition of conditions upon registration unless those conditions are being imposed for disciplinary purposes should not be considered further.**

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?

Response: **Subject to the registration of insolvency practitioners continuing to be split between personal and corporate insolvency, the streamlining is likely to be only in regard to overlapping requirements for registration. The applicant should be required to satisfy the specific requirements for registration as either a registered liquidator or trustee. The applicant should have the appropriate skills and experience required to attain registration.**

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?

Response: Formal training may be required to assist practitioners to transition between the two professions in order to ensure that they fulfil their statutory obligations. However, the extent of this training and the extent of divergence between the personal insolvency and corporate insolvency regimes could be minimised through the efforts of both the Department of Attorney General and the Treasury to ensure that the respective legislation is as closely aligned as is possible.

REGISTRATION PROCESS FOR INSOLVENCY PRACTITIONERS

Reform options

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

Response: Supported

Option Two: adoption of committee structure in corporate insolvency

Response: Supported

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?

Response: Yes. An applicant seeking registration as a registered liquidator or registered trustee should be required to be interviewed as part of the registration process.

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?

Response: No. An application for registration should be required to have completed a specialist insolvency course of at least 2 semesters duration; however, the registering authority should be empowered to require an applicant to complete an examination if the interview panel have any reservations concerning the abilities of the applicant.

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

Response: Yes. The same standards should apply for registration as both a registered trustee and a registered liquidator.

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?

Response: The process should be the same.

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

Response: Yes. It is appropriate for the current fee for registration of liquidators to be increased.

149. Should the official liquidator role be maintained?

Response: The role of official liquidator would appear to all intents and purposes to have passed its used by date. There appears to be no good reason to maintain the role of official liquidator any longer. As the origins of the role of official liquidators lies in the delegation by the Court of its powers consideration will need to be given to whether changes are required to be made to the respective Court Rules.

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

Response: No comment.

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?

Response: The conditions that should be required to be met for renewal of registration are:

- **Continuous full time employment for at least 80% of the prescribed period in the administration of corporate and personal insolvencies.**
- **Evidence of completion of appropriate CPD activities.**
- **Evidence of the maintenance of appropriate professional indemnity and fidelity insurance throughout the period of previous registration.**

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?

Response: The renewal process should include a fee. The fee should be commiserate merely with the administrative costs for completing the renewal. The renewal fee should not be determined with reference to the numbers and natures of administrations to which a practitioner is appointed.

REMUNERATION FRAMEWORK FOR INSOLVENCY PRACTITIONERS

Reform options

Option One: status quo with potential conflicts of interest addressed

Response: Supported

Option Two: address the issue of disbursements

Response: Not supported. The issue is adequately dealt with in existing regulations and the IPA Code.

Option Three: aligned enhancements

Response: Not supported

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?

Response: Yes for the sake of uniformity a provision should be included in the Corporations Act that aligns with the Bankruptcy Act prohibition upon practitioners making any arrangements whereby a benefit is received either directly or indirectly in addition to remuneration to which he or she is entitled. However, the existing legislative provisions along with IPA Code prohibit a corporate insolvency practitioner from inappropriately classifying remuneration as disbursements. Yes if the legislatures intention is to prohibit charging disbursements with a profit component that may benefit, directly or indirectly, the practitioner it should be clearly specified.

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?

Response: The current requirements for the provision of information to creditors to assist them in assessing costs are appropriate. The IPA Code provides for a standard template for providing this information to creditors. The requirements should be aligned for corporate and personal insolvency.

1 Section 165 of the Bankruptcy Act.

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

Response: The concerns expressed in the report regarding the cross subsidisation are ill founded. Some cross subsidisation will always occur in conduct of business or the provision of services by the public sector. An example is ITSA. Internally estates with assets effectively subsidise the administration of estates with no assets. Further in estates administered by registered trustees a realisations charge is taken from the proceeds of asset realisations and interest earned on accounts maintained by the registered trustee are paid out as an interest charge to ITSA.

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

Response: The issue of disbursements is already dealt with in the IPA Code. Recognition of the IPA Code through the regulations of the Corporations Act and the Bankruptcy Act would assist in addressing any concerns about the inappropriate use of disbursements by insolvency practitioners.

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?

Response: The IPA Code requires that future remuneration be capped. It is not unreasonable to expect that an Insolvency Practitioner would go back to creditors in order to seek an increase on the initial remuneration cap if required. This commonly occurs already.

