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The Manager
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The Treasury
Langton Cresent
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4th February 2012

Dear Sir/Madam

Please see attached my submission marked up in **BOLD BLUE** text as comments written over your Department's published Position paper titled – "A MODERNISATION AND HARMONISATION OF THE REGULATORY FRAMEWORK APPLYING TO INSOLVENCY PRACTITIONERS IN AUSTRALIA".

I take liberty to firstly state that I generally find the proposed reforms commendable. I do however believe that there has been insufficient attention paid to the lack of regulation of receiverships, especially those where the appointer of the receiver and manager is one of the major banks.

Another area that I hold concerns is the fact that very little has been stated in the position paper addressing the litany of regulatory failures that have been disclosed during recent a Court case wherein a rogue insolvency practitioner was tried and convicted on 19 criminal counts. No doubt Treasury is acutely aware that the many submissions made to the Senate inquiry in 2009/2010 made complaints in the dozens that ASIC and ITSA had failed in their respective duty to protect members of the public and small business from predatory conduct practiced by receivers, liquidators and trustees. I strongly believe that in order for the commendable proposals to have any real positive impact there also needs to be regulatory reform to ensure the regulators have teeth and that all those who choose to disobey the law and practice unlawful predatory conduct, will fear the consequences.

I have attached for your information a copy of a submission I made to the Senate Economics Reference Committee, inquiry titled – "Competition within the Australian banking sector". I have included this as it will provide you with a good background to my capacity and knowledge to make the comments that I have provided in respect to your position paper. The accessible links in the submission provide support for many of my claims articulated in my response to the position paper.

In respect to my reply to the position paper, my inserts generally follow highlighted text of the position paper that I believe marks the sections which have attracted my commentary.

Yours faithfully

D.L Johnston

Submission to the Senate Economics Committee

Inquiry into Competition within the Australian banking sector

The following submission is prepared by D. Lindsay Johnston, sole director of Agtion Consultancy Services Pty Ltd ("Agtion"), 14/10, 229 Macquarie Street, Sydney, NSW.

OVERVIEW

Agtion is a specialist consultancy practitioner involved in advising and assisting incorporated small businesses and individuals involved in disputes with financial institutions and insurance companies. The company has provided this service since 1999 and as a generalisation the company specialises in the agribusiness sector and its related downstream processing and distribution industries.

Agtion became involved in this specialist consultancy discipline as a result of it, and its associated companies being forced into so called "voluntary receivership" by a major bank in 1996. The companies and I commenced litigation after the companies were released from receivership in 1999. The legal battle against the bank continued until it was resolved in 2007. I am experienced in litigation(1) mainly due my need to appear and represent myself in Court, and from my practical experience obtained from working behind the scenes with lawyers in multiple client cases against banks. I offer the inquiry the benefit of my practical observations.

On 26 May 1997, a report prepared by the House of Representatives Standing Committee on Industry, Science and Technology was published. The report was titled "***Finding a Balance: Toward Fair Trading in Australia – Small Business Finance***"(2) ("the Fair Trading Report"). I made submissions to that Standing Committee inquiry that were derived from my experiences in the Courts and I articulated the difficulties that individuals, small business proprietors and company directors suffer when in that combative environment against the superior power and resources of a major bank at all levels of litigation or attempted alternate dispute resolution. My submission and many others to that inquiry made it succinctly clear to the Committee that mortgagors, and directors, shareholders and employees of mortgagors and guarantors of indebtedness to banks, faced the unenviable and at times impossible task of competing against the banks' depth and breadth of access to legal resources and their unlimited access to finance.

Regretfully the Government of the day failed to adopt many of the recommendations published in the Fair Trading Report. See - http://www.aph.gov.au/house/committee/isr/Fairtrad/report/CHAP5.PDF

1. Court Judgments: [2005] NSWCA 383; [2006] NSWCA 224; [2004] NSWSC 363; [2005] NSWSC 1360; [2006] NSWSC 1278.
2. House of Representatives Standing Committee on Industry, Science and Technology report.

SPECIFIC ISSUES

The terms of reference issued by the Inquiry that I have adopted for the purposes of this submission, will be as follows:

1. Any policies, practices and strategies that may enhance competition in banking, including legislative change;

2. the role and impact of past inquiries into the banking sector in promoting reform; and

3. any other related matter.

This submission will concentrate principally and firstly on the incapacity of individuals and small businesses to be competitive during dispute resolution processes and to outline some of the reasons for the banks' significant competitive advantage. I will also comment on the consequential damage that the national interest suffers, the potential and real damage to natural ecosystems and the environment and to the health of the Australian people, all caused by direct, indirect and even perhaps unintended consequences of unfair and uncompetitive practices arising from decisions made by financial institutions and the insolvency practitioners that the banks have appointed. I will recommend to the Inquiry the reforms that I believe are necessary to enable the weaker entity to be competitive at the formation of contract, during a disagreement in respect to terms of contract and should the disagreement be unable to be resolved by an alternative dispute resolution process, to place that weaker party in a position to rightfully and fairly put their case before the Courts on a competitive basis;

The second issue that I will offer my opinion on will be, the impacts of past inquiries that have been established in this Parliament and at the State level and the influences they have had on the banking sector;

The third issue is the usefulness of co-operatives, non-institutional lending and non-profit making financial institutions and their role in promoting competitiveness in the financial services sector; and

Fourthly the impact that the lack of competitiveness in respect to banking practices has on innovation and the commercial development of progressive and sustainable industrial practices.

POLICIES, PRACTICES AND STRATEGIES TO ENHANCE COMPETITION

Existing banking policies and practices promote anti-competitive and unfair conduct

Financial services are ubiquitous and available in many forms across the economy, but in nearly every instance whether an individual consumer of those services likes it or not, the consumer will invariably and in most cases unwittingly use the services of one of the major banking corporations at some time and will either directly or indirectly pay for that service. The market dominance, infiltration and influence over political and economic policy settings by the “big four banks” or the four pillars, as they have been described, has placed them in a position that they are each too big to be allowed to fail and although they are seen to be operating as independent corporations, the members of this oligopoly operate under a public-private-partnership that guarantees their prosperity and dominance. One only has to refer to the haste when the guarantee was announced during the turmoil of the GFC.

A major difficulty that all consumers face is the lack of control and influence with regard to their respective individual contractual outcome, and in the vast majority of cases the consumer does not understand the terms of their contract and simply act on “blind trust” that the final outcome will be favourable. Needless to say there are many instances where the consumer finds themselves in disagreement with their financial institution and it is only then that they realise that the banks’ interpretation of the contract was vastly more complex and onerous than how the consumer first understood. I regard the general lack of consumer education and knowledge as a major driver of anti-competitive conduct within the financial services sector.

Understandably the second tier banks, foreign banks and their subsidiaries, credit and charge card providers, and the credit unions and building societies (“the alternative financial services providers”) all conduct their business relationships with consumers along lines where they at least try to offer services that distinguish them as being different from the big four banks. However, the reality is that unless each of those competitors is able to conduct their business on a “level playing field”, as competitors to the big banks, they can only deliver a more personalised and sometimes marginally more cost effective service. The problem the competitors face is that they usually need to or are forced to utilise the services of the major banks and the costs associated with those transactions are either absorbed into their overhead costs or directly passed on to the individual consumer. Either way the consumer is paying a cost for a service over which they have no control.

It may be argued that the alternative financial services providers are more personal and compassionate in the way they deal with consumers. Although that appears to be true in most instances, and that is a good reason for consumers to deal with those institutions, the pricing that the alternatives can offer is still heavily influenced by the pricing and management conduct of the "big four".

Private lending is a small financial services instrument that is sometimes available to consumers. In order to make private lending safe and truly cost competitive there will need to be reform of the institutional mechanisms that regulate securities. There appears however, to be scope for growth for this type of service and the other alternatives if major reform can be implemented.

It is my experience that disputes consumers have with financial institutions arise from:

1. A disagreement over pricing and/or whether the pricing or alteration of the pricing is compliant with a relevant term or terms of the contract; and/or

2. the financial institution acting unilaterally and unreasonably without any objective assessment of the consumers' capacity to service the loan and for it to reduce a credit limit or vary the terms of a loan without either prior written notification or discussion with the consumer. Too often the consumer is told that is was, a "head office decision" or "change of policy", a done deal and the notes for the decision are confidentially hidden from the consumer in the file. There is also the abuse of process, of a reliance on legal professional privilege to deny consumers access to documents during legal proceedings; and/or

3. confusion over or misuse of a term of the contract (express or implied); and/or

4. personality clashes between bank officers and consumers. Sometimes these disputes escalate to the extent that the dominate party, the bank officer, engages in "bullying tactics" to bring the perceived "delinquent" customer into line.

In many of the cases that I have studied since the mid 1990s, the above outlined course of conduct seems to be common in most disputes. No doubt the changes that occur throughout the economic cycle have some influence on the way banks assess and perceive business performance, but it is inconceivable that the consistency of anti-competitive and unfair conduct by the banks does give rise to the suspicion that customers with good asset bases are being targeted for the purpose of profit exploitation. Essentially four practices seemingly occur as follows:

1. The borrower is offered a deal, sometimes with minimal security and on favourable terms to entice them to borrow more and invest in expansion or to refinance. This may be done at the instigation of either the bank or the consumer; and

2. At a time suitable to the bank, the suggestion is made that the bank requires further security or that its security needs to be reviewed and the consumer is threatened with the withdrawal of facilities if their co-operation is not forthcoming; and

3. After the consumer has provided security to the bank's satisfaction the bank will revise its pricing and demand a margin increase; and

4. Should the consumer resist the attempt by the bank to increase its margin, the bank will threaten to, or carry out enforcement of its securities.

Needless to say any unfair conduct of a bank has a very destabilising influence on the consumer and often the business is placed under external administration with devastating consequences. At this point the bank has created what I term "self fulfilling prophesies". The bank purposefully creates an issue that it escalates into a dispute and it then makes all the determinations to ensure that the borrower will not be able to refinance unless all of the bank's demands are met. In most instances refinancing or any form of exit is impossible in those circumstances. Consumers in general and small business consumers in particular, either out of ignorance or by the influence and at times the downright use of "bullying" tactics by banks, demand that the consumer will not utilise more than one financial services provider at any given time. I have seen instances of small business operators being threatened by bank managers and told to close an alternative account or suffer the consequence of the primary bank withdrawing its support and enforcing its securities. This type of anti-competitive behaviour by banks has the effect of making small business operators captive to the bank in respect to decision making and forces them to become price takers in respect to the bank's services and subsequently renders them unable to be entrepreneurial, as business should be. It follows that this anti-competitive conduct that restricts innovation must have a negative impact on national productivity.

Worse still, at times banks target whole industries or segments of industries and declare them off limits. Although I concede that a bank has a right, if not a prudential duty to ensure that it protects its depositors' funds, it cannot be allowed to use that requirement as an excuse to embark on unilateral enforcement action, to the detriment of the borrower. There exists an unfair imbalance.

Sadly in the agribusiness sector, if a consumer is in the wrong place at the wrong time the bank is likely to make assessments and then force its decisions onto the consumer. The problem is the way that the bank makes those assessments. All too often a decision will be made from data that is not specific to the consumer's business model and the banks disregard any objective information that may be provided by the consumer. Banks rely heavily on their own "panel advisors" who in turn, due to the banks' financial power, adopt models, based less on objectivity and the likely business performance, but the panel advisors act out of fear that they will be sued should anything go wrong. This is further evidence of the misuse of financial power and abuse of process and results in anti-competitive influences.

In a specific case, a progressive farmer was criticised by a bank for adopting soil carbon sequestration practices. The bank labeled the practice "junk science" and unviable, supposedly based on a report by an "expert" from the bank panel who favoured more conventional and exploitative farming practices. The bank did not believe that the new science and technology would be accepted as mainstream in the future. That farmer might have been ahead of his time but his career in agriculture was cut short by a misinformed decision made by the bank. The question is, can Australia afford to lose its best young and innovative minds from agribusiness and continue to allow banks to be unfair and anti-competitive in the manner that they deal with innovation?

Property valuation terms of reference for mortgage lending purposes are significantly influenced by the banks. Up to five different methods can be applied for valuation of the same property, with each valuation dependent on the terms of reference provided to the valuer. Values of mortgagors' properties for mortgage lending purposes are invariably lowered to the bottom of the possible range and the terms of reference that are adopted deviate from the principle set out in the legal authority *Spencer –v- Commonwealth*[(3)]. It appears that valuers acting conservatively under the influence of their bank appointers adopt a valuation based on a distressed sale outcome of the property being potentially sold as "mortgagee in possession" or by a bank appointed receiver.

3. Spencer –v- Commonwealth [190] HCA 82

Banks invariably use their own in-house valuers or a valuer appointed from their panel who, for the reasons enunciated above and acting on the banks instructions, under value mortgagors' properties. In this case the banks' anti-competitive behaviour is the misuse of restrictive trade mechanisms which deliver property valuation outcomes that protect the banks' strategic plans should there be a change in economic conditions generally, or should a consumer threaten to or actually commence legal action. It is just a further example of the misuse of market and financial power to act unfairly and in an anti-competitive manner to adversely influence, in this specific example, the property owner's right of equity of redemption.

I will conclude my summary of the problematic influences imposed by banks on the regional economies of the various districts that constitute rural and regional Australia by stating the fact that many Governments, local, state and federal have for many years expended significant allocations of taxpayer money to promote rural and regional development and targeted decentralisation schemes. Unfortunately as these commendable programmes were being rolled out, the banks, practicing their unfair and uncompetitive business practices, were undoing a lot of the good public sector work and continue to do so.

In my case, one of the businesses operated by the family company group was a stockfeed mill located in a regional city. The business had employed up to 22 people and was servicing a market from Southern Victoria to the New England district of New South Wales. As manager of the business I had chosen to target ruminant livestock producers as the main market, and in particular "drought feed" sales. The bank appointed receiver, immediately after his appointment, shut down the business, sacked all the employees and eventually sold the plant and equipment and other components of the operation on a "to be dismantled and removed at the purchasers' cost" basis. The business had taken twenty years to build and was still growing but was dismantled and sold for a fraction of its operational value. Needless to say, not only did that industry lose a competitor which had been successful and profitable for twenty years, the market place also lost a valuable supplier during the long succession of drought years that followed and the region where the stockfeed mill was based lost the benefit of that employment. The loss was all caused by a misconceived and unilateral decision by the bank acting without the benefit of a Court order or any other judicial determination.

In another case study, an enterprising dairy farming family wanting to add value to their produce, made application for approval to establish a processing factory on their farm. All approvals were granted and construction began.

The farm was unencumbered and the family applied for a loan from a subsidiary bank of one of the majors. Only a portion of the farm was mortgaged and the loan was freely granted. The business grew and eventually employed about 12 people in an isolated rural community and the manufactured product from the business was marketed across three states. The business had also received assistance from the State Government and the local council and it had been awarded for its excellence. I investigated the business and considered the operation to be successful in every respect. Despite the success of the business, the bank served a notice onto the business owners demanding repayment of the loan only a few months after it had made further advances against the original security. The business owners had refused the bank's demand for further security and they invited me to investigate their dispute. In this case I discovered that the bank's security documentation was defective and unenforceable and without any justification whatsoever the bank then used its financial power to "bully" the customer, refusing to negotiate or discuss the matter unless it was done on a lawyer to lawyer basis. Needless to say, the matter had developed into a very bitter dispute by that stage and a great deal of personal animosity existed between the local bank manager and the asset manager for the bank, and the business owners. The bank used that personal animosity issue as its excuse to refuse to negotiate with the customer. The matter ended up in the Courts with the business owners conducting their own defence and the bank succeeded in obtaining judgment on the debt, but failed in its bid for a possession order. The business owners, who had done nothing wrong, suffered health problems, the business suffered financially due to the unwarranted distraction and for family and health reasons the owners discontinued their battle in the Courts. Eventually, after the bank was subjected to a barrage of adverse publicity surrounding its misconduct, the family was able to directly negotiate with the bank and obtain an acceptable settlement. By the time settlement was achieved however, the business had closed, the farm had been sold and the employees in a small rural community had all lost their jobs. I regard this case study as a classic example that demonstrates how a bank, by abusing its financial power as a litigant, can corrupt and abuse court processes and waste the courts time at the expense of the taxpayer. Similar accounts have been told by numerous other former business owners and managers located all over Australia(4) .

4. ABC Four Corners – Banks Behaving Badly – 10 March 1997

In respect to existing banking policies and practices, the macro reform issue is more difficult to analyse and dissect. In order to deliver tangible benefits to consumers one needs to understand that modern banking includes the complexity of balancing multiple trading activities, some of which are speculative, with traditional banking practices. The banks are not just in the business of banking any longer, but now into wealth management, currency trading, share broking and insurance of all kinds. With this in mind together with the fact that many directors of public companies hold multiple appointments, and that these positions as directors and CEOs are interchangeable across corporate boundaries, has made anything to do with financial services in Australia, if not the World, so complex that no one dare touch it, or suffer the consequences. Recently a CEO of a bank, in response to allegations made by consumer groups in respect to profiteering or price gouging, said that he was running a business for profit, that the bank was not a welfare provider and the public was reminded that their superannuation funds have a significant stake the bank's shareholding. These are my words, but I believe those words accurately summarise the sentiment that the bank CEO made in his statements recorded in the public domain. Recently another CEO of a bank(5) publically criticised a proposal by a member of the House of Representatives to regulate fees, to the effect that the members' proposal was a "*slippery slope*" and that it would hurt customers' access to ATMs, particularly in marginal areas. I assume that he meant the outer suburban, regional and rural areas. The same CEO was also reported to say *"It's very easy to give away someone else's property. This sort of stuff we've seen in eastern [bloc] countries prior to the fall of the Iron Curtain, when people's property rights were abrogated. People should start to think, where does this lead next?"* Maybe we do have reason to fear something, perhaps it is the ever increasing complexity of international and trans-national banking with the participants' reliance on CDOs and the like that has corrupted the current banking model in such a way that it has the potential to impoverish entire nations if the avarice of banks and their senior executives and officers is not controlled, or at least properly regulated. The legal authorities that cite judgments determined in the courts in respect to that CEO's bank, suggest that it has had a long history of offending the property rights of its customers. If that CEO meant that the bank should be allowed to operate from a privileged position and not be subjected to scrutiny, then truly it is likely that the Australian big banks are out of control and it must be that they do adhere to the belief, that they are a law unto themselves and that at least their senior management believe they should be immune from the moral, ethical and legal standards that regulate our society.

5. Report – Sydney Morning Herald – CBA boss slams fees criticism – Clancy Yeates - November 16, 2010

I conclude this section almost where I began. Through Australian citizens' various superannuation funds, each of us, almost without exception, find ourselves indirectly and without our consent investing in or being forced to deal with major banks in some way. The "spin doctors" who drive the propaganda disseminated from the major banks are quick to remind critics that if there is any potential tampering of banks' conduct, that there will be negative consequential influences that will flow into the households of retirees and those looking to their superannuation to fund their retirement. The spin doctors never fail to point out that there will be a political downside for any politician who dares take on the banks.

Surely the people deserve a better system of banking and insolvency regulation that will force a bank and/or its receiver to act firstly in the national interest. The law must force them to open up their conduct to public scrutiny and then face the competitive pressures that other businesses face to produce the best possible outcome in the national interest and in particular, if applicable, to assist the disadvantaged districts of rural and regional Australia.

Proposals to promote competitive and fair banking conduct

Neither individual nor think tank comprising experts will have all the answers. Only a Royal Commission with its wide powers of inquiry can provide the best possible recommendations.

I offer to the Inquiry my suggestions for reform. I only ask that my opinions be placed on the public record for potential debate and consideration by the community, as I believe that meaningful reform can only be achieved after proper debate has taken place and each stakeholder has been granted their opportunity to put forward their ideas.

The global financial crisis and the Government guarantee that followed has demonstrated beyond doubt that banking is a public-private-partnership. In such circumstances it is only proper that the "public" part in that partnership demand a social contract with the profit driven banks. The social contract should provide at a minimum, access to "fee free" credit accounts for wage earners and for people on regular low incomes, portability of credit accounts, exit fee free discharges from loans and cost free access to ADR for individuals and small businesses and a mediation process regulated by national (or at least complimentary) legislation modeled on the New South Wales *Farm Debt Mediation Act* (as amended)(6) .

6. Farm Debt Mediation Act (1994)

In a circumstance where a mediation fails, or the bank declares for any reason thereafter that it intends to pursue enforcement action, the Court should at first instance determine at the bank's cost, whether the matter was mediated in good faith and whether each party exercised the right, without restriction to competitively and fairly participate at the mediation.

If the Court determines that a bank failed to mediate in good faith and that it interfered in any way with its weaker opponent's right to mediate on equal terms, the dispute should be referred back to mediation. The onus should be on the bank to prove to the Court that it did mediate or attempt to mediate in good faith and that it acted fairly at all material times during the process of pre-mediation and mediation.

In summary, I recommend the Inquiry investigate the following additional suggestions:

- The protection of the *National Consumer Credit Protection Act* (2009) should be extended to include all small businesses;
- All appointments of insolvency practitioners to administrations and personal bankruptcies will be by order of the Court. The onus of proof that insolvency exists and that external administration is necessary will rest with the applicant;
- All parties with an interest in an insolvency application, such as trade unions and individual employees, superannuation funds, shareholders and directors, unsecured creditors and secured creditors should each receive notice of any impending application and have the right to appear before the Court. The Court should have wide discretionary powers (including, but not limited to all interested parties participation in the mediation in compliance with the terms of a social contract) and make its determinations with regard to the competing interests of the parties and to the relevance, if any of a social contract;
- Shareholders of the banks should determine without exception, the remuneration packages and "golden handshakes" provided to CEOs and all senior executives;
- APRA should be granted greater regulatory powers over all banks that do business in Australia to ensure that a parent and/or any subsidiary company is not participating in business activities that may risk either depositors funds or any Government guarantee;
- Directors of banks must not hold any other directorships in public companies or large private companies whilst ever their bank directorship is current;

- Insolvency appointments should be regulated by an independent body to ensure that there is no favoritism by practitioners in respect to their appointers and other vested interests and to eliminate fee gouging of affluent administrations;
- Lawyers acting in externals administrations to be appointed by an independent process;
- National or complimentary property law setting out the same rights and responsibilities in all jurisdictions of mortgagors and mortgagees;
- A national legal mechanism to make mortgages completely portable between competing mortgagees with the only cost being an administration fee for registration of the alternative mortgagee's interest on the folio identifier;
- Encourage superannuation funds and wealthy entities and individuals to engage in first registered mortgage lending on the basis of the portable access created by the reform process;
- Access available to credit unions, building societies and any other competitor who can comply with the prudential requirements to operate a financial institution to have access to cheque dealing, foreign exchange dealing and clearing facilities generally that are independent and free from the big four banks. This may require direct government financial assistance ;
- The elimination of all impediments to directors directly representing their company's legal interests in all judicial jurisdictions; and
- Donations to political parties and to politicians' campaign funds by banks should be banned.

I hold a strong conviction that only a Royal Commission into banking practices, procedures and policy, examining as much as possible at the macro and micro levels in Australia and internationally, can determine the best recommendations. If the Senate Inquiry is minded to make a recommendation that a Royal Commission should be appointed, then I am of the view that it should also examine in parallel the conduct of insolvency practitioners (at all levels of external administration and personal insolvency) and the potential to improve access to, and to reduce the cost and improve the efficiency of legal services and make similar recommendations to improve the practices and procedures of the various court jurisdictions.

The terms of reference for a Royal Commission should be recommended by a body specifically established specifically for that purpose with its membership drawn from consumer groups and the Law Reform Commissions relevant to the various jurisdictions.

THE ROLE AND IMPACT OF PAST INQUIRIES INTO THE BANKING SECTOR PROMOTING REFORM

In 1994, the New South Wales Parliament passed into law the *Farm Debt Mediation Act* (1994). Ineffective, as the legislation first was in respect to its intended purpose to curtail bank excesses, and that it was possibly counterproductive in its early years, this at least was an attempt by the legislature in that jurisdiction to recognise that there was a serious and dangerous competitive imbalance between the banks and the farmer/consumer of the banks' services. The Act, after numerous amendments to it, now provides some protection to the business of farming and functions within the expectations of its intended purpose.

At the time the *Farm Debt Mediation Act* became law, banks had faced years of vitriolic criticism and allegations of misconduct ranging from fraud and perjury during court cases, and to the likely possibility that at least one bank, Westpac, was insolvent. I do not propose to comment on the veracity of the allegations, but wish to highlight the fact that serious allegations had been made and to explore some of the responses that came from the legislatures.

At the state level not much appears to have happened other than the passing of *Farm Debt Mediation Act*, however some members of the Parliament continued to actively expose elements of bank misconduct and allegations of unfair and unreasonable business practices. I personally made submissions to some of those parliamentarians who, although being empathetic could do no more than keep the issues alive in Hansard. I believe that most state governments at that time were more interested in disposing of their state banks and each state government had a vested financial interest with potential legal consequences arising from state bank conduct that made it easier to let the market sort itself out. The 1990s, similarly to the past couple of years saw a period of considerable consolidation with the acquisition of smaller and less competitive banks by the major four. Significantly the public spotlight was and still is focused on allegations that bank misconduct is a serious issue. Prima facie this suggests that bank pricing and business practices are not yet regulated to a standard that complies with public expectations.

The Commonwealth Government however, was keen to be seen to be inquiring into ways to avoid the near catastrophe of the aftermath of the recession of the early 1990s that was likely to have been caused by the excesses of the banks and their reckless lending in the 1980s.

Enter the Financial System Inquiry ("the Wallis Inquiry") and the House of Representatives - Fair Trading Inquiry. At least the Wallis Inquiry appears to have achieved something beneficial in the national interest. It is reported that the Government of the day overwhelmingly adopted his report and established APRA. In his speech titled, "APRA: Some Reflections on Where We Have Been and Where We are Heading"[(7)] Jeffrey Carmichael provides a succinct insider's account of the processes and the difficulties encountered during the reform process.

It is likely that without APRA and its regulatory framework the Australian economy may not have emerged as unscathed from the GFC. Unfortunately the other reforms recommended by Wallis to regulate business conduct through the establishment of ASIC and to provide the ACCC with increased powers over pricing, appear to have not been successful. The mere fact that ASIC, on the rare occasion that it does prosecute a body or individual involved in financial services or insolvency malpractice, fails to secure a conviction or penalty worthy of mention, suggests that the current law may not be appropriate to deal with the nature of the misconduct, or that the regulator is not able to perform its duty.

Unfortunately apart from the recommendations of Wallis to improve the prudential regulation of banks it is likely that the two inquiries have done nothing but pave the way for a reduction in competition and make the consumer more vulnerable to price gouging by the big four, whilst they each profit from the safety of publically funded guarantees and good prudential regulation.

It appears from my reading of historical accounts that the recommendations of the numerous inquiries and the Royal Commission of 1936, have as a generalisation, not been adopted and passed into legislation to protect the consumer from anti-competitive and unfair conduct by banks.

7. APRA: Some Reflections on Where We Have Been and Where We are Heading. Jeffrey Carmichael – Saturday, 29 August 1998 – www.apra.gov.au/speeches/98_05.cfm

RELATED INFLUENCES RESTRAINING REFORM

The threat from the banks to reformist ideals is real and has had consequential influences for the entire community for most of the past century and in the past the banks have caused major damage to individual politicians and to political parties and political idealism. In the book the *"The Battle for the Banks"*[(8)] A.L. May, the author, carefully and skillfully demonstrates how, with the use of their massive power of organisation, the trading banks of the day brought down the Chifley Government and embraced the support of groups like the League of Rights and that the aftermath from those times changed the mood of the political landscape perhaps for decades, particularly in respect to any willingness to reform the banks and curtail any excesses. It appears to me in 2010 that the very fear that the banks themselves spread during their campaign in 1949, that being competition and free enterprise would be crushed by the Chifley proposal, has now turned, and it is the banks operating in the comfort of their oligopoly that diminishes opportunities for individual enterprise and lowers the competitiveness of the economy.

The opportunity for reform of the banking system may be better now than at any time in history, I just hope that the expressed willingness of the Labor Party, the Coalition and the Australian Greens that I will call tri-partisan support for reform, will deliver the reform that is not just necessary for the benefit of the Australian people, but that the reform may provide some lead for banking and insolvency reform internationally.

The question is how long does the Australian community have to suffer loss of its productive assets, have its wealth and competitiveness diminished, suffer damage to the nation's natural and urban environment and allow some individual citizens' health and lives to be destroyed by banks and insolvency practitioners acting unfairly and overall working against the national interest?

I sincerely hope, for the sake of the Australian people, our economy, our environment and generally in the Australian national interest, that a Royal Commission will be appointed and thereafter reform of financial services and insolvency practices will be forthcoming and that the tri-partisan commitment for change will remain strong in the face of the obvious backlash that will be launched by the powerful banks and their associated self interest group supporters.

8. The Battle for the Banks – A.L May – Sydney University Press 1968 (ISBN 10: 0424057808)

A response by D.L Johnston to the proposals paper:

A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia

CHAPTER 1 — INTRODUCTION

1.
On 2 June 2011, the Parliamentary Secretary to the Treasurer and Attorney-General jointly released the Options Paper, ‘A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia’ (the Options Paper).

2.
The Government received thirty-three submissions in response to the Options Paper. These submissions have informed the Government’s consideration of this important issue and contributed to the development of a number of proposals for law reform.

3.
This paper sets out the Government’s proposed reforms following its consideration of views provided in response to the Options Paper. The reforms are intended to improve value for money for recipients of insolvency services and to address cases of misconduct in the insolvency profession.

4.
The reforms are aimed at ensuring the framework for insolvency practitioners promotes a high level of professionalism and competence by practitioners; promotes market competition on price and quality; provides for increased efficiency in insolvency administration; and enhances communication and transparency between stakeholders.

OVERVIEW OF REFORM PROPOSALS

5.
Reforms to the standards of entry into the insolvency profession are proposed to improve the balance between the need to protect consumers of insolvency services with the need for a competitive market that provides the best opportunity for maximising returns to creditors.
(See Chapter 2 — Standards of entry into the insolvency profession)

6.
The qualification and experience requirements for insolvency practitioners would be aligned across the personal and corporate regimes. The requirements would include a prescribed level of formal studies in insolvency administration, adequate insurance cover, a fit and proper person test, and the requirement that the person has not been convicted of an offence involving fraud and dishonesty in the past 10 years.

7.
The framework for standards of entry would also be adjusted to allow conditions to be placed upon insolvency practitioners. This would include conditions on the registration of a particular practitioner and industry-

wide conditions. Standard conditions would be able to be imposed in relation to continuing education, quality assurance or review programs, insurance, complaint handling, residency, and inactive practice.

8.
The registration of practitioners would be aligned in a manner similar to the current personal insolvency process. Applications for registration would be determined by Committees composed of a regulator representative, an industry representative and a third person selected from a panel appointed by the Minister. Practitioners would be required to renew their registration every three years. (See Chapter 3 — Registration of insolvency practitioners)

9.
Reforms to remuneration arrangements are also proposed, including mandated caps on prospective fee approvals; restrictions on payments of disbursements to related entities; amendments to minimum fee entitlements; and the introduction of mechanisms for independent investigations into costs for corporate insolvency. Given recent substantial changes to remuneration arrangements in personal insolvency, there would be limited amendments to the rules regarding practitioner remuneration as part of this package. (See Chapter 4 — Remuneration framework for insolvency practitioners)

10.
Significant communication and monitoring reforms are proposed to better empower creditors to monitor administrations and obtain information from practitioners. The laws governing committees of inspection would be aligned and consolidated, with committees of inspection being given expanded functions and rights. Creditors would have improved abilities to make reasonable requests for information; to set reporting requirements and to require meetings to be convened. Changes would also be made to allow resolutions to be passed without meetings in order to streamline the operation of administrations and reduce costs. (See Chapter 5 — Communication and monitoring)

11.
Funds handling and record keeping rules would be aligned and made more efficient. Rules regarding the audit of accounts would be reformed and the ability of the regulators to appoint a person to audit the financial statements of an insolvency administration would be aligned. Mechanisms to enable third party reviews by insolvency practitioners of corporate administrations would also be introduced. (See Chapter 6 — Funds handling and record keeping)

12.
Insurance rules would be revised and penalties for not taking out appropriate cover significantly increased. A practitioner would be required to take all reasonable steps to maintain adequate and appropriate professional indemnity insurance and adequate and appropriate fidelity insurance, with an increase in the offence from 5 penalty units ($550) to up to 1000 penalty units ($110,000) for a breach of this duty. (See Chapter 7 — Insurance requirements for insolvency practitioners)

13.
There would be significant reforms to discipline and deregistration mechanisms. The regulators would be empowered to take direct action in relation to certain breaches. Liquidators would no longer be subject to

the Companies Auditors and Liquidators Disciplinary Board’s (CALDB’s) jurisdiction. Personal and corporate insolvency practitioners would be subject to Committees modelled on the current personal insolvency disciplinary mechanisms, with an expansion in Committees’ powers. Recognised professional bodies would be able to make referrals to the Committee in the same way as regulators. (See Chapter 8 — Discipline and deregistration of insolvency practitioners)

14.
Reforms are also proposed to provide creditors with powers regarding the removal and replacement of insolvency practitioners. Creditors would be given the power to remove practitioners by resolution, subject to protections against actions that amount to an improper use of the power. Amendments would provide for the efficient transfer of records from outgoing to incoming practitioners. (See Chapter 9 — Removal and replacement of insolvency practitioners)

15.
Regulators’ powers would be amended in relation to information gathering, information provision to stakeholders, and their ability to require meetings to be called. The ability of the regulators to gather information would be clarified and enhanced. The reforms would facilitate cooperative arrangements between the personal insolvency regulator and corporate insolvency regulator. Mechanisms would be introduced to ensure transparency in relation to regulator resourcing, the levels of complaints and referrals, regulator activity and regulatory outcomes. (See Chapter 10 — Regulator powers)

16.
Specific reforms are also proposed to ensure that the insolvency framework works for small businesses. It is proposed that reforms would be introduced to ensure compliance by directors with filing and record provision obligations; allow practitioners to assign causes of action; facilitate greater co-operation between the Australian Securities and Investments Commission (ASIC) and the Insolvency and Trustee Service Australia (ITSA) on connected insolvencies; and improve the utilisation of the existing Assetless Administration Fund (AA Fund). (See Chapter 11 — Specific issues for small business)

17.
The Government’s 2010 Corporate Insolvency Reform Package has also been revised to ensure it is consistent and complements the proposed reforms set out in the Proposals Paper. (See Chapter 12 — 2010 Corporate Insolvency Reforms)

STRUCTURE OF THIS PAPER

18.
While the major changes in the law are highlighted, for a full understanding of how the law would differ from the status quo the proposed new regime should be compared against the summary of the current law in relation to these areas as set out in detail in the Options Paper. This paper and the Options Paper have been set out in the same structure to allow easy comparison.

19.
Some aspects of the new regime are drawn from either the current personal or corporate insolvency regimes. While some aspects of the new regime do not differ significantly from the status quo (in one or both regimes), they are in many cases restated below in order to facilitate a clear and complete understanding of the new regime. This is particularly so for personal insolvency law, as many aspects of the new regime would closely resemble the status quo in that regime.

20.
All reforms are proposed to be adopted in the current respective legislative vehicles, namely the Corporations Act 2001 and the Bankruptcy Act 1966.