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?

Response: The proposal to incentivise challenges to the remuneration claims of insolvency practitioners is inappropriate. Creditors with concerns regarding the remuneration of the insolvency practitioner should seek to obtain the support of other creditors to oppose the remuneration sought by the insolvency practitioner. Alternatively, if still aggrieved by the outcome of the creditors meeting they should apply to the Court for a review of the insolvency practitioners remuneration.

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?

Response: A registered liquidator should not be entitled to exercise a casting vote on a motion regarding his/her remuneration. A resolution for the approval of remuneration should obtain both a majority in value and a majority in number to be validly passed.

COMMUNICATION AND MONITORING

Reform options

Option One: maintain the status quo

Response: Not supported

Option Two: align creditors' powers to effectively monitor administrations

Response: Supported. A request for a meeting should be by 25% or more of creditors by value.

Option Three: controlling the direction of a winding up

Response: Not supported

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?

Response: Any amendments to increase the provision of information to creditors by the insolvency practitioner will need to be balanced by the cost of preparing and providing this information. The provision of this information on demand will increase the costs of the administration. The provision of information through more frequent physical meetings of creditors will increase the costs of the administration. Circulating resolutions, voting by written notice (see subsection 73(5) of the Bankruptcy Act) and resolutions without meetings (see section 64ZBA of the Bankruptcy Act) should be considered to reduce the costs associated with the convening and conduct of creditor meetings and meetings of committees of inspection. Communication with creditors should be permitted via access to the insolvency practitioner's web page and electronic communication should be facilitated by the legislation.

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

Response: Yes

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

Response: Yes, Statutory prohibitions. Insolvency practitioners should be able to communicate with creditors through their website.

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?

Response: No.

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?

Response: If such a proposal were to be incorporated in both the Bankruptcy Act and the Corporations Law, 25% of creditors by value and at least 10% in number would be an appropriate threshold for both personal and corporate insolvency.

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?

Response: Annual meetings for creditors voluntary windings up could be removed however, a mandatory reporting requirement should be retained for the conclusion of a winding up in order to trigger the deregistration process.

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

Response: The role of the committee of inspection could be given greater prominence through the delegation by the Court to the committee of inspection of the approval of certain procedural matters.

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?

Response: The rules governing committee of inspections should be aligned between corporate and personal insolvency.

Committees of inspection should not be required to meet physically. Resolutions should be capable of being passed by either circulating resolution or resolutions without the holding of meetings.

Shareholders should not be represented on COIs formed as a result of the compulsory winding up in insolvency or a creditors voluntary winding up.

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?

Response: Creditors should not be able to make a binding resolution on a liquidator. The capacity of the liquidator to properly conduct the administration will be effected and costs of administrations may increase. If it is determined that creditors should be given this power the liquidator should be empowered to apply to the Court to have the resolution overturned.

FUNDS HANDLING AND RECORD KEEPING

Reform options

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

Response: Not supported.

Option Two: alignment with enhancements

Response: Supported

Option Three: increase penalties

Response: Not supported

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?

Response: The rules governing record keeping, accounting, audits and funds handling in corporate and personal insolvencies should be aligned. Separate accounts should be maintained for each administration if the funds deposited in the account reach a prescribed threshold level.

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

Response: Annual reporting on the anniversary date of the appointment should be adopted.

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?

Response: The audit provisions should be aligned.

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?

Response: This option is not supported. A Court Order should be required.

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

Response: Yes. A maximum of one month unless an extension to the Order is obtained.

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?

Response: The existing penalties are adequate. Proactive monitoring of compliance by the appropriate regulator is required.

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

Response: Increasing penalties is unlikely to make practitioners pay greater attention to the requirements. Active monitoring of practitioners should be undertaken by the appropriate regulator.

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

Response: Additional civil obligations and criminal offences should only be considered in circumstances where the practitioner is found to have systemically failed to comply with his/her obligations and or failed to respond to demands from the appropriate regulator to remedy this position. The non-compliance would need to be both wilful and systematic.

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

Response: Where the inaccuracies are the result of wilful action or inaction by the insolvency practitioner or the systematic noncompliance with proper procedures.

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?

Response: Where the late lodgement, non-lodgement or false lodgement of accounts is the result of wilful action or inaction by the insolvency practitioner or the systematic noncompliance with proper procedures.