21.
Except where expressly stated otherwise, the proposed reforms also relate to members' voluntary liquidations. References to reforms to the insolvency administration governance rights of creditors should, in relation to this form of administration, also be read as referring to equivalent members' rights. For example, creditors' rights to make reasonable requests for information should, in relation to a members' voluntary liquidation, be read as extending to members' rights to make reasonable requests for information.

CHAPTER 2 — STANDARDS OF ENTRY INTO THE INSOLVENCY PROFESSION

BACKGROUND TO PROPOSALS

22.
This chapter proposes reforms to ensure that practitioners have the requisite skills and knowledge to uphold the high standards expected of insolvency practitioners.

23.
The reforms aim to balance the need to protect consumers by maintaining the high standards of the insolvency profession with the need for a competitive market that provides the best opportunity for maximising returns to creditors. **THE REFORMS ARE DOOMED TO FAILURE UNLESS ALL EXTERNAL ADMINISTRATION APPOINTMENTS ARE TO BE INCLUDED IN THE REFORM PACKAGE. A DANGEROUS LOOP HOLE IS BEING CREATED IN THIS PACKAGE THROUGH THE NON-INCLUSION OF RECEIVERS, RECEIVER AND MANAGERS AND CONTROLLERS. FURTHERMORE THERE HAS BEEN SUBMISSIONS FROM MANY INDIVIDUALS AND SMALL BUSINESS THAT HAVE REPEATED ALLEGED THAT THERE HAS BEEN PAST REGULATORY FAILURE IN RESPECT TO POLICING AND PROSECUTING INSOLVENCY PRACTITIONERS ("IPs")WHO HAVE ABUSED THEIR PRIVILEGED STATUS. *NOTHING IN THIS PROPOSED PACKAGE HAS DONE ANYTHING TO ENSURE THAT THE REGULATORS DO JUST THAT – REGULATE, POLICE AND PROSECUTE OFFENDERS. THIS IS A GLARING FAILURE IN THE PROPOSED REFORM.***

PROPOSED REFORMS

Harmonised standards of entry

24.
The proposed reforms would provide a harmonised set of entry standards for insolvency practitioners. They would be modelled on the current entry standards for personal insolvency, with additional enhancements.

25.
A common set of standards for registration as a personal or corporate insolvency practitioner would be set out in the Corporations Act and Bankruptcy Act. These requirements would be relevant not only to initial registration, but would also define what is required of practitioners on an ongoing basis. Breaches of these ongoing requirements would be grounds for initiating various disciplinary processes (see Chapter 8 — Discipline and deregistration of insolvency practitioners).

26.
In order to be a registered liquidator or registered trustee, a person would be required to show that he or she:

a) has the qualifications, experience, knowledge and abilities prescribed, including:

–
Holding degrees representing collectively three years of full time study in commercial law and accounting, but with no less than one year of equivalent full time study for either.
:
The requirement for three years of collective study reflects the current interpretation by both regulators that the law and accounting qualification requirements (of three years of accounting and two years of law) may relate to concurrent study within a single three year period.

:
The proposed reforms remove the current preference for accounting over legal studies, while also recognising that a minimum level of accounting and legal study is required. Internationally, it is not uncommon for the insolvency profession to be made up of persons who are primarily lawyers as well as those who are primarily accountants, with specialist external assistance being provided to liquidators from professionals with legal or accounting skills where required. The removal of the accounting preference may expand the range of persons who can become practitioners, without reducing the standards of the profession. Registration requirements that mandate minimum levels of administration experience at a senior level (see below) would supplement the requirement for minimum practical accounting skills. Irrespective of the period of accountancy or legal study, registration would require possession of an actual ability to perform satisfactorily in these areas (see below).

–
A prescribed level of formal tertiary studies in insolvency administration specific study. The prescribed level would be at least equivalent to that currently provided under the Insolvency Practitioners' Association (IPA) Insolvency Education Program provided by the Queensland

University of Technology. This study may form part of the legal and accounting studies previously referred to or may be in addition to it.
:
This is a new requirement for both corporate and personal insolvency entry standards, recognising the specialist nature of insolvency services.

:
It is not intended that this would be required for a restricted registration (such as for registration to work solely as a receiver). An alternative insolvency specific study requirement would be able to be prescribed.

–
Engagement in relevant employment on a senior full-time basis for a total of not less than three years in the preceding five years. **THE 5 YEAR STANDARD SHOULD BE RETAINED. GIVEN THE COMPLEXITY OF INDUSTRIAL APPOINTMENTS WHERE KNOWLEDGE IS REQUIRED IN RESPECT TO SELECTING INDUSTRY SPECIFIC EXPERTS TO PROVIDE THE IP WITH ADVICE, MORE EXPERIENCE, NOT LESS IS REQUIRED.**
:
This compares to the current requirements for two years in personal insolvency and five years in corporate insolvency. The reduction in corporate insolvency experience requirements is balanced by the expanded power for the regulator to impose industry wide conditions applicable to new practitioners (see below). Setting the experience requirement at three years for both corporate and personal insolvency would achieve the appropriate balance of experience, and would align the requirements across the two regimes.

– Possession of the ability to perform satisfactorily the duties of a practitioner.
– Possession of the ability to comply with any conditions upon their registration.

b)
has adequate and appropriate professional indemnity and fidelity insurance cover;

c)
is a fit and proper person;

d)
has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; **IF AN APPLICANT HAS AT ANY TIME BEEN CONVICTED OF AN OFFENCE OF THIS TYPE, THE PERSON SHOULD AUTOMATICALLY BE DISQUALIFIED FOR LIFE.**

e)
has not been subject to a personal insolvency administration in the previous 10 years;

f)
has not been involuntarily deregistered within the 10 years before making the application;

g)
has not been involuntarily deregistered in the other regime within the 10 years before making the application; and

–
This is a new requirement for both regimes. As similar duties are held under both regimes and there would be a highly aligned nature of the processes under which a person may be disqualified with the enactment of the proposed reforms, 'mutual recognition' of deregistration is appropriate.
–
There would also be mutual recognition of suspensions. A practitioner would not be capable of being registered if their registration was involuntarily suspended under the other regime.

h)
is not otherwise disqualified from managing a company.

–
This is currently a corporate insolvency requirement but not a personal insolvency requirement. If a person has been determined not to be an appropriate person to hold a position of authority (as a director) over property being held for a group of stakeholders (shareholders/creditors), it may be considered that they should not similarly be in a position of authority as an insolvency practitioner with control of property held on behalf of creditors/shareholders (for corporate insolvency matters) or a debtor or bankrupt (for personal insolvency matters). **UNFIT MEANS EXACTLY THAT. IF THERE IS ANY DOUBT ABOUT THE PERSON'S ABILITY OR CHARACTER HE/SHE SHOULD NOT RECEIVE REGISTRATION IN EITHER REGIME WITHOUT AN APPLICATION TO THE COURT FOR IT DO DEAL WITH THE REGISTRATION APPLICATION ON ITS MERITS.**

27.
Residency outside Australia would be a ground upon which a Committee may refuse registration as either a registered liquidator or registered trustee. The regulators would be empowered to impose conditions to address non-residency (this is discussed in greater detail below).

28.
A practitioner would be able to apply for different forms of registration, for example personal, unrestricted corporate or restricted corporate registration, which would include receivers. Different entry requirements may apply to different registrations. For example, the regulations would be able to prescribe specialist training requirements for different restricted classes. **THIS PROPOSAL IS SIMPLY DANGEROUS. I FEAR THAT INAPPROPRIATE PERSONS WILL FLOCK TO BE REGISTERED TO ACT ONLY AS RECEIVERS, RECEIVERS AND MANAGERS AND CONTROLLERS, APPOINTED BY SECURED CREDITORS. THE WORST OF THE WORST ACTS COMMITTED BY IPs ARE OFTEN IN THESE EXTERNAL ADMINISTRATIONS. THE SENATE INQUIRY IDENTIFIED EVIDENCE OF A KIND THAT SHOULD SUGGEST TO THE PARLIAMENT THAT TO PROCEED WITH SO CALLED REFORM WITHOUT THE INCLUSION OF THIS GROUP OF PRACTITIONERS, IS AT BEST BIZARRE AND AT WORST SIMPLY STUPID. IN THIS RESPECT I DRAW YOUR ATTENTION TO MY SUBMISSION (#97) I MADE TO THE SENATE ECONOMICS REFEENCE COMMITTEE TITLED – "COMPETITION WITHIN THE AUSTRALIAN BANKING SECTOR". I RELY HEAVILY ON MY COMMENTS IN THAT SUBMISSION AS IT WILL BECOME CLEAR TO PARLIAMENT THAT PERSONS REFERRED TO BY ME AND OTHERS WHO LATER BECAME ROGUE IPs LEARNT THEIR UNETHICAL CONDUCT HABITS WHILST ACTING UNDER THE INSTRUCTIONS OF THEIR APPOINTERS. TO IGNORE MY WARNING ON THIS POINT WILL**

ONLY LATER LEAD TO THE REQUIREMENT OF MANY MORE INQUIRIES, BUT ONLY AFTER MANY MORE HONEST CITIZENS HAVE BEEN TAKEN TO THE CLEANERS. PLEASE PROCEED WITH GREAT CAUTION.

29.
Practitioners that are currently registered would become subject to the new standards of entry as ongoing requirements for maintaining registration, with the following exceptions:

29.1. They would not be required to undertake insolvency specific study in accordance with paragraph 26(a) in order to maintain registration.

29.2. Suspensions or deregistrations under the other insolvency regime prior to the commencement of the new regime would not automatically be a separate ground for removal (see paragraph 26(g)). However, the circumstances underlying the suspension or deregistration may still form the basis of some other ground of removal (such as not being a fit and proper person).

Conditions on registration

30.
The framework for standards of entry would also be adjusted to allow conditions to be placed upon insolvency practitioners. This would include conditions on the registration of a specific practitioner and industry-wide conditions would apply to all practitioners.

31.
Currently, neither the personal or corporate insolvency regimes allow the regulators to approve industry wide conditions on registration. This contrasts with the regulation of company auditors, where ASIC has the power to impose conditions in relation to specified issues.

32.
Regulators would be able to approve industry wide conditions, with respect to certain specified areas, that would apply to all registered practitioners. Practitioner-specific conditions would be able to be applied by the Committee that considers the registration application.

33.
The regulators would be empowered to impose industry wide conditions:
a) in relation to continuing professional education (such conditions could extend to requiring practitioners to pass assessments of required learning);

b) in relation to the periodic or other review of the practitioner's insolvency work as part of a quality assurance or review program (in part, this would support any inspection program by the regulator);

c) in relation to insurance (must be consistent with and would supplement legislated obligations);

d) in relation to establishing and maintaining a system for resolving complaints;

e) on the form of practice engaged in by persons in their first two years of registration. Conditions would be restricted to those necessary to address issues regarding inexperience; **SIGN OFF BY COMMITTEE OF INSPECTION (COI) FOR ALL ADMINISTRATIONS, WITH ABSOLUTELY NO EXEMPTIONS. A COMMITTED AND INFORMED COI IS THE BEST LINE OF DEFENCE TO STOP THE INFILTRATION OF CRIMINAL ACTIVITY AND OTHER INAPPROPRIATE CONDUCT INTO EXTERNAL ADMINISTRATIONS. NEEDLESS TO SAY THAT THERE IS A REQUIREMENT FOR THE REGULATOR TO HAVE A DIRECT REGULATORY RELATIONSHIP WITH THE COI AND THE IP, BUT NOT THROUGH THE SAME CONDUIT.**

–
This reform would complement the reduction in the minimum required experience for registration as a liquidator from five years to three years. The conditions power in conjunction with streamlined disciplinary procedures (see below) for breaches of these conditions means that new practitioners can be viewed as effectively being on ‘probation’.

f)
on practitioners who have not accepted any new appointments for a period exceeding 12 months. Conditions would be restricted to those necessary to address concerns regarding maintenance of practice capacity, knowledge and experience; and

g)
on practitioners residing outside of Australia. Conditions would be restricted to those necessary to facilitate regulatory and administration issues that may arise due to all or part of their practice taking place outside of the jurisdiction.

–
There is no current residency requirement for personal insolvency practitioners. While it is desirable that persons who otherwise meet the requirements for registration should be able to maintain registration, particular regulatory issues may arise due to the presence of case managers and records outside of the jurisdiction.
–
This proposal would allow Australian registered practitioners who relocate to a New Zealand branch of their firm to maintain their registration subject to meeting standard conditions regarding non-residency.

34.
Conditions (a) to (d) reflect the kind of conditions ASIC is currently empowered to impose in respect of persons registered as company auditors, while conditions (e) to (g) would be added specifically for the insolvency regime.

35.
The law would provide that practitioners are obliged to comply with any conditions on their registration, irrespective of how they are imposed.

CHAPTER 3 — REGISTRATION OF INSOLVENCY PRACTITIONERS

BACKGROUND TO PROPOSALS

36.
This chapter proposes reforms to amend the framework for the registration of insolvency practitioners. The registration framework determines the

opportunities that the regulators have to decide on who enters into the market for the provision of insolvency services.

37.
The reforms aim to strengthen the registration framework for corporate insolvency practitioners by introducing a Committee structure based on the current personal insolvency structure. The framework would also be strengthened by requiring a renewal of registration every three years.

PROPOSED REFORMS

Classes of practitioner

38.
There would be a single class of practitioner in corporate insolvency (although registration may be conditional or restricted to specified classes of administration). The separate class of official liquidator, as well as debtor company specific registration, would be removed from corporate insolvency. Registered liquidators would be able to perform all functions currently restricted to official liquidators.
38.1.
With the removal of official liquidators, who are currently obliged to consent to act in court ordered windings up, it would become necessary for any person petitioning for a court ordered winding up to obtain the consent of a corporate insolvency practitioner to act. A person would similarly need to obtain consent to act when seeking to have ASIC place a deregistered company into liquidation under the proposed corporate law reforms contained in the Government's Protecting Workers' Entitlements Package.1

39.
At this time, only two classes of restricted registration are proposed: registered liquidator restricted to act as a receiver and receiver and manager; and registered liquidator restricted to act as a receiver only.

39.1.
There are many people in the insolvency industry who currently specialise in receivership work. These people may hold sufficient skills and experience to be able to accept appointments to these kinds of administration, but not enough to be registered as an unrestricted registered liquidator. The proposed reforms in relation to the standards of entry and conditions on registration would have sufficient flexibility to enable receivers to be registered as long as they satisfy certain criteria relevant to working as a receiver.

Application to become a practitioner

40.
The process for applying for registration as a practitioner would be aligned between personal and corporate insolvency, with the system largely based on the current personal insolvency regime.

41.
The regulators would be responsible for accepting initial applications and determining that the application is complete and accompanied by the

relevant fee. The regulators would have the discretion to determine whether to process applications as received or consider applications on a periodic basis, not more than six months apart. The regulators would not determine whether to register an applicant. Instead, provided the application is complete, the regulator would refer the application to a Committee for determination.
www.alp.org.au/protecting-workers-entitlements-package/

41.1.
Currently, ASIC is able to register practitioners directly, while ITSA must refer applications to a Committee for consideration and determination.

42.
There would be a fee for making an application for registration as a practitioner, which would not be refundable if an application was rejected by a Committee. If the application is successful a registration fee would also be payable. This would adopt the current approach under the Bankruptcy Act.

43.
The current application fee for registration in personal insolvency is $2,000 (which has been determined on cost recovery principles) and in corporate insolvency is $351, indexed to the consumer price index (CPI).
Composition of committee

44.
Committees would have three members. One would be a delegate of the respective regulator and one would be an IPA representative. The third member would be selected by the Minister from a pool of candidates chosen by the Minister. This power would be able to be delegated. This composition is based on the current personal insolvency Committee requirements. **THE IPA HAS FAR TOO MUCH INFLUENCE ON A COMMITTEE OF 3. THIS PROPOSAL PROVIDES INSUFFICIENT PROTECTION FOR CONSUMERS AND UNSECURED CREDITORS. THE COMMITTEE SHOULD BE EXPANDED TO 5 MEMBERS WITH ONE BEING FROM A CONSUMER ADVOCACY GROUP SUCH AS THE AUSTRALIAN CONSUMERS ASSOCIATION AND THE FINAL MEMBER BEING DRAWN FROM THE RANKS OF THE AUSTRALIAN LAW REFORM COMMISSION.**

Committee functions – initial registration

45.
The Committee would determine whether a person should be registered. The new law setting out the consideration of applications by a Committee would be modelled on the current personal insolvency regime. Applicants would be required to sit for an interview and the Committee could choose to require the applicant to sit an examination.

46.
The Committee would be able to recommend the registration of a practitioner conditionally provided that an applicant substantially meets the minimum requirements and the practitioner’s deficiencies are capable of being addressed by those conditions.

46.1.
Initial registration conditions imposed by the Committee could only be aimed at addressing deficiencies in relation to meeting the standards of entry requirements. For example, an applicant may demonstrate

insufficient experience in a specific type of insolvency administration. The Committee might determine that the person should be registered, provided that they only accept appointments of that kind jointly with another practitioner (for a specified number of appointments or a specified period).

47.
The Committee must notify the applicant of the outcome of the process and must provide a statement of reasons if an application is refused (or conditions imposed). No statement of reasons is required if the application is granted unconditionally.

48.
Registration decisions of a Committee would be subject to review by the Administrative Appeals Tribunal (AAT).

49.
If a Committee determines that a person should be registered, the regulator must register them subject to their taking out insurance (and providing adequate proof of such) and paying a registration fee. This reflects the current approach under the Bankruptcy Act.

49.1. In personal insolvency, the registration fee is currently $1,200. There is currently no equivalent fee in corporate insolvency.

50.
Committees would also operate in relation to practitioner disciplinary matters (as is the current case in personal insolvency). Further details on general Committee processes are contained in Chapter 8 — Discipline and Deregistration of Insolvency Practitioners.

Renewal of registration

51.
A practitioner would be registered for a three-year period. This reflects the current position under the Bankruptcy Act. Registered liquidators would no longer be registered indefinitely. Applications for renewal would be made to the regulator, with a fee payable. In personal insolvency, the renewal fee is currently $1,600.

52.
Renewal would require satisfaction of standard registration requirements, such as the maintenance of insurance cover and the payment of fees. The renewal process would also provide an opportunity for regulators to conduct reviews of practitioner conduct during the preceding three years and to utilise their new powers to refer matters to Committees for disciplinary action or to take direct regulatory action. Compliance with continuing professional education requirements would also be required for renewal.

53.
Renewal would be in addition to the annual return process, which would be amended to require practitioners to provide proof of insurance annually. The annual return process is discussed in Chapter 7 — Insurance Requirements for Insolvency Practitioners.

Notification of certain events

54.
A practitioner would be required to notify the regulator if he or she:

a)
becomes an insolvent under administration (including under a foreign law);

b)
has been convicted of an offence that would disqualify them from registration;

c)
is disqualified from managing corporations;

d)
does not maintain adequate and appropriate professional indemnity and fidelity insurance;

e)
fails to comply with a Bankruptcy Notice; or

f)
was subject to disciplinary proceedings under the other insolvency regime.

55.
Notification of events (a) or (b) are currently required under personal insolvency law, while event (c) is currently required under corporate insolvency law.

56.
Events (a) to (d) would be grounds for disqualification by direct administrative action under the proposed new regime, while failing to comply with a Bankruptcy Notice would be considered strongly indicative of current or imminent circumstances that would affect the entitlement of a practitioner to continue to be registered.

57.
The proposed reforms would make it an offence in both the Corporations Act and Bankruptcy Act to breach the notification requirements, punishable by a maximum of 100 penalty units ($11,000). This is an increase from the current 5 penalty units ($550) in corporate insolvency, where a practitioner fails to notify ASIC of being disqualified from managing a corporation. A breach of the equivalent notification requirement under personal insolvency law is currently not an offence. **THE PROPOSED PENALTY IS INSUFFICIENT FOR A BREACH. GIVEN THE FACT THAT WHEN CRIMINAL CONDUCT IS DETECTED BY THE REGULATOR THE MONEY INVOLVED IS OFTEN INTO $MILLIONS, THE PENALTY FOR BREACHES PARTICULARLY IN RESPECT TO FAILING TO MAINTAIN INDEMNITY AND FIDELITY INSURANCE SHOULD INCLUDE A PERIOD OF PENAL SERVITURE AND NOT LESS THAN 1000 PENALTY POINTS.**

58.
Practitioners must also notify the regulator of changes in personal details. This is currently the case under both regimes.

CHAPTER 4 — REMUNERATION FRAMEWORK FOR INSOLVENCY PRACTITIONERS

BACKGROUND TO PROPOSALS

59.
This chapter proposes reforms to the remuneration framework for insolvency practitioners.

It is important that the remuneration framework appropriately empowers creditors on issues of remuneration as it not only affects the returns available to creditors, but the confidence that creditors have in the insolvency system as a whole.

60.
The reforms aim to provide additional accountability to creditors in respect of remuneration and streamline minimum remuneration requirements to minimise the costs incurred by an administration.

REFORM PROPOSALS

Minimum fees

61.
It is proposed to amend the Corporations Act and Bankruptcy Act to allow insolvency practitioners to claim a minimum fee of $5,500 (GST inclusive). This would be an increase from the current minimum amount set in the Bankruptcy Act, which is $5,420.00. In a corporate insolvency, currently a liquidator can claim a minimum fee of up to $5,000 if he or she has attempted to hold a creditors meeting to approve fees, but failed due to the lack of a quorum.

62.
There are significant costs in holding a meeting to approve the minimum fee in a corporate insolvency, regardless of the number of attendees or proxies received, with the cost of obtaining a fee approval in an assetless administration estimated to be between $3,000 and $4,000. Where the fee for which approval is sought is small, this cost can easily outweigh the benefit being sought, which is of particular concern in small business insolvencies.

63.
Insolvency practitioners are required by law to carry out certain basic functions. Given this, it would be appropriate for there to be a minimum guaranteed entitlement to remuneration.

Fee caps

64.
The Corporations Act and Bankruptcy Act would be amended to require prospective fee approvals to specify a fixed maximum capped amount. Once the initial fee cap is set, that amount may be revised at a later date only by creditor or COI resolution, or by the Court.

65.
This amendment reflects current industry best practice. Fee caps provide a check upon the unlimited escalation of time based fee entitlements, facilitate creditor engagement in the remuneration setting process and provide a valuable means of setting creditor fee expectations.

Casting votes on remuneration

66.
A registered liquidator (or any other person elected as Chair) would be prevented from using a casting vote where the resolution is one for the approval of the remuneration of the liquidator in any external administration.

66.1. The remuneration of a personal or corporate insolvency practitioner may be approved by creditors by the passage of an ordinary resolution. Currently, under the Corporations Act, ordinary resolutions require the support of a majority of creditors by value and number. However, if only one majority exists, the practitioner may exercise a ‘casting vote’ and cause the resolution to pass. In contrast, under the Bankruptcy Act, ordinary resolutions require only a majority by value and there are no casting votes. The definition of ordinary resolution would not be aligned under the reforms.

67.
Where there is a conflict between a resolution by number and value, the motion for approval of a liquidator’s remuneration would be taken to be defeated. This addresses the inherent conflict in a practitioner being able to determine whether a resolution approving his or her own remuneration is passed or rejected.

Disbursements

68.
Reforms are proposed to prevent the misuse of disbursements by allowing creditors to control the use of disbursements where the practitioner or a related party would receive a profit or advantage.

69.
It is proposed that personal and corporate insolvency practitioners would be prevented, without the prior approval of creditors, from: directly or indirectly deriving a profit or advantage from a transaction, sale or purchase for or on account of the estate; or conferring upon a related entity a profit or advantage from a transaction, sale or purchase for or on account of the estate.

70.
Under the second limb of this rule, a practitioner who engages a related entity to provide services to an administration would require creditor approval if the transaction confers a profit or advantage on the service provider. Transactions provided at cost (for example, obtaining photocopying services from the firm’s service company for a fee without a profit margin) would not offend the rule and would not require approval.

70.1. Currently, corporate insolvency practitioners are subject to the general corporations law officers’ duties, including a duty to not improperly use their position or gain an advantage. Personal insolvency practitioners are prevented from directly or indirectly deriving any profit or advantage from a transaction, sale or purchase for or on account of the estate or any gift, profit or advantage from a creditor.

71.
The proposed reforms would also clarify that the existing (common law and, in the case of personal insolvency, statutory) duties to manage actual or apparent conflicts of interest require disclosure of any engagements of related entities, apply whether or not a profit or advantage is being received.

72.
Personal and corporate insolvency rules would also be aligned in relation to the ability of practitioners to accept gifts and benefits, give up part of their remuneration to another person, and acquire property from the insolvency administration.

Cost assessment in corporate insolvency

73.
The Corporations Act would be amended to provide the regulator and the court with the power to appoint a cost assessor to assess and report on the reasonableness of the remuneration and costs incurred in all or part of an administration. A cost assessor would:

- be under a duty to act independently, in the interests of creditors as a whole (and if they have a financial interest, members), and to avoid actual and apparent conflicts of interest;
- be given rights to access administration records and to require records of the liquidator's firm relating to the administration; and
- only be able to report on their findings to creditors as a whole, the COI, the regulators, law enforcement, or the court.

74.
Given the markedly different remuneration regime existing in personal insolvency (including, the availability of binding regulator administrative review mechanisms); and the generally smaller size of personal insolvency administrations, this proposal would apply to corporate insolvency only.

75.
It can be difficult for creditors to assess the reasonableness of a practitioner's claim for remuneration. In order to be able to meaningfully exercise their rights to challenge a practitioner's remuneration (or other rights, such as the right to replace a practitioner), creditors should also have an effective mechanism by which they can seek an expert assessment of any claims for remuneration.

76.
As a breach of remuneration-related obligations may amount to a breach of a practitioner's duties, the regulator would also be able to seek an independent expert assessment of the reasonableness of costs. This could occur as a result of creditors raising concerns about a practitioner's remuneration with a regulator. The regulator would be able to appoint an

expert without seeking a court order, in the same way as they can currently initiate an audit of the accounts of an administration.

77.
It would be open to practitioners to consent to an independent cost assessment, without requiring a creditor to obtain a court order to that effect. The practitioner would need to have regard to their general duty to act in the interest of the administration, when determining whether to agree to the costs of the assessment being borne by the administration or some other party.

78.
The court would be given broad powers to intervene in or to assist an assessment. For example, the court would be able to prevent or vary the terms of an assessment; or remove and replace the assessor. In addition, the court would retain its power to appoint an assessor to assist in a court review of a practitioner’s remuneration.

79.
In a regulator initiated matter, costs would be set by the regulator and borne by the administration. In court initiated matters, costs would be set by the court and the court may determine who should bear the costs. The court would have power to set, vary or review costs.

Reviews of trustee remuneration in personal insolvency

80.
It is proposed that the Bankruptcy Act be amended to allow the regulator to initiate a review of a trustee’s remuneration on its own initiative, without a referral from a bankrupt or creditor.

81.
Currently in personal insolvency the regulator can administratively review a trustee’s remuneration if a bankrupt or creditor applies for a review. However, in some cases, a trustee’s remuneration arrangements may potentially be of concern but due to disinterest or a lack of information on the part of affected parties no referral is made to the regulator. **MINUTES OF COI AND CREDITOR MEETINGS TO BE LODGED WITH REGULATOR AND SIGNED BY CHAIRMAN, SECRETARY AND IP (CREDITOR MEETINGS NOT TO BE CHAIRED BY IP) MEMBERS OF COI ARE NOT TO BE EMPLOYEES OF IP or ADMINISTRATION. DEPENDING ON THE SIZE OF THE ADMINISTRATION AND THE ATTITUDE OF THE CREDITORS THE COMMITTEE COULD BE AS LARGE AS 9. I DEAL WITH THIS ISSUE SEVERAL TIMES IN THIS SUBMISSION AND I REPEAT THE COI IS THE BEST LINE OF DEFENCE AGAINST ANY UNTOWARD CONDUCT, WITH ITSELF FACING CHECKS AND BALANCES FROM THE IP AND HIS/HER MANAGERS, OTHER CREDITORS AND UNDER DIRECT REGULATION BY THE REGULATOR.**

82.
Situations may also arise where creditors do not approve remuneration (for example, because the bankruptcy is annulled before a remuneration proposal can be put to creditors) and therefore no remuneration claim notice is provided by the trustee. This notice is a prerequisite to a bankrupt or creditor applying for a review by the regulator.

83.
In such circumstances the proposed power for the regulator to be able to initiate a review would provide a mechanism for the trustee’s

remuneration to be reviewed by the regulator if the bankrupt or a former creditor is dissatisfied with an amount claimed. In order to facilitate the exercise of this proposed new power, new notification requirements would be imposed upon trustees in relation to anticipated annulments in certain circumstances. **BOOKLET OR HANDBOOK TO CIRCULATE TO ALL CONCERNED, PRINTED BY ASIC AND ITSA ESPECIALLY FOR USE BY MEMBERS OF THE COI TO EMPOWER CREDITORS TO ASSIST THE REGULATOR AND REPORT COMPLAINTS, MISCONDUCT ETC.**

CHAPTER 5 — COMMUNICATION AND MONITORING

BACKGROUND TO PROPOSALS

84.
This chapter proposes changes to the key mechanisms governing the provision of information to stakeholders. This includes the role of Committees of Inspection (COIs), the requirements for regular reporting to creditors, the ability of creditors to make requests for information and the calling of meetings.

85.
The purpose of these reforms is to address information asymmetries between creditors and insolvency practitioners that interfere with the ability of creditors to inform themselves of the course of insolvency administrations and, where appropriate, exercise their rights in relation to the administration or the practitioner.

REFORM PROPOSALS

Committees of inspection

86.
It is proposed that the current divergent rules governing COIs in liquidations, voluntary administrations, deeds of company arrangement, bankruptcies, controlling trusteeships and personal insolvency agreements be replaced with a closely aligned set of rules aimed at enhancing creditor participation in insolvencies. **RECEIVERSHIPS SHOULD HAVE COIs ELECTED BY CREDITORS TO PROVIDE CHECKS AND BALANCES TO ENSURE THAT SECURED CREDITORS DO NOT INFLUENCE THE INDEPENDENCE OF THE IP AND THAT THE IP DOES NOT WILLFULLY SACRIFICE THE INTERESTS OF CREDITORS AND SHAREHOLDERS WHO ARE NOT HIS/HER APPOINTER.**

87.
It would be expressly stated that COIs have an advisory and supervisory role. Their functions would include being empowered to:

a)
make reasonable requests for information to the practitioner (aligned with the new general obligation upon practitioners in this regard — see paragraphs 94 to 98);

b)
amend reporting requirements to creditors as a whole (see paragraphs 101 to 104), if this is delegated to them by creditors;

c)
pass resolutions which practitioners must have due regard to, including resolutions that the practitioner should disseminate information to creditors as a whole;

d)
approve practitioner remuneration, if this is delegated to them by creditors;

e)
obtain specialist advice or assistance;

f)
commence or intervene in proceedings relating to the review of conduct, review of remuneration; and intervene in proceedings seeking court approvals for actions by the practitioner;

g)
require the practitioner to convene meetings of creditors or members and put specified resolutions to them and, if requested, disseminate accompanying text approved by the COI;

h)
approve the continuation of director’s powers in court ordered windings up and creditors voluntary liquidations (which, with alignment of the law between court ordered and creditor’s voluntary liquidations, may also be approved by the liquidator, creditors or the court);

i)
direct liquidators (not trustees) to invest surplus funds; and

j)
extend the role of a COI in corporate insolvency to approve certain compromises and contracts in place of creditors’ or court approval.

88.
Functions (a) and (b) are new functions relating to other reform proposals set out in this paper. Functions (c), (d) and (g) to (j) reflect similar functions currently vested in COIs in some, but not all, kinds of administration. Functions (e) and (f) are functions that the individual members of a COI may currently take in their own right but not on behalf of the COI.

89.
The rules preventing members of a COI from receiving benefits or purchasing assets from the administration without the approval of the court or the general body of creditors (excluding the parties to the transaction) would apply across all forms of personal and corporate insolvency administration.

90.
It would be made clear that COIs are able to determine their own procedures and that they may make decisions by circular resolution.

91.
There would be a general power for the court to review, cancel, vary or restrict the powers, functions and entitlements of a COI or its members.

This power would be limited to ensuring that COIs conduct themselves properly and do not abuse their powers.

Composition of COI

92.
It is proposed that the systems governing appointment to COIs would be reformed to make sure that COIs are representative of the general body of creditors. A person authorised by more than a prescribed portion of the potential votes in an administration, for example – 10 per cent by value, would have a right to select a member of a committee; however, if they do so, those votes could not be exercised in respect of any resolutions to select or remove other members of the committee. The reforms would ensure that those controlling the voting of the general body of creditors would not be able to control the selection of all of its members and that priority creditor classes, most notably employees, would be appropriately represented. Creditors would be able to remove and appoint members, with removal requiring seven days notice.

93.
Corporate COIs would be established without the involvement of members unless, in the opinion of the practitioner, there is a reasonable prospect of members having a financial interest in the conduct of the administration Currently all corporate insolvency COIs require members to be involved in their establishment. (this would be assumed in a members' voluntary liquidation**). MEMBER REPRESENTATIVE (OR BANKRUPT) ALWAYS SHOULD BE INVITED TO ATTEND (EVEN IF NOT A MEMBER OF THE COI) UNLESS IT IS CONCEDED BY A GENERAL MEETING OF MEMBERS (OR THE BANKRUPT) OR THE COURT ORDERS THAT THERE WILL BE NO DIVIDEND PAID TO MEMBERS OR THAT THE BANKRUPT IS BEHAVING IN A WAY THAT IS AGAINST THE INTERESTS OF THE ADMINISTRATION AND IS MAKING THE COI DISFUNCTIONAL OR INSECURE DUE TO CONFLICT OF INTEREST ISSUES AS A CONSEQUENCE OF THEIR ATTENDANCE.**

Ad hoc individual requests for information

94.
The proposed reforms would align the obligations concerning reasonable requests for information in respect of members/debtors in liquidations, voluntary administrations, deeds of company arrangement, bankruptcies, controlling trusteeships and personal insolvency agreements. The result of the alignment would be improved access to information, particularly for creditors in corporate insolvencies.

95.
An insolvency practitioner would be required to give information about the administration of the estate to a creditor who reasonably requests it. This power would be based upon the current Bankruptcy Act obligations. **COI MEMBERS TO HAVE RIGHT TO INSPECT ALL RECORDS, EVIDENCE, CORRESPONDENCE, FILE NOTES, LEGAL ADVICES (UNLESS CONFLICT OF INTEREST APPLIES).**

96.
Requests for information would be able to be complied with by providing or making available information in a manner elected by the practitioner (including posting the information online).

97.
A few key specified kinds of requests (for example, requests for the most current creditor lists (including names, amounts owed and contact details, and email addresses if available), detailed Work in Progress reports, and transaction reports) would be prescribed as being reasonable to request, and time limits within which such requests must be complied with would also be provided. It is intended that there would be rules preventing nuisance or vexatious requests which could cause the administration to incur unreasonable costs. This could include situations where a request is made repeatedly and within a short timeframe.

98.
As creditors would be provided with improved information access rights, certain reporting requirements would be removed, including the requirement to: lodge full transaction reports to the regulator with all corporate administration returns; and provide copies of creditor lists at the commencement of all voluntary liquidations.