INSURANCE REQUIREMENTS FOR INSOLVENCY PRACTITIONERS

Reform options

Option One: increasing severity of penalties for breach

Response: Not supported

Option Two: required notification of lapsed insurance policies

Response: Supported

Option Three: establishment of a fidelity fund

Response: Not supported

Option Four: mandated periodic checking of insurance cover

Response: Supported

Discussion questions

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

Response: Yes, the insurance requirements for liquidators and registered trustees should be aligned.

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?

Response: Whilst increasing penalties may have some impact on deterrence, increased supervision of insolvency practitioners monitoring compliance with this requirement by the appropriate regulator is more likely to have a stronger deterrence response.

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

Response: A fidelity fund should not be established.

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

Response: Option 4 is supported

DISCIPLINE AND DEREGISTRATION OF INSOLVENCY PRACTITIONERS

Reform options

Option One: enhanced status quo

Response: Not supported

Option Two: alignment of disciplinary frameworks for practitioners

Response: Supported

Option Three: enhance the powers of the Court

Response: Supported

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?

Response: I support the adoption of the committee's system and the abandonment of the CALDB's system for corporate insolvency practitioners.

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?

Response: Yes, I believe that aligning the disciplinary frameworks will provide for more consistent and improved outcomes for practitioners and other stakeholders.

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?

Response: No

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

Response: Yes, the statutory framework for the committee system currently in Bankruptcy Act should be replicated for the Corporations Act.

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

Response: Yes

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

Response: Yes

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

  Response: Yes, a time limit should be established for decision by the committee and it should be aligned to the current time limit for bankruptcy.

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?

  Response: Yes, if the CALDB is maintained, a statutory time frame should be provided for decisions by the CALDB.

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

  Response: The bankruptcy committee should be able to hear evidence from third parties.

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

  Response: The decisions of the board or the committee should be published after the completion of any review of the decision.

- 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?

  Response: Yes

- 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?

  Response: Yes

- 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'?

  Response: Yes, the Bankruptcy Act should be amended to provide ITSA with an expressed power to seek to deregister a registered trustee where the trustee is no longer "fit and proper".

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?

  Response: Any proposal to expand the powers of ASIC and ITSA to discipline insolvency practitioners directly should be carefully considered as these actions may have serious adverse consequences upon a practitioner and should be subject to review.

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

Response: The suggested amendments may breach considerations of natural justice in circumstances where a decision has not been made by the relevant disciplinary body or the insolvency practitioner is appealing the decision. Notwithstanding this, provisions of the type proposed are unlikely to be used very often and a court would consider all relevant matters when making a determination in respect to such an application.

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?

Response: The court should be given the power to direct a practitioner to stand aside but only in circumstances where the allegations have had a determination made in regard to them and any appeal process has been dealt with.

REMOVAL AND REPLACEMENT OF INSOLVENCY PRACTITIONERS

Reform options

Option One: enhanced status quo

Response: Supported

Option Two: alignment

Response: Supported

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?

Response: An initial meeting of creditors to consider the removal of a liquidator in a compulsory winding up should not be mandated. Creditors should be empowered to remove a liquidator, however, a liquidator should not be required to convene a meeting in a compulsory winding up for this purpose immediately upon his appointment.

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

- Should there be an exception for assetless administrations?

Response: Yes

- Should approval of the appointed registered liquidator be able to be obtained through a mail out?

Response: Yes

- 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?

Response: No, the consideration of the replacement of an incumbent liquidator should be undertaken in a meeting convened by the incumbent liquidator. Subsection 73(5) of the Bankruptcy Act should be considered to provide for voting by creditors by written notice. A majority in number and value should be required to pass a resolution of this nature.

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?

Response: Creditors in corporate insolvencies should generally be empowered to remove a registered liquidator. The casting vote should be removed for such resolutions and a majority in number and value should be required.

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

  Response: The incoming liquidator should be required to put any resolutions sought by his predecessor to creditors for consideration in respect to remuneration. The incoming liquidator should recognise any lien over the pool of funds or assets formerly subject to the former liquidator's control.

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

  Response: A trustee can be removed upon the passing of an ordinary resolution which is simply a majority in value of creditors attending the meeting. This threshold is perhaps too low in circumstances where an appointment may be contested.

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?