99.
For the purpose of all rights to obtain information or to attend (but not vote) at creditors' meetings, the Commonwealth would be treated as a contingent creditor in relation to the General Employee Entitlements and Redundancy Scheme (GEERS) where the lodgement of employee claims for such is contemplated.

Reporting to stakeholders

100.
Creditors (and COIs, if delegated by creditors) would be empowered to pass resolutions (by majority in number and value with no casting vote held by the practitioner/chair) imposing reasonable reporting requirements regarding the debtor affairs and administrations. The proposed changes would allow flexibility for creditors in determining what information they want provided and when. **I WOULD SUGGEST THAT COMPLIANTS TO THE REGULATOR IN RESPECT TO BANKRUPT/DIRECTOR/IP/INDIVIDUAL COI MEMBER CONDUCT WOULD INVITE A MANDATORY RESPONSE FROM THE REGULATOR TO INVESTIGATE AND REPORT.**

101.
These requirements would set out when reports must be sent or made available to creditors or members, the matters that must be covered in those reports, and how those reports must be sent or made available. These requirements could also set out when meetings of creditors must be held. These powers would be new for creditors in both corporate and personal insolvency.

102.
While creditors would be empowered to impose a custom reporting requirement, default reporting requirements would also apply. Different default requirements may be prescribed for different types of administration. The contemplated standards would, for all administrations:

- require initial notification of the commencement of an administration to be sent to creditors, which would be mandatory regardless of whether there are sufficient administration assets to pay for the notice; and
-

allow, at the election of the practitioner, all subsequent creditors' reports and notifications to be made available (including online) with a short notification of the issue of the report being sent to all creditors.

103.
Reporting standards in relation to the notices and reports regarding the initial and main meeting of creditors in a voluntary administration would not be capable of alteration by creditors. Lodgement of the notice and report in relation to the main meeting would be required to be lodged with the regulator. This would align corporate insolvency to the position in personal insolvency where the report in relation to the main meeting in a controlling trusteeship must be lodged with ITSA.

104.
With the introduction of the ability for creditors to determine reporting requirements and an obligation for practitioners to comply with reasonable requests for information, some current default one-size-fits-all reporting and meetings requirements become unnecessary and result in unnecessary costs being imposed on administrations.

104.1.
Current mandated annual and final meetings in corporate insolvency (which have no equivalent in personal insolvency) would not be replicated in the default reporting standards. It would be open to creditors to approve alternative requirements. As a result of changes to final meetings requirements in corporate insolvency, there would be consequential changes to company deregistration processes.

Meetings of creditors

105.
Meetings of creditors are an important means of enabling creditors to seek information on the conduct of an administration and to have the opportunity to ask questions and make representations to a practitioner. **OR THEIR MANAGERS, CONTRACTORS AND AGENTS.** Meetings of creditors also provide an opportunity for creditors to put forward and vote on resolutions to replace underperforming practitioners (see paragraph 181).

106.
It is proposed that the rules concerning when a meeting could be called be enhanced and harmonised. The reforms would allow creditors to more frequently call meetings by requiring a practitioner to convene a meeting of the creditors whenever:

- the creditors so direct by resolution (either through a meeting or postal vote);
- a COI so directs;
- so requested in writing by at least 25 per cent by value of creditors; or
- so requested in writing by less than 25 per cent by value of the creditors representing at least 10 per cent by value and who have lodged with the practitioner sufficient security for the cost of holding the meeting.

107.
Requiring that at least 10 per cent by value of the creditors support the calling of a meeting, even when security has been provided, prevents creditors incurring unnecessary costs by attending meetings which are not supported by a sufficient portion of creditors.

107.1.
Currently, practitioners in corporate insolvency are compelled to call meetings when requested by creditors representing at least 10 per cent by value but may require security irrespective of the level of support for the calling of a meeting.

108.
Practitioners would still be authorised to voluntarily choose to call a meeting in other circumstances. In addition, there would be a special threshold set for the first meeting in creditors' voluntary liquidations (see paragraph 188). **WITH APPROVAL OF THE COI OR IF THE IP PAYS THE COSTS OF THE MEETING IF NOT BACKED BY THE COI OR BY RESOLUTION AT A FULL CREDITORS MEETING.**

Voting on resolutions without calling a meeting

109.
The Corporations Act would be amended to provide for voting on resolutions without requiring the calling of a meeting. The law would be aligned to the current personal insolvency position, which allows resolutions without meetings for all kinds of resolution.

Chapter 12 – 2010 Corporate Insolvency Reforms.

Annual estate returns

110.
For every administration that a practitioner administers during a year, the practitioner would be required, within a specified period after the end of that year, to give the regulator a return, in an approved form, in relation to the administration of that estate during that year.

110.1.
These reports may require information to be provided on the receipts and payments for the period and any interest charged.

111.
This would align the laws to the current personal insolvency position. Corporate insolvency administration reports would no longer be required to be lodged every six months. **COI EVERY 3 MONTHS AND RIGHT TO FULL INSPECTION OF CASH BOOKS AND SOURCE DOCUMENTS. I FURTHER SUGGEST THAT COI MEMBERS MAY BE PAID AN HONORARIUM OR APPROVED PAYMENT BY CREDITORS AT A FULL MEETING AND IN THAT CASE HAVE DUTY OF CARE RESPONSIBILITIES CONSISTENT WITH DIRECTORS (OFFICE BEARERS INDEMNITY INSURANCE MAY BE REQUIRED IF NOT INDEMNIFIED BY THE CREDITORS).**

112.
The associated existing minor offence provision in personal insolvency would be replaced by a default late lodgement fee (as is currently the case in corporate insolvency). The new regime would provide that the late fee would be payable by the practitioner personally (EACH LATE LODGMENT

WOULD APPEAR ON A free PUBLICALY ACCESSABLE REGISTER UNDER THE IPs NAME) and not reimbursable out of the administration; this would ensure that the late fee operates as a real incentive to lodgements being made on time. The provisions in Part 7.4 of the Criminal Code Act 1995 regarding knowingly providing false information to a Commonwealth entity would continue to apply.

CHAPTER 6 — FUNDS HANDLING AND RECORD KEEPING

BACKGROUND TO PROPOSALS

113.
This chapter proposes changes to enhance and align the rules governing funds handling and record keeping for corporate and personal insolvencies.

114.
The aim of these reforms is to reduce the costs incurred by practitioners, and consequently administrations, in complying with multiple funds handling rules, while still promoting good governance in insolvency administrations and protecting the interests of creditors.

REFORM PROPOSALS

Funds handling

115.
It is proposed that the rules around funds handling be changed so that the opening of separate accounts for each administration would not be required unless actual or anticipated receipts for an administration exceeded both a prescribed amount (for example, $50,000) and number of receipt transactions (for example, 10 receipts). It is proposed that the rules regarding funds handling between personal and corporate insolvency; and between the various kinds of insolvency administration be aligned.

115.1.
Currently, combined accounts are not permitted in corporate insolvency, but are permitted in personal insolvency.

116.
Penalty interest provisions would apply for late banked monies. Under these provisions practitioners would be personally liable to pay penalty interest for late banked monies. This would reflect the current position in personal insolvency. Penalty interest provisions would also be extended to apply to monies withdrawn from accounts without authorisation.

117.
In personal insolvency, penalty interest would be treated as ‘interest’ for the purposes of the personal insolvency interest charge regime, under which all interest in personal insolvency matters must be paid to the Commonwealth. In corporate insolvency, penalty interest would be required to be applied to meet disbursements (only where funds would otherwise not be available to pay them), distributions to creditors or members, or paid into the Companies and Unclaimed Monies Special Account. Penalty interest would not be able to be used to meet practitioner remuneration claims.

118.
The current offences relating to failing to bank funds into the correct account would be aligned to apply to monies not banked or banked into the wrong account. Maximum penalties for breaches would be increased to 50 penalty units ($5,500).

119.
An explicit requirement to perform regular bank reconciliations would be imposed in corporate insolvency mirroring existing personal insolvency requirements.

120.
Investment rules would not be aligned, given that all interest is payable to the Government in personal insolvency but not in corporate insolvency.

IN RESPECT TO 115 – 120 THIS IS NOT REFORM AND SHOULD NOT PROCEED IN THIS WAY. THIS SEEMS TO BE A SWEETENER TO IPAA. THE PROVISION COULD BE THAT THE ACCOUNT MUST BE OPENED WITHIN 7 DAYS OF A RECEIPT BEING MADE TO THE IP. THE CTH SHOULD NOT POCKET THE INTEREST FROM +VE ADMINS AT ALL AND THERE SHOULD BE A SPECIAL CORPORATE LEVY PAYABLE WITH EACH YEARS' COMPANY REGISTRATION RENEWAL TO FINANCE THE VALUELESS INSOLVENT ADMINISTRAION INVESTIGATION FUND. FOR EXAMPLE THIS SHOULD BE A PROGRESSIVE TAX ON ALL CORPORATIONS AND REGISTERED BUSINESSES OF SAY $20 FOR SMALL BUSINESSES WITH LESS THAN $.5M TURNOVER TO $100,000 FOR THE LIKES OF THE TOP 50 COMPANIES.

Record keeping

121.
The rules regarding the keeping of records in personal and corporate insolvency would be aligned.

122.
The Corporations Act rules regarding the destruction of administration documents would be extended to all kinds of corporate insolvency and to personal insolvency.

123.
However, in order to maintain consistency with the seven year period following finalisation after which trustees obtain an automatic release (a release discharges the trustee from all liability in respect of any act done or default made by him or her in the administration of the estate of the bankrupt) records would by default be required to be kept for seven years following finalisation in personal insolvency, rather than five years as in corporate insolvency.

124.
A penalty for unauthorised destruction of records or failing to keep books would apply (as currently is the case in corporate insolvency) and be increased to 50 penalty units ($5,500).jail?

125.
The regulators would be empowered to allow electronic copies to be preserved in substitution of the ongoing retention of hard copies of documents.

Audit

126.
It is proposed that the current provisions empowering regulators to appoint a person to audit the financial statements of an insolvency administration would be aligned. The additional rules providing for information access and the remuneration of auditors that exist in corporate insolvency law would be replicated in personal insolvency law.

126.1.
Under the corporate insolvency regime, the cost of the audit forms part of the costs of the administration and copies of the audit must be provided to the liquidator.

127.
The aligned provisions would empower the court to order an audit of insolvency administration financial statements, upon the application of an interested party. The court would be given the power to determine on a case by case basis who would bear the costs of such an audit (for example, the applicant or the administration).

Reviews

128.
It is proposed that, in the case of corporate insolvency, the audit provisions be extended to empower a regulator or the court to appoint another insolvency practitioner to review and report on all or part of an administration. A reviewer would:

- be under a duty to act independently; in the interests of creditors as a whole (and, if they have a financial interest, members or the bankrupt); and to avoid actual and apparent conflicts of interest;
- be given rights to access administration records, and to require the production of records of the liquidator’s firm relating to the administration (for example, time sheets or diaries); and
- have to report their findings to creditors as a whole, the COI, the regulators, law enforcement or the court. Other than reporting to a COI, a reviewer would be prohibited from communicating selectively to creditors.

129.
In a regulator initiated matter, costs would be set by the regulator and borne by the administration. NO BORNE BY IP PERSONALLY UNLESS OTHERWISE VARIED BY THE COURT. In court initiated matters, costs would be set by the court and the court may determine who should bear the costs. The court would have the power to set, vary or review costs.

130.
The court would be given broad powers to intervene in (for example, prevent or vary the terms of a review; or remove and replace the reviewer) or to assist a review.

CHAPTER 7 — INSURANCE REQUIREMENTS FOR INSOLVENCY PRACTITIONERS

BACKGROUND TO PROPOSALS

131.
This chapter proposes reforms to insurance obligations, including increasing the penalties attached to not holding insurance and requiring annual reporting. Insurance is an important part of the insolvency framework as it provides protections for creditors in the event of any breaches by an insolvency practitioner.

132.
The aim of these reforms is to ensure that adequate and appropriate insurance cover is maintained by insolvency practitioners to cover losses arising from any breaches by them of their obligations to the administration and creditors. An important element of providing a strong incentive for practitioners to maintain adequate insurance is ensuring that the penalties reflect the serious consequences of failing to comply with this obligation.

REFORM PROPOSALS

Insurance

133.
It is proposed that the offence provisions in relation to the non-maintenance of insurance cover by insolvency practitioners be aligned across the personal and corporate insolvency regimes.

134.
A practitioner would be required to take all reasonable steps to maintain adequate and appropriate professional indemnity insurance and adequate and appropriate fidelity insurance. It is proposed that an offence of up to 1000 penalty units ($110,000) would apply for a breach of this duty **+ 6 MONTHS JAIL OR BOTH. In corporate insolvency, the current penalty is 5 penalty units ($550), while there is no equivalent offence in personal insolvency. FIDELITY INSURANCE INCLUSION COMMENDABLE, BUT UNLIKELY TO BE APPLICABLE IF IP IS THE MALFEASOR OR CRIMINAL. THERE IS A FURTHER NEED FOR THE IPAA, CHARTHERED INSTITUTE, CPAA ETC TO BUILD AN INDEMNITY FUND TO BE PAID INTO BY IPs. THIS FUND COULD BE UNDERWRITTEN BY THE LEVY SCHEME ON COMPANY REGISTRATIONS UNTIL SUCH TIME AS IT HAD SAY $50M ON INTEREST BEARING DEPOSIT INVESTMENT WITH APPROVED FINANCIAL INSTITUTIONS. THE COI CHECKLIST WILL INCLUDE A CURRENT CERTIFICATE OF CURRANCY FROM THE INSURER WHEN THE COI IS ELECTED FOR EACH NEW ADMINISTRATION. THE FIRST DUTY OF THE COI IS TO CONFIRM THE VALIDITY OF THE CERTIFICATE OF CURRANCY AND RECORD THAT FACT IN THE COI MEETING MINUTES FOR LODGMENT WITH THE REGULATOR. SIMILARLY THIS WILL BE DONE ON EACH ANNEVERSARY DATE WHEN RENEWAL OF THE POLICY FALLS DUE.**

135.
Consistent with the obligation imposed by legislation, the regulator would also be able to impose industry wide conditions regarding maintenance of insurance cover. This would provide a means for ASIC to give direction as to what is ‘adequate’ and ‘appropriate’. However, the

ASIC conditions would not be determinative of whether the criminal offence has been breached.

Annual practitioner returns

136.
It is proposed that the requirements around annual practitioner returns be aligned across the personal and corporate insolvency regimes. Regulators would continue to be provided with a high degree of flexibility regarding the information required in a return.

136.1.
Currently, in corporate insolvency, an annual practitioner return must be lodged. The annual return document sets out details about the practitioner's practice and information about the insolvencies the practitioner was involved in during the year.

137.
The law would mandate the attachment of proof of insurance. Currently, such proof must be lodged upon renewal of registration in personal insolvency, with no equivalent obligation in corporate insolvency.

138.
A fee would be able to be prescribed for the lodgement of this return, and this fee may be variable. The fee for corporate insolvency practitioners may be calculated with reference to the number and type of administrations handled during the period. The current fees payable by registered trustees, which are based on the amount of unsecured property realised in each administration (realisations charge) and on the interest accrued in each administration net of certain fees (interest charge), would be retained in personal insolvency.

THESE RETURNS SHOULD BE COUNTER SIGNED OFF BY AN AUTHORISED MEMBER THE COI OF EACH ADMINISTRATION WHERE APPLICABLE WHERE ASSETS HAVE BEEN LIQUIDATED AND PAID TO THE ADMINISTRATION. A LODGEMENT WITHOUT THE COUNTER SIGNATURE OF THE COI NOMINEE WOULD REQUIRE INVESTIGATION BY THE REGULATOR.

CHAPTER 8 — DISCIPLINE AND DEREGISTRATION OF INSOLVENCY PRACTITIONERS

BACKGROUND TO PROPOSALS

139.
This chapter proposes reforms to the disciplinary and deregistration process for insolvency practitioners, with significant changes applying to corporate insolvency practitioners. A strong disciplinary and deregistration process provides integrity to the insolvency framework and ensures that appropriate action can be taken when misconduct occurs.

140.
The aim of these reforms is to strengthen and align the disciplinary and deregistration processes, giving the regulators and others the power to refer matters to Committees, similar to what currently occurs in personal insolvency. This new framework would better enable timely and appropriate disciplinary action to be taken when misconduct occurs, while ensuring that practitioners are treated fairly and are afforded natural justice.

REFORM PROPOSALS

Direct administrative action by the regulators

141.
The proposed reforms would provide grounds on which the regulators would be able to act directly to suspend or deregister practitioners, without referral to a Committee. This would facilitate swift action in circumstances where a practitioner is clearly not capable of appropriately performing their functions.

141.1.
The suspension process would provide the practitioner with an opportunity to remedy any small breach without losing their registration, while also allowing the regulator to promptly intervene where it has concerns about a practitioner's conduct.

142.
Currently, ITSA does not have a power to administratively deregister or suspend a practitioner, although it may refuse to renew a trustee's registration where they have not maintained or provided proof of insurance or have not paid certain fees. ASIC may take direct action to disqualify a practitioner in limited circumstances, including where a practitioner does not maintain insurance cover, is disqualified from managing corporations, or becomes an insolvent under administration. Both regulators may also deregister a practitioner voluntarily at the request of the practitioner.

143.
Grounds for direct action by the regulator would include where the practitioner:
a)
becomes an insolvent under administration;

b)
is disqualified from managing corporations under Part 2D.6 of the Corporations Act;

c)
does not maintain adequate and appropriate professional indemnity insurance **(AND FIDELITY INSURANCE),** or does not provide adequate proof of this to the regulator **(AND THE COI)** when requested;

d)
requests that the regulator cancel their registration;

e)
requests that the regulator suspend their registration;

f)
has been involuntarily deregistered under the other registration regime;

g)
has been involuntarily suspended under the other registration regime;

h)
dies;

i)
has been convicted of an offence that would disqualify them from registration; or

j)
fails to comply with a notice directing them to pay:

j.1.
an outstanding administration-related tax or fee in excess of a prescribed amount;

j.2.
an infringement notice issued by the regulator in personal insolvency; or

j.3.
money outstanding to an administration as a result of a review process in excess of a prescribed amount (administrative remuneration review in personal insolvency; any review of practitioner conduct or remuneration by the Court for corporate or personal insolvency).

–
In relation to j.1, currently, non-payment of estate charges (including penalty interest on outstanding estate charges) is grounds for non-renewal in personal insolvency. In relation to j.3, it would not enable suspension or deregistration in relation to a stayed Court order or an administrative decision under review.

144.
Additionally, if upon registration conditions have been imposed by a Committee to address deficiencies, a regulator would be empowered to deregister or suspend that person for failing to comply with those conditions without referring the matter to a Committee; unless the Committee when setting the conditions has determined otherwise. Similarly, a regulator would be empowered to deregister or suspend a person for failing to comply with industry wide conditions imposed upon persons in their first two years of registration, without referral to a Committee.

144.1.
The ability for the regulators to take action for such breaches reflects the probationary nature of the registration of a person in their first two years of registration and the importance of conditions for those who have been registered notwithstanding that they have deficiencies that prevent their unconditional registration.

145.
The regulators would also be empowered to suspend a practitioner’s ability to accept new appointments, without referral to a Committee, if the practitioner fails to comply with a notice directing them to lodge an outstanding annual administration or practitioner return.

145.1.
Annual administration returns contain information required by regulators to determine whether the practitioner should remain registered. Non-lodgement of estate returns are strongly indicative that a practitioner is not properly managing essential record keeping and accounting

obligations in relation to the practitioner’s workload. Non-lodgement of returns is currently a ground for referral to a Committee or CALDB and for deregistration. In parallel to the regulators current power to take action directly, regulators would remain able to refer non-lodgement of returns to Committees.

146.
The regulators would also be empowered to suspend a practitioner’s ability to accept new appointments where they have failed to comply with a direction to correct an inaccurate return previously lodged. In these circumstances it would still be open to the regulator to seek other disciplinary remedies by referral to a Committee, if the extent of non-compliance with lodgements or the totality of alleged breaches warranted such action.

147.
In determining whether to exercise their powers in respect of suspension or deregistration, the regulators would be required to afford natural justice to the practitioner. Decisions of the regulator would be reviewable by the AAT.

Disciplinary action by committee

148.
It is proposed that the new regime would provide for referral of a disciplinary matter by the regulator, or other prescribed bodies, to a Committee. This would facilitate swift handling of matters involving potential misconduct by a practitioner, and is a significant change from the way disciplinary matters are currently handled in corporate insolvency.

149.
The current show cause process under the Bankruptcy Act would be adopted under both regimes. There is currently no requirement to issue a show cause notice in corporate insolvency prior to a referral to CALDB.

150.
The regulators would be able to issue a show cause notice to a practitioner and make a referral to a Committee where, in the opinion of the regulator, a practitioner:

- has breached his or her duties (including where appointed to conduct a review of another practitioner’s administration);
- no longer meets the ongoing requirements to maintain registration;
- is no longer actively practicing;
- is no longer residing in Australia; OR
- **IS THE DEFENDANT OR IS NAMED IN 2 OR MORE CIVIL PROCEEDINGS IN WHICH HE OR SHE IS ALLEGED TO HAVE BREACHED HIS OR HER DUTY. WHEN AN IP IS BEING SUED CIVILLY, THIS IS OFTEN THE EARLY SIGN THAT THE PERSON IS PROBABLY EITHER RECKLESS OR POSSIBLY DISHONEST.**

151.
There would be two Committees operating, one for corporate insolvency matters and one for personal insolvency matters. However, the law would facilitate the exchange of information between regulators, requiring the regulators to provide copies of show cause notices to the other regulator if the practitioner is registered in both regimes. In addition, the regulator may rely upon the findings of a Committee in the other regime in forming its opinion to issue a show cause notice.

151.1.
For example, where a personal insolvency Committee determines that a person who is registered under both systems is not a fit and proper person for the purposes of registration as a registered trustee, ASIC may rely upon this as a fact when determining whether to refer the person to a corporate insolvency Committee.

152.
Prescribed legal or accounting professional bodies or the IPA would also have standing to refer their members to a Committee on the same basis. This would enable professional bodies that may be in possession of information concerning a practitioner’s misconduct to act swiftly to remedy practitioner misbehaviour.

153.
In determining whether to refer a practitioner to a Committee, the regulator would be able to rely upon the existence of an unresolved act of bankruptcy by the practitioner to determine that the practitioner may be insolvent and therefore may be unable to satisfactorily perform the functions of a practitioner.

154.
The regulator could refer matters to a Committee where it is seeking any of the listed remedies (see paragraph 155). The regime would not be solely disciplinary in nature. For example, if a practitioner should become incapacitated, the Committee system would be able to temporarily suspend their registration and transfer their files to another practitioner.

Committee functions

155.
A Committee would be empowered to grant a wide range of remedies in relation to referred matters, including:
a)
deregistering a practitioner;

b)
suspending a practitioner’s registration;

c)
suspending a practitioner’s ability to accept new appointments;

d)
imposing a condition on a practitioner’s registration, including a condition that they enter into a specified undertaking as a condition of their continued registration;

e)
issuing private or public admonishments or reprimands;

f)
removing a person from a specified administration; OR

G) REQUIRING THE IP TO PAY A BOND OR SUCH OTHER SECURITY INTO COURT UNTIL SUCH TIME AS THE MATTER HAS BEEN DETERMINED OR RESOLVED.

156.
CALDB presently has open to it all of the above remedies except (f). The personal insolvency Committee can exercise all but (e) and (f).

157.
The new regime would enable a Committee to restrict a practitioner from acting as a delegate or on behalf of another practitioner following their deregistration (for up to 10 years) or during a period of suspension.

157.1.
Currently, neither CALDB nor a Committee have an equivalent power. Concern has been expressed as to the ability of certain deregistered practitioners to continue to be involved in high level insolvency case management as consultants to registered practitioners.

157.2.
This would give Committees the power to restrict the ability of suspended or deregistered persons to continue to be involved in specified administrations in a non-registered capacity (or in certain roles in respect of any administration), in appropriate cases. Committees would consider each matter on a case-by-case basis to determine whether such restrictions are appropriate, and the nature and extent of any such restrictions. All practitioners would have a corresponding general duty to not knowingly engage a person to act in respect of an administration contrary to the terms of such a determination by a Committee.

Imposition of conditions

158.
A Committee would be empowered to recommend conditions be imposed upon specific practitioners. Conditions would be required to be directed towards the overall purpose of the registration regime and be justified by the findings of the Committee.

159.
As part of a disciplinary proceeding, a Committee would be able to consider the imposition of conditions on their own initiative or at the request of the regulator. This is consistent with Committees having the power to impose conditions on their own initiative or at the request of the regulator when determining whether a person should be initially registered.

160.
Additionally, regulators would be able to impose conditions on registrations, with the practitioner’s consent. Regulator imposed conditions would be capable of being removed by the regulator or varied with the consent of the practitioner.

161.
Committees would be able to vary or cancel conditions (including those entered into voluntarily with the regulator).

162.
While conditions would be required to be made public, if a condition requires entering into an undertaking, the undertaking itself need not be made public.

Committees – general rules

163.
It is proposed that all decisions by a Committee would need to be by majority, that the relevant regulators would be required to give effect to the decisions of a Committee, and decisions concerning registration and deregistration would be reviewable by the AAT.

164.
The procedures of a Committee would be based upon current personal insolvency Committees. The procedures would seek to ensure the streamlined and efficient consideration of registration and of disciplinary matters, while also ensuring natural justice for practitioners.

164.1.
The procedures would reflect an expectation that more legally complex matters; matters where extensive use of coercive examination powers are required; and matters where disciplinary remedies alone are insufficient (for example, where compensation orders should be sought), are matters that should not be referred to Committees but should instead proceed directly to court.

165.
A Committee would be empowered to request the presence of a witness, but not compel them to appear. This reflects the current positions in personal insolvency. A Committee convened for disciplinary purposes would be entitled to dispense with a hearing and determine a matter on the papers with the consent of the practitioner.

166.
In the interests of increasing transparency for all stakeholders, Committees would be required to publish their decisions and reasons in relation to disciplinary matters. This would not be required when considering registration applications.

167.
In contrast to the current power of CALDB, a Committee could not impose costs orders. **WRONG!! THIS POWER SHOULD NOT BE DILUTED. THE POSSIBILITY HOWEVER SHOULD BE OPEN TO THE COMMITTEE TO HAVE THE IP ENTER INTO A DEED COVERING PAYMENT OF COSTS TO PROTECT CREDITOR INTERESTS.**

168.
A Committee that has convened would be empowered to disband if it no longer serves any practical purpose (for example, because the practitioner resigns) or if it forms the view that the matter before it is one that should more appropriately be considered by another body.

169.
Regulators would be empowered to publicise, as they see fit, Committee decisions and reasons. Where the decision was adverse to the practitioner, regulators would also be able to require the practitioner to publicise or disclose at their own expense the decision and reasons of the Committee, to specified persons, in specified circumstances. Currently, there is no express power for this to occur.

170.
A Committee in one regime could take into account the findings of a Committee in the other regime in determining appropriate remedies; and would be bound by findings of fact by the Committee in the other regime. Currently, neither CALDB nor a Committee may rely upon the finding of the other and must form their own conclusions on a consideration of the facts.

171.
The other insolvency regulator would be able to attend and have access to all materials relating to a Committee process in respect of a person who is registered under the other regime or is seeking registration under the other regime.

Court control over practitioners

172.
The proposed reforms would consolidate into a single provision, replicated in both the Corporations Act and Bankruptcy Act, the various provisions which empower persons to seek review of an insolvency practitioner's conduct in various kinds of insolvency administration.

173.
A person would be required to have a financial interest in an administration in order to seek a review in relation to the administration. This would address the issue raised in Vink v Tuckwell [2008] VSC 100. **OTHER THAN A TRADE UNION REPRESENTING THE INTERESTS OF EMPLOYEES OR FOR EXAMPLE THE LIKES OF NSW FARMERS REPRESENTING COLLECTIVELY REPRESENTING THE INTERESTS OF SMALL BUSINESS CREDITORS.**

174.
The regulators and certain prescribed bodies would also be given standing to apply to Court for the review of a practitioner's conduct. It is intended that prescribed bodies would include certain professional bodies and trade unions, where their members individually or as a class have an interest in the administration. Relevant Government departments would also have standing to apply.

175.
The amendments would expressly provide that a court, when considering whether to remove a practitioner from a particular administration, can take into account public interest considerations (such as maintaining confidence in the insolvency system as a whole) and that these considerations may override the individual interests of the practitioner, creditors and members in a particular administration. **OVERRIDING PUBLIC INTEREST MUST BE – EMPLOYEES – CREDITORS (AND NOT IN ALL CASES SECURED CREDITORS) AND MEMBERS. FOR EXAMPLE WHERE AN IP IS SHOWN TO BE TAKING HIS/HER INSTRUCTIONS FROM THE APPOINTER IN A RECEIVERSHIP THE SECURED CREDITOR WILL LOSE PREFERENCE AND THE IP WILL FOREGO HIS/HER FEE AND DISBURSEMENT CLAIMS FROM THE ADMINISTRATION. ANY CLAIMS BY THE IP WILL BE**

CIVIL CLAIMS AGAINST THE APPOINTER. THE COI OF THE ADMINISTRATION MAY HAVE INFLUENCE TO BRING SUCH MATTERS ON FOR DISCIPLINARY ACTION. THE IP MUST ALWAYS USE LAWYERS, INDEPENDENT OF THE COMPANY OR BANKRUPT, THE APPOINTER AND THE CREDITORS.

175.1.
For example, where there is a prima facie case of serious misconduct, and/or disciplinary proceedings have commenced, the court might direct a person to stand aside from the administration in advance of the final resolution of those disciplinary proceedings, without first finding that a breach of duty has occurred.

Ancillary powers upon suspension or deregistration

176.
Upon a vacancy arising following suspension or deregistration, the regulators would be able to appoint a replacement practitioner.

177.
This would include where a person is suspended or deregistered by a Committee or by the Court, where the Committee or Court has not made any order to appoint a replacement.

178.
In January 2010, various corporate insolvency reforms were announced by the Government. A power of this kind was proposed in that announcement. That proposal, revised to take into account this reform package, is set out below. (see Chapter 12 – 2010 Corporate Insolvency Reforms)

CHAPTER 9 – REMOVAL AND REPLACEMENT OF INSOLVENCY PRACTITIONERS

BACKGROUND TO PROPOSALS

179.
This chapter proposes reforms to the framework for the removal and replacement of insolvency practitioners. The ability for creditors to remove and replace practitioners provides an important element of governance and accountability to the insolvency framework.

180.
The aim of these reforms is to provide the recipients of insolvency administration services with greater power in determining whether a practitioner should be removed, while providing adequate protections for practitioners against abuse of such powers.

REFORM PROPOSALS

Removal by resolution

181.
The proposed reforms would provide a right for creditors (and members in members' voluntary windings up) to remove a practitioner by a resolution passed by majority in value and number. This would extend to all forms of

insolvency administration. The resolution would be required to be passed on a poll (as is currently the case in personal insolvency) and not ‘on the voices’. The insolvency practitioner/chair would not have a casting vote if the majorities were deadlocked, but would have the ability to concede to the removal resolution. **THIS REFORM IS INADEQUATE AS IT SHOULD NOT PROVIDE THE IP WITH ANY VOTE. SHOULD THE IP BE ELECTED TO CHAIR THE MEETING THE CHAIR WOULD HAVE NO VOTE, SHOULD ANOTHER CREDITOR BE ELECTED TO CHAIR THE MEETING THEN THAT CREDITOR WOULD HAVE THE POWER TO EXERCISE VOTES AS PER VALUE OF DEBT HELD ONLY.**

182.
Currently, in personal insolvency, practitioners can be removed by resolutions passed by a majority in value. In corporate insolvency, practitioners can be removed by majorities in value and number but with the practitioner holding a casting vote in the event that both majorities do not pass the resolution. However, generally, in corporate insolvency, practitioners can only be removed by creditor resolution at defined moments around the commencement of an administration. Additionally, creditors cannot remove practitioners by resolution at all in court ordered liquidations.

183.
The law would reflect that the recipients of insolvency services should have freedom of choice of practitioner. A breach of duty would not be required to be established before a resolution for removal can be passed.

184.
It is proposed that a practitioner would be able to apply to court to prevent removal. The court’s power to prevent removal by creditors would be directed solely at preventing removals that amount to an improper use of the power. The court would not be empowered to conduct a merits review of the collective decision of creditors to remove a practitioner. A practitioner would not be able to seek to prevent removal merely on the basis that the likely benefits of removal do not exceed the costs of removal.

185.
If a practitioner seeks to challenge their removal, they would be obliged to separately record the time and disbursements incurred in the challenge and if they were unsuccessful in resisting their removal, they would not be entitled to claim those costs out of the administration unless the court determined that they were reasonably incurred. LEGAL COSTS TO FOLLOW THE EVENT IN THE USUAL FASHION AS ORDERED BY THE COURT

186.
The initial notifications to creditors in all administrations would be required to provide or refer to prescribed or regulator approved information on creditors’ rights to remove or replace practitioners.

Initial meetings of creditors

187.
It is proposed that default initial meetings of creditors would no longer be required in creditors’ voluntary liquidations. With the proposed reforms to allow creditors to request the calling of meetings for any purpose, including to vote on replacing practitioners and to approve practitioners’ remuneration, default initial meetings in insolvency administrations would have little value and cause unnecessary costs to be

incurred. **DISAGREE, A MEETING SHOULD TAKE PLACE TO ELECT A COI, IF COST AN ISSUE IP SHOULD NOT ATTEND TO JUST ELECT COI AND SEND ONLY ONE OF HIS LOWER PAID EMPLOYEES AS AN OBSERVER TO TAKE NOTES TO ENSURE THE MINUTES REFLECT THE TRUE POSITION.**

187.1.
In practice, very few removal resolutions are currently passed at initial meetings as creditors are unlikely to be in a position to assess practitioner performance at the time these initial meetings are held.

188.
While initial meetings of creditors for creditors’ voluntary liquidations would be removed, the threshold for creditors to require a meeting to be held at the expense of the administration would be lowered to five per cent by value for requests made in the two weeks following notification of the commencement of an administration.

189.
Initial meetings would be retained in voluntary administrations, given that the short timeframes involved may make it impractical to rely on creditor requests to call meetings. Initial meetings are not currently required to be held in relation to any other form of insolvency administration. **INITIAL MEETINGS SHOULD BE MANDATORY TO BRIEF ALL CREDITORS AND ELECT COI.**

Transfer of records

190.
There is currently some uncertainty as to the ownership of administration records created by insolvency practitioners and the obligations of outgoing practitioners to hand over administration records. To facilitate the replacement of insolvency practitioners, reforms would be made to ensure that replacement practitioners can access and utilise prior records in relation to an administration, thereby minimising disruption to the administration.

191.
The law would specify that possession of both debtor and administration records passes with a change in practitioner, with the former practitioner retaining rights to inspect and obtain copies of the records.

192.
A practitioner’s right to the records of the administration (for example, as the creator of those records), including any liens in respect of remuneration, would arise subject to the rights of subsequent practitioners to take possession of and use records for administration purposes.