  Response: Yes, members in a members voluntary winding up should have the same right as creditors in a creditors voluntary winding up if creditors are empowered to remove the liquidator in a creditors voluntary winding up subsequent to the first meeting

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?

  Response: Yes. Consideration will need to be given to issues such as legal professional privilege, the extent of files that would need to be transferred to the incoming insolvency practitioner. Remuneration issues including access of outgoing insolvency practitioner to records to formulate remuneration reports and the right of the outgoing insolvency practitioner to exercise a lien over assets subject to their control in order to protect their remuneration entitlements.

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?

  Response: See response to previous discussion point. The incoming liquidator should be required to put any resolutions sought by his predecessor to creditors for consideration in respect to remuneration. The incoming liquidator should recognise any lien over the pool of funds or assets formerly subject to the former liquidator's control.

REGULATOR POWERS

Reform options

Option One: increase regulators powers in an aligned manner

Response: Supported

Option Two: ombudsman

Response: Supported

Discussion questions

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

Response: Yes

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?

Response: Yes, decisions of a similar type to that allowed under the Bankruptcy Act.

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

Response: The Bankruptcy Act provides for specific decisions of the trustee to be reviewed by ITSA. Decisions of a similar nature should be subject to review by ASIC.

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?

Response: Paid for by the party seeking the review if unsuccessful and from the administration if the application is successful.

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?

Response: Yes

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?

Response: No, unless subject to disciplinary proceedings and this forms part of the practitioners penalties. See comments regarding requirements for registration. Evidence of compliance with CPD requirements should be sought.

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?

Response: The relevant regulator could chair the meeting at which the removal of the insolvency practitioner is to be considered. Alternatively, the relevant regulator may review the result of the vote including proxies and proofs of debt.

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

Response: Yes. Since the decision in *Hall v Poolman* the provision has been subject to abuse. It is often used as a defensive strategy by defendants to legal proceedings initiated by liquidators.

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

Response: Yes

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?

Response: Yes, continuing processional development, insurance etc.

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

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

  Response: The new body 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?

  Response: The new body should be able to hear disputes in both personal and corporate insolvency and should be independent of both regulators.

- 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?

  Response: The body should have the powers to hear and deal with disputes, obtain information and records relevant to the complaint.

  The body should not be privately run but should be a statutory body.

- 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?

  Response: The body could be funded either by a fee on corporate incorporation, transfer of funding from ASIC or ITSA or an assets realisation charge or interest charge on corporate insolvency matters.

- Should the body have an explicit educative role?

  Response: The body should have an explicit educative role.

  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?

  Response: The body should not have the right to deal with systemic issues. The body should not have the right to commence its own investigations. It should only operate on a complaint basis.

- What types of disputes should the body be able to hear and deal with?

  Response: Complaints regarding the administration of estates that do not involve allegations of wilful improper conduct by insolvency practitioners.

- Should the body be able to review remuneration?

  Response: No. However it may be able to direct the matter to an assessor for determination.

- Should this be done through independent cost assessors?

  Response: Yes

SPECIFIC ISSUES FOR SMALL BUSINESS

Reform options

Option One: clarify regulatory obligations of ASIC and ITSA

Response: Supported

Option Two: expand the scope of the AA Fund

Response: Supported

Option Three: amend Corporations Act to address phoenix activity

Response: Supported

Discussion questions

674. Are any statutory reforms required to assist regulators to provide improved regulation in relation to interconnected personal and corporate insolvencies?

Response: Yes

Are improvements needed in relation to their capacity to share information and cooperate?

Response: Yes

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?

Response: Acting as director whilst a bankrupt

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?

Response: Yes, but non recourse if no assets realised.

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

Response: Yes, however, I am not aware of any significant funding being made under section 305 for some time.

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

Response: Expressly allowing an Insolvency Practitioner to act as both Trustee and Liquidator unless expressly conflicted. Enable appointment of special purpose trustee or liquidator by administrative process if conflict recognised.

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

680. Is there a case for automatic disqualification of directors after a company failure?

Response: Yes

If so, how many repeated failures should trigger disqualification?

Response: Three other than in a group.

Should there be a threshold for failures to trigger disqualification (for example, where less than 50 cents in a dollar are returned to creditors)?

Response: Yes where employee entitlements not paid in full, or the director has failed to complete a Report as to Affairs, or deliver up the Company's books and records.

Over what period must the failures occur?

Response: 5 Years.

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

Response: Yes

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?

Response: Yes