193.
The law would provide regulators with a power to take possession of and transfer administration and debtor records to new practitioners – including in any scenario where there is a temporary vacancy. This is consistent with an earlier reform proposal announced by the Government in January 2010. (see Chapter 12 – 2010 Corporate Insolvency Reforms)

THE LAW SEEMS TO BE SETTLED ON THE AUTHORITY THAT A RECEIVER FOR INSTANCE IS THE AGENT OF THE CORPORATION (SEE EXPO INTERNATIONAL v CHANT). IF THIS REMAINS THE CASE THEN THIS REFORM NEEDS TO GO FURTHER AND AT THE END OF AN ADMINISTRATION THE WHOLE OF THE RECORDS INCLUDING COPIES OF RECORDS GENERATED BY IPs DURING THEIR PERIOD OF CONTROL WILL AGAIN VEST IN THE CORPORATION (AFTER A RECEIVERSHIP OR VOLUNTARY ADMINISTRATION) IF AND WHEN IT IS RETURNED TO THE CONTROL OF ITS DIRECTOR(S), OR THE BANKRUPT WHERE BANKRUPTCY IS ANNULLED.

CHAPTER 10 – REGULATOR POWERS

BACKGROUND TO PROPOSALS

194.
This chapter proposes reforms to the powers available to regulators. Regulators play an important role in ensuring that the insolvency framework functions effectively. The regulators would be provided with the power to provide information to stakeholders, to direct the calling of a meeting of creditors and to direct practitioners to answer questions.

195.
The aim of these reforms is to ensure that the insolvency regulators are sufficiently equipped to monitor the conduct of regulators and to address the concerns of stakeholders.

REFORM PROPOSALS

Power to obtain written answers to questions

196.
It is proposed that the corporate insolvency regulator would be able to require practitioners to answer questions concerning an administration or their conduct. The proposed power would be subject to claims for legal and penalty privilege made by a practitioner. **THERE IS MUCH EVIDENCE OF ABUSE OF PARTICULARLY LEGAL PROFESSIONAL PRIVILEGE CLAIMS BY IPs. AS WITH RECORDS ALL LEGAL ADVICES, LETTERS AND LIKE DOCUMENTS SHOULD BECOME THE PROPERTY OF THE CORPORATION IN CIRCUMSTANCES WHEN THE CORPORATION OR ESTATE IS RETURNED TO THE DIRECTORS, MEMBERS OR OWNER, AND WHERE THE COST OF OBTAINING THE ADVICE ETC WAS BORNE BY THE ADMINISTRATION. IN CIRCUMSTANCES WHERE THE IP PAID ANY SUCH COST PERSONALLY IN THE FIRST INSTANCE THIS PROVISION SHOULD NOT APPLY.**

196.1.
In personal insolvency, the regulator may require a practitioner to answer an inquiry made to him or her in relation to any administration in which the trustee is, or has been, engaged. This power may be exercised whether or not a breach is suspected provided it is for the purpose of discharging ITSA’s functions. ASIC does not have an equivalent power. It is proposed that ASIC would also be empowered to give written directions to practitioners to answer questions in respect of an administration or their conduct as a registered practitioner.

197.
It is not proposed to provide the corporate insolvency regulator with specific powers to obtain information from any person who is believed to

have information that is relevant to an inquiry or investigation. ASIC would be able to continue to rely upon its existing information gathering powers in these cases. **THERE IS CLEARLY A REGULATORY FAILURE WITHIN THE CURRENT REGIMES AND IN MY VIEW THE POWERS OF ASIC AND ITSA SHOULD BE EXPANDED TO DELIVER QUICKER, MORE COST EFECTIVE INFORMATION GATHERING PROCEDURES. THIS SHOULD INCLUDE SPECIFIC POWERS TO OBTAIN INFORMATION FROM ANY PERSON WHO MAY HAVE KNOWLEDGE OF MISCONDUCT OR ANY THING ELSE THAT DOES OR COULD NEGATIVELY IMPACTS ON THE OUTCOME OF AN ADMINISTRATION.**

197.1.
The personal insolvency regulator may, upon forming a belief on reasonable grounds that 'a person' has information that is relevant to an inquiry or investigation, by written notice given to the person, require the person to give, within the period and in the manner specified in the notice, any such information.

Improve surveillance of liquidators

198.
In order to enable the regulators to proactively conduct practice reviews and reviews of individual administrations, it is proposed to give regulators additional authority to attend premises at which the practitioner is carrying out administrations or keeping books; inspect books; and require reasonable assistance. Suspicion of a breach would not be required for these powers to be exercised.

Information provision

199.
It is proposed that reforms would be made to facilitate the handing over of information by the regulator to stakeholders in any given administration. Specifically, it is proposed that the regulator would be given the clear power to provide or make available to stakeholders (including creditors, members, directors, employees, and the bankrupt) any information or material relating to an insolvency administration that would fall within the authority of the practitioner to provide on their own initiative. This power would not extend to authorising the disclosure of material in respect of which legal professional privilege applies. (**SEE NOTES TO PARAGRAPH 196).**

199.1.
ITSA already possesses broad powers to disclose information, and may provide a report on the outcome of any inquiry or investigation into an administration to any person it thinks fit. The existing exceptions to ASIC confidentiality obligations do not clearly afford a means for it to provide information to assist stakeholders to exercise their own remedies.

200.
This reform would be important in providing key information to creditors and members, without the cost of court intervention, particularly in the small number of cases where there are obstructive practitioners. This reform would also allow the regulators to provide further information to those people making complaints or inquiries to them.

201.
The regulators would also be authorised to direct practitioners to provide information directly. In exercising these powers, the regulators:

- must have regard to the impact on the administration of disclosing the information or copies of materials;
- must give the practitioner notice of their intention to disclose the information; and
- may require the person seeking access to compensate the administration by an amount determined by the regulator as being reasonable as a precondition of it exercising this power, where the provision of the information sought may impose a significant burden upon an administration.

202.
The exercise of the power to release, or direct the release of, information would be discretionary. It is important that the regulator be able to decline to intervene in circumstances where it is more appropriate that a dispute regarding information access be resolved in another way. **ONE OF THE GREAT PROBLEMS WITH ANY EXTERNAL ADMINISTRATION IS THE ISSUE OF UNCERTAINTY. IN MY VIEW THIS PROPOSAL MAKES UNCERTAINTY MORE LIKELY. IN MANY CASES IT IS SO HARD TO UNDERSTAND THE COMPLEXITY INSOLVENCY THAT LAWYERS HAVE DIFFICULTY. THE USE OF ANY DISCRETION SHOULD BE LIMITED AND CLEARLY ITS LIMITS SHOULD BE DEFINED IN THE BOOKLET OR HANDBOOK ON INSOLVENCY THAT SHOULD BE MADE AVAILABLE TO THE COI AND OTHER INTERESTED CREDITORS, MEMBERS AND DIRECTORS. A SECTION ON HOW THIS DISCRETION WILL BE EXERCISED AND WHEN COURT PROCEEDINGS MAY BE NECESSARY SHOULD BE MADE AVAILABLE.**

203.
In particular, the regulator would be free to choose not to exercise the power to provide information if in the opinion of the regulator:

- the practitioner would not be obliged to provide the information; or
- the question of whether the information or books should be provided is a matter more appropriately determined by either the practitioner or the court; or
- provision of the information is not supported by creditors or members collectively as evidenced by resolution.

Power to direct that a meeting of creditors be called

204.
It is proposed that, to supplement improved rights for creditors to require the calling of meetings, regulators would be given a power to direct that a meeting of creditors be called. Regulators would be provided with supporting powers to require the inclusion of certain material in convening documents.

205.
ASIC would be empowered to attend and participate at meetings of creditors. ITSA currently has this power in relation to personal insolvency administrations.

206.
This would be extended to enable ASIC to attend meetings of members in member’s voluntary windings up, and for ASIC and ITSA to attend meetings of a COI in any form of external administration.

Cooperative regulation

207.
Cooperative arrangements would be established to facilitate information flows between the regulators which are particularly important in cases of dual registration. It is proposed that the regulators would be given a broad power to share regulatory information regarding persons with dual registration, persons seeking dual registration, or in respect of events/actions taking place at a time when a practitioner held dual registration.

207.1.
This would be supported by a prescription that each regulator be required to cooperate and assist the other regulator in relation to dual-registered practitioners.

208.
The bodies to which the regulators can share information would also be increased to facilitate information flows between bodies which may have an interest in allegations of misconduct of practitioners. Information sharing would be permitted between the regulators and the IPA, Law Societies and prescribed professional disciplinary bodies.

208.1.
Currently, ASIC is empowered to share information with a prescribed professional disciplinary body for the performance of its functions. The Institute of Chartered Accountants, CPA Australia and the National Institute of Accounts are prescribed.11

209.
In addition, information sharing would also be permitted between the regulators and the Department of Education, Employment and Workplace Relations in relation to practitioners’ conduct regarding GEERS.

Transparency in regulatory activity

210.
It is proposed to increase reporting by ASIC against key criteria, including in relation to its insolvency surveillance program.

211.
While much of the detail of the activities of the regulators must remain confidential in order to be effective and in order to respect the rights of those persons being investigated, a degree of transparency is required in order to maintain the confidence of stakeholders.

211.1.
For example, in each Annual Report ITSA reports on: the purpose of their regulation activities, the level of complaints, its regulatory activity, the number and nature of breaches detected and the outcomes of its regulatory activities (see the 2010-11 ITSA Annual Report, from pages 25 to 34). High level details of the resourcing of its practitioner

regulation activities are also published in its Cost Recovery Impact Statements.

CHAPTER 11 — SPECIFIC ISSUES FOR SMALL BUSINESS

BACKGROUND TO PROPOSALS

212.
This chapter proposes reforms to address concerns relating to small corporate insolvencies, such as facilitating a one-stop-shop for related insolvency matters. Divergence between the personal and corporate insolvency regimes can cause more acute problems for small businesses, given that directors and creditors may have to deal with both a registered liquidator and a registered trustee that are operating under different statutory frameworks.

213.
The aim of these reforms is to facilitate the proper and efficient administration of insolvency administrations across all businesses; to address breaches of corporate law by company officers; and to deter phoenix activity.

REFORM PROPOSALS

Clarify obligations for small business administrations

214.
It is proposed that the Corporations Act and Bankruptcy Act be amended to remove any legal impediments to the adoption of a ‘one stop shop’ approach to dealing with complaints regarding interconnected administrations.

215.
ASIC and ITSA would examine how they can put in place systems to provide a ‘one stop shop’ approach for creditors and other stakeholders with an interest in interconnected personal and corporate small business insolvencies. The proposals to harmonise the corporate and personal insolvency regimes would facilitate the development of a ‘one stop shop’.

Insolvency practitioner assignment of cause of action

216.
Reforms are proposed to allow practitioners to assign causes of action. This would increase the level of deterrence against corporate breaches, reduce losses suffered by stakeholders as a result of those breaches and increase the overall efficiency in insolvency administrations.

216.1.
There is some uncertainty as to whether statutory rights of action arising under the Corporations Act may be sold. The statutory powers of insolvency practitioners would be amended to clarify that a practitioner is empowered to assign statutory rights of action arising out of the Corporations Act that vest with the practitioner (or company) during an administration, to a third party. **THIS REFORM SHOULD NOT BE JUST LIMITED TO IPs, BUT SHOULD ALSO INCLUDE A BANKRUPT WHO HAS ANNULLED**

HIS/HER BANKRUPTCY AND CORPORATIONS DISCHARGED FROM RECEIVERSHIPS WHICH INVARIBALY HAVE LIMITED ASSETS, YET AT TIMES SUBSTANTIAL CLAIMS AGAINST THE RECEIVER AND THE APPOINTOR. IT IS IMPORTANT THAT THESE ENTITIES BE INCLUDED IN THIS REFORM AS THE SECURITY FOR COSTS HURDLE IS OFTEN USED BY FINANCIAL INSTITUTIONS AND THE IP INVOLVED TO DETER, RESTRICT AND STAY CASES THAT HAVE REASONABLE PROSPECTS FOR SUCCESS.

217.
The ability to take civil action to recover company property inappropriately dissipated prior to business failure and hold directors liable for insolvent trading are key mechanisms to address phoenix activity.

218.
The inability to obtain funding is a major obstacle to the commencement of these actions. The taking of these actions may also delay the finalisation of administrations as a whole, ultimately to the detriment of creditors. The sale of rights of action may enable the value in such rights to be realised in the absence of funding being available and may result in the pursuit of matters which would not otherwise have been able to be pursued.

Assetless Administration Fund

219.
It is proposed that changes would be made to extend the application of the AA Fund to facilitate the deterrence of phoenix behaviour.

220.
The AA Fund would be extended to permit funding (grants or limited recourse loans) for purposes other than the preparation of misconduct referrals, to include funding practitioner activities that may have the effect of:

- deterring phoenix company behaviour (for example, taking litigation against directors for phoenix activity related breaches);

- preventing or reversing phoenix company behaviour (for example, recovering property transferred to successor companies under phoenixing arrangements); and
- depriving persons of the benefits of breaches of duty by company officers (including breaches by corporate insolvency practitioners) that have a significant adverse effect on employees, consumers or small business (which may include funding replacement liquidators to investigate a former liquidator where there are concerns that the liquidator was complicit in phoenix activity). **THIS REFORM SHOULD BE EXTENDED TO ANY PERSON WHO AIDS AND ABETS THROUGH ADVCE OR CONDUCT, WHETHER PAID OR UNPAID TO A COMPANY DIRECTOR, OTHER IP, MEMBERS OF THE CORPORATION, BENEFICIARIES OF A TRUST OR TO A PERSON WHO LATER BECOMES A BANKRUPT, THAT DIMINISH, SQUANDER OR TRANSFER THE ASSETS OF A CORPORATION. PHOENIX ACTIVITY, IS JUST ONLY ONE OF MANY ACTIVITIES THAT DIMINISH THE RECOVERIES OF AN EXTERNAL ADMINISTRATION.**

221.
The AA Fund is a fund administered by ASIC.12 It finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report. A particular focus of the AA Fund is to curb fraudulent phoenix activity.

222.
In contrast, under section 305 of the Bankruptcy Act, funding may also be provided for taking or defending litigation (including AAT reviews) and investigations other than for the purpose of preparing misconduct referrals to ITSA. Section 305 funding is, in practice, limited to matters where there are compelling public interest considerations.

223.
Corporate law breaches and fraudulent phoenix activity may, in some cases, more effectively and more cost efficiently be deterred through civil action being taken, rather than through regulator initiated enforcement action (such as director disqualification or criminal or civil penalty prosecutions). The AA Fund, unlike section 305 funding, does not provide ASIC with the flexibility to utilise the fund to support such activity. **THIS REFORM IGNORES THE FACT THAT CIVIL ACTION ALONE IS AN INSUFFICIENT DETERRENT WHEN THE SUMS OF MONEY THAT MAY BE FRAUDULENTLY MISAPPROPRIATED, MAKE THE RISK OF A SMALL LOSS ON ONE OCCASION OVERALL A VERY PROFITABLE PURSUIT AND WORTH THE RISK. A PENAL SERVITUDE DETERRENT IS ABSOLUTELY ESSENTIAL.**

224.
Funding could also be used to fully or partly cover the costs of a practitioner performing mandatory functions in relation to an administration, where there would otherwise be insufficient funds in the administration to have a practitioner appointed and the other criteria for accessing the AA Fund are satisfied. **THESE APPOINTMENTS SHOULD BE DEALT WITH IN A SIMILAR WAY TO LEGAL AID. THE FEES FOR SUCH APPOINTMENTS WOULD BE BELOW THE MARKET RATE, BUT IT WOULD BE A REQUIREMENT OF EVERY REGISTERED PRACTITIONER TO TAKE ON THEIR FAIR SHARE OF ASSETLESS APPOINTMENTS AND CONDUCT THE WORK IN A MANNER THAT COMPLIES IN EVERY WAY WITH THE EXPECTATIONS OF THE COMMUNITY.**

224.1.
For example, if a company has been suspected to have been involved in phoenix activity but there are no assets left in the company and no practitioner is willing to accept an appointment to that company, then ASIC might (depending upon competing demands for regulatory resources) provide funding towards the costs of a practitioner performing the mandatory tasks in the administration (in order to induce a practitioner to accept the appointment) as well as towards preparing and providing a report on whether it has been involved in phoenixing.

225.
In addition, the purposes of the AA Fund would be extended to enable ASIC to fund registered trustees for otherwise in-scope activities.

226.
The law would also be amended to provide that existing Corporations Act restrictions on the ability of the company to enter into contracts that operate for longer than three months would not apply to contracts

required for activities funded out of AA Fund monies, given that such actions have been implicitly vetted and approved by ASIC.

Reports as to affairs / Statements of affairs

227.
It is proposed that reforms would be made to consequences connected with lodging a report as to affairs (RATA). Specifically, the penalty for failure to lodge a report as to affairs would be increased to 50 penalty units and aligned across all forms of insolvency. In addition, ASIC would be empowered to issue information gathering notices requiring the former directors or officers to complete the RATA within a stipulated timeframe, which would mirror the current power afforded to ITSA.13

228.
RATAs and statements of affairs are documents that must be completed and provided by directors or debtors at the commencement of an insolvency administration. They are a means of ensuring that practitioners are provided with information necessary to facilitate efficient administration.

229.
Where corporate record keeping obligations have been complied with, it should be a relatively straight forward task for a director to complete a RATA and provide the company's books (or indicate where they may be located, if they are no longer within their control). A refusal to provide a completed RATA or to provide books impacts the ability of a practitioner to properly conduct the administration and may be motivated by a wish to conceal corporate misconduct in the lead up to insolvency.

230.
Where a director does not comply with their obligations to lodge a completed RATA or to provide books and records, corporate insolvency practitioners would continue to refer thebreach to ASIC.

231.
It is proposed that a new streamlined director suspension (not full disqualification) provision would be introduced to support compliance with director obligations to lodge RATAs. The suspension power would also apply to non-compliance with demands by practitioners to directors at the commencement of administrations to deliver the company's books and records. The new suspension process could be utilised by ASIC either as an alternative or in addition to criminal prosecution. **WHAT THIS REFORM IGNORES IS THE FACT THAT IN MANY EXTERNAL ADMINISTATIONS THE IP PREPARES THE RATA AND TRIES TO BULLY THE DIRECTOR(S) TO SIGN. THERE IS A NEED TO INCLUDE IN THE REFORM AN EXCLUSION TO THE EFECT THAT THE RATA IS NOT TO BE PREPARED BY THE IP OR ANY STAFF OR PERSONS ASSOCIATED WITH THE IP. THE DIRECTOR(S) ARE TO BE GRANTED UNFETTERED ACCESS TO BOOKS AND RECORDS TO PERFORM THEIR STATUTORY DUTY. IF ANY PERSON, DIRECTOR, SECRETARY OR IP FAILS IN THIS DUTY, A CRIMINAL SANCTION SHOULD STILL APPLY IN ADDITION TO THE PROPOSED SUSPENSION/DISQUALIFICATION CRITERIA.**

232.
ASIC would formally demand compliance by the director. If the director did not comply with the demand and they did not provide a reasonable excuse, ASIC would be required to file a notice of suspension on the public record. Upon being recorded on the public register, the director would be prohibited from managing a company. **IF MY SUGGESTED AMENDMENTS**

AT 231. ARE ADOPTED THIS SECTION WOULD ALSO APPLY TO AN IP WHO INFLUENCES OR TRIES TO INFLUENCE OR OBSTRUCTS A DIRECTOR IN CARRYING OUT THE DIRECTOR'S STATUTORY DUTY.

232.1.
Currently ASIC would assign such a referral to their Liquidator Assistance Program, which would seek provision of the completed form or books; and may commence prosecutions against non-compliant directors. ASIC currently successfully prosecutes approximately 450 directors per annum under this program.

233.
There would be a delay after lodgement and notice to the director before the suspension became effective, to enable directors to seek a review. Notices would be reviewable internally by ASIC and then by the AAT. The suspension would be delayed during the period of review. **THIS REFORM SHOULD APPLY TO ALL PERSONS WHO HAVE A RIGHT OF APPEAL SHOULD MY SUGGESTIONS MADE ABOVE BE ADOPTED.**

234.
Suspensions would come to an end upon a person complying with their lodgement obligations; upon a person providing a reasonable excuse for non-compliance; upon the completion of the insolvency administration; or after three years of non-compliance.

235.
Expired suspensions would remain recorded on the public register for five years from the time they take effect. However, in relation to a first suspension, the record of a spent suspension could be removed upon the person having completed a prescribed course in director's duties. Automatic disqualification would occur following three suspensions inrelation to unrelated companies.

236.
The regime would have sufficient flexibility to recognise that there will be occasions where a director may not be able to provide records or may be limited to providing information to the practitioner as to the location of the records. However, this would not extend to situations where a director cannot produce a RATA or records because of their own actions or omissions which were intended to or would have the probable effect, of records becoming not reasonably accessible by the practitioner.

CHAPTER 12 – 2010 CORPORATE INSOLVENCY REFORMS

237.
On 19 January 2010, the then Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, announced a series of reforms arising out of the Corporations and Markets Advisory Committee's Issues in External Administration report, issues raised during consultation on the Corporations Amendment (Insolvency) Bill 2007, and various concerns raised by the industry or highlighted by Court decisions.

238.
These are listed below. Where the current reform proposals have resulted in revisions to these proposals, the proposed changes are identified.

RELATION-BACK AND COMMENCEMENT DATES

239.
The terms ‘relation-back’ and ‘commencement date’ are utilised in a number of ‘clawback provisions’ contained in the Corporations Act which enable the reversal of uncommercial transactions, unfair preferences, unfair loans and unreasonable director-related transactions made in the period leading up to the commencement of a company’s liquidation. The existing anomalies in these provisions are subject to abuse and may potentially be used by directors to manipulate the relation-back and commencement dates for a liquidation, limiting how far back the clawback provisions will apply.

240.
It was announced in January 2010 that the Government would amend the law to address the anomalies that exist in the Corporations Act definitions of ‘relation-back date’ and ‘commencement date’ where there are successive or overlapping insolvency administrations.

241.
This reform would be progressed in an unamended form.

ACCESS TO CREDITOR LISTS

242.
In a voluntary liquidation where the company is insolvent, a liquidator is required to provide to creditors the names, addresses and estimated amounts owed in respect of all other creditors in the administration. Hard copies of these lists must be sent to all creditors with debts in excess of $1,000, and upon request to creditors with debts less than this threshold.

243.
It was announced in January 2010 that the law would be amended to provide that insolvency practitioners should be permitted, but not compelled, to make creditor lists available electronically, rather than posting hard copies.

244.
In light of the reforms proposed at paragraph 94 concerning reasonable requests for information by creditors, creditor lists would now only be required to be provided in voluntary administrations. However, practitioners would be required to make them available on request. This applies to all liquidations and deeds of company arrangement. **AS STATED IN MY COMMENTS AT 94 ABOVE, THE COI (WHICH I PROPOSE IS TO BE MANDATORY IN EVERY ADMINISTRATION WITH A MINIMUM MEMBERSHIP OF 3 AND MAXIMUM OF 9) SHOULD HAVE ACCESS TO ALL LISTS. IT SHOULD BE UP TO THE COI TO DIRECT AND SUPERVISE THE IP AS TO WHETHER CREDITOR LISTS ARE CIRCULATED TO ALL CREDITORS AND HOW THEY ARE CIRCULATED IN COMPLIANCE WITH THE CORPORATIONS ACT.**

NOTICE TO PROPERTY OWNERS

245.
An administrator is required to consider whether the company to which they have been appointed would retain any equipment or other property in

the company's possession that is owned by a third party. An administrator who decides not to retain such property must notify the owner of that decision within five business days after the commencement of the administration.

246.
It was announced in January 2010 that the law would be amended to provide that an external administrator would be required to advise the third parties of the location of their property, when they are advising those parties that they do not intend to use their property in an administration (provided that the information is reasonably available to the practitioner).

247.
This reform would be progressed in an unamended form.

CHAIRING THE MAJOR MEETING

248.
A voluntary administrator is obliged to chair the major meeting of creditors, at which the proposed deed of company arrangement is considered and voted upon, unless excused by a Court order. **THERE IS FAR TOO MUCH HISTORY AVAILABLE FROM THE MANY CREDITORS OF ADMINISTRATIONS BRINGING EVIDENCE OF ABUSE OF POWER TO ALLOW AN IP TO HAVE A STATUTORY RIGHT TO CHAIR AND APPOINT. THE CHAIR SHOULD BE CHOSEN FROM THE RANKS OF CREDITORS, OTHER THAN A SECURED CREDITOR(S). AS PRIOR STATED ABOVE, MEETINGS SHOULD BE MANDATORY IN ALL ADMINISTRATIONS AS SHOULD THE ELECTION OF A COI.**

249.
It was announced in January 2010 that the law would be amended to provide that the major meeting of creditors should be able to be chaired by an administrator's nominee, when it cannot reasonably be chaired by the administrator, without the need for a Court order.
Creditors would have the right to reject the nominee and require the meeting to be adjourned and be chaired by the administrator or an acceptable nominee.

250.
This reform would be progressed in an unamended form.

NOTIFICATION OF BREACH OF DEED OF COMPANY ARRANGEMENT

251.
Creditors have the right to resolve to terminate deeds of company arrangement that have been breached or to apply to the courts for remedial action. However, there is no statutory requirement for a deed of company arrangement administrator or for the directors of the company (where the deed of company arrangement returns control of the company to the directors rather than an administrator) to inform creditors that a breach of the deed of company arrangement has occurred. It is currently open for the terms of a deed of company arrangement to impose such an obligation.

252.
It was announced in January 2010 that the law would be amended to provide that a deed administrator or the directors, where the deed of company arrangement returns control to directors, should be required to notify creditors (in the case of directors, via the administrator) of any breach of a deed of company arrangement which could reasonably be expected to have a material effect on the purpose or outcome of the deed.

253.
This reform would be progressed in an unamended form.

PROVISIONAL LIQUIDATOR’S REMUNERATION

254.
Where a person has petitioned the Court for the liquidation of a company, the Court may appoint a provisional liquidator to take control of the company to safeguard the assets of the company pending the outcome of the proceeding. Currently, a provisional liquidator’s remuneration must be approved by the Court.

255.
It was announced in January 2010 that the law would be amended to allow creditors to approve a provisional liquidator’s remuneration in cases where they would ultimately bear these costs, subject to the power of the Court to confirm, increase or reduce that remuneration.

256.
This reform would be progressed in an unamended form.

POSTAL VOTING BY CREDITORS

257.
Liquidators of court-ordered or creditors’ voluntary liquidations cannot enter into compromises of debts in excess of $100,000 or agreements under which the company’s obligations may not be discharged within three months, except with the approval of the Court, the COI or a resolution of the creditors. In the case of a members’ voluntary liquidation, the relevant approval is by a special resolution of members.

258.
It was announced in January 2010 that the law would be amended to allow postal voting in all kinds of liquidations in respect of these matters.

259.
The passage of creditor resolutions without the holding of a meeting would now be extended to all kinds of resolution. The law would be aligned with the current personal insolvency position (see paragraph 109).

REPLACING A LIQUIDATOR

260.
The members in a members’ voluntary liquidation or creditors in a creditors’ voluntary liquidation may fill any vacancy in the office of liquidator which may arise if the incumbent ceases to be a registered liquidator, resigns or dies.

261.
It was announced in January 2010 that the law would be amended to provide that ASIC would be able to administratively appoint a replacement liquidator when there is a vacancy in the office. Public notice of appointments would be required and appointments would have to be in accordance with publicly available guidelines to be developed by ASIC, in consultation with relevant stakeholders.

262.
This reform would be implemented in a way that complements proposed new mechanisms allowing for creditors to remove practitioners and providing for ASIC to replace suspended or deregistered practitioners (see Chapter 9 — Removal and replacement of insolvency practitioners).

TAKING POSSESSION OF AND TRANSFERRING BOOKS

263.
ASIC does not have a generic power to require the production, and to take possession, of books of a company under external administration. Its powers in this regard can only be used in support of its enforcement and other functions and powers. There is also no power for ASIC to transfer books to another person.

264.
It was announced in January 2010 that the law would be amended to provide that ASIC, in the event of a vacancy in the position of external administrator, would be able to take possession of books relating to a company in external administration and transfer those books to another external administrator.

265.
This reform would be implemented in a way that complements proposed new mechanisms governing the transfer of books upon the removal, suspension or deregistration of a practitioner (see paragraph 190).

THE PUBLICATION OF EXTERNAL ADMINISTRATION NOTICES

266.
There are a range of notices that, in the course of external administrations, must be published in the print media. These public disclosure obligations are in addition to obligations for petitioning creditors and for external administrators to communicate directly with known creditors to inform them of certain events.

267.
It was announced in January 2010 that the law would be amended to facilitate the future possibility of provision of notices via a single website. The reforms would apply to both advertisement requirements and gazettal requirements.

268.
This reform would be progressed in an amended form to require that notices be lodged on the single website. This reform would affect current newspaper advertisements and gazettals as required under the Corporations Act for:

Section 412 — Information as to compromise with creditors

Section 436E – Purpose and timing of first meeting of creditors
Section 439A – Administrator to convene meeting and inform creditors
Section 446A – Administrator becomes liquidator in certain cases
Subsection 449C – Vacancy in Office of Administrator of Company
Section 450A – Appointment of Administrator
Section 465A – Notice of Application
Section 491 – Circumstances in which company may be wound up voluntarily
Section 497 – Meeting of creditors
Section 498 – Power to adjourn meeting
Section 509 – Final meeting and deregistration
Section 568A – Liquidator must give notice of disclaimer
Section 601AB – Deregistration – ASIC initiated
Regulation 5.3A.07 – Administrator becomes liquidator – additional cases
Regulation 5.6.14A – Advertisement of a meeting
Regulation 5.6.39 – Notice to submit particulars of debt or claim
Regulation 5.6.48 – Notice to creditors to submit formal proof
Regulation 5.6.65 – Liquidator to give notice of intention to declare a dividend
Regulation 5.6.69 – Postponement of declaration

Note below:

NOTICE OF APPOINTMENT OF RECEIVER, RECEIVER AND MANAGER OR CONTROLLER SHOULD BE ALSO INCLUDED IN THE ABOVE ADVERTISED LIST AND THE REFERENCE TO ADVERTISED INFORMATION SHOULD BE MADE AVAILABLE IN THE HANDBOOK THAT I HAVE REFERRED TO EARLIER ON THAT SHOULD BE USED TO EDUCATE AND INFORM CREDITORS AND IN PARTICULAR THE MEMBERS OF THE COI.

269.
With the removal of the first meeting of creditors in a creditors' voluntary winding up, the requirement to publish notice of the holding of this meeting would be replaced by a requirement to publish notice of the commencement of the administration (see paragraph 187).

EXEMPTION FROM PUBLICATION

270.
A company in external administration that changes its name during, or six months prior to, the external administration must disclose its former name as well as its current name on public documents, for the period of the administration or any subsequent liquidation.

271.
An administrator of a deed of company arrangement has the right to apply to the Court for an exemption from this disclosure requirement. The Courts may grant such an exemption provided that there is no significant risk to the interests of creditors, including contingent and prospective creditors, as a whole. Corporate insolvency practitioners in other kinds of external administration do not have standing to seek similar orders.

272.
It was announced in January 2010 that the law would be amended to provide that administrators, receivers and other controllers and liquidators, as well as deed of company arrangement administrators, would have the right to apply to the court for an exemption from the requirement for a company to publish its former name on public documents.

273.
This reform would be progressed in an unamended form.

ELECTRONIC COMMUNICATION WITH CREDITORS

274.
The purpose of sending notices to creditors is to ensure that they are informed of events that may affect their rights and as a result are given an opportunity to protect those rights. **THE PUBLICATION OF A HANDBOOK (REFERRED TO ABOVE) FOR USE BY CREDITORS AND IN PARTICULAR FOR THE USE BY THE COI, SHOULD BE PUBLISHED ELECTRONICALLY AND MADE AVAILABLE ON THE WEBSITE.**

275.
It was announced in January 2010 that the law would be amended to provide that external administrators would be permitted to advise, in their first notification to creditors, that all further notices to creditors and other documents relevant to the external administration would be published on a designated website. The first notification would also indicate that a creditor may choose: to register to be notified electronically when new material is placed on the website; or to receive by mail, free of charge, a printed version of these further notices and other documents. If they make no nomination, they would not receive any further notifications.

276.
It is proposed that this reform would be progressed in an altered form, in light of the reforms proposed at paragraph 100. Practitioners would be required to provide initial notification of the commencement of an insolvency administration. Further notices or reports to creditors would still require practitioners to provide individual notification of the communication (which may occur electronically), unless excused by the Court. However, the practitioner would have the option of making the full text of the communication available, rather than being required to send out the full text of the communication. Practitioners would be able to make communications available via a website.

APPOINTMENT OF LIQUIDATOR UPON TRANSITION FROM DEED OF COMPANY ARRANGEMENT

277.
The NSW Supreme Court case of Jick Holdings identified an error in the insolvency provisions of the Corporations Act arising from the amendments in the Corporations Amendments (Insolvency) Act 2007. The error has the effect that where the Court makes an order terminating a deed of company arrangement and winding up a company, or where a provision in a deed of company arrangement provides for its termination and the winding up of a company is triggered, no liquidator is appointed by default to the subsequent liquidation.

278.
It was announced in January 2010 that the law would be amended to provide that, for section 446B transitions, the former administrator would be automatically appointed as the liquidator, subject to:

278.1.
the Court having the power to appoint an alternative liquidator, in the event that a deed of company arrangement or administration is brought to an end by a Court order; and

278.2.
except where the Court provides otherwise, creditors holding 10 per cent or more of the claims against the company by number or value being able, within 10 working days of the transition, to direct the default liquidator to call a meeting of creditors to be held within 20 working days of the transition to consider whether to appoint an alternative nominated liquidator.

279.
This reform would be progressed in an unamended form.

ASSETLESS ADMINISTRATION FUND

280.
Sections 473 and 499 of the Corporations Act provide that a liquidator's entitlement to remuneration only arises if approved by a COI, a meeting of creditors or the Court.

281.
ASIC administers the AA Fund which may, upon application by a liquidator, provide financial assistance to carry out investigations into alleged misconduct by company officers.

282.
On one view, sections 473 and 499 may be interpreted as requiring liquidators to obtain approval before seeking payment from the AA Fund for investigation work.

283.
It was announced in January 2010 that the law would be amended to provide that insolvency practitioners should be explicitly authorised to claim properly incurred remuneration out of AA Fund monies even in the absence of any approval under sections 473 or 499 of the Corporations Act.

284.
It is proposed that this reform be progressed, but extended to allow remuneration payments arising from a practitioner's completion of services under GEERS to be accepted without approval.

284.1.
Liquidators are often engaged to verify and distribute employee entitlements by the Department of Education, Employment and Workplace Relations under GEERS. The proposed reforms would clarify that this work does not require creditor approval for payment to the practitioner.

POOLING PROVISIONS

285.
Pooling provisions for liquidations were introduced as part of the 2007 reforms. The amendments did not provide for notice of pooling-related

Court orders under sections 579A, 579B and 579C of the Corporations Act to be lodged with ASIC.

286.
It was announced in January 2010 that the law would be amended to provide that persons obtaining such orders would be required to lodge notice of them with ASIC.

287.
This reform would be progressed in an unamended form. **I AM OPPOSED TO POOLING UNLESS IT APPLIES TO COSTS INCURRED IN ASSETLESS ADMINISTRATIONS ONLY.**

COMPANY UNDER EXTERNAL ADMINISTRATION – FORMER NAME TO BE USED ON DOCUMENTS

288.
Section 161A of the Corporations Act was inserted in the 2007 insolvency reforms. There are incorrect cross-references in the section.

289.
It was announced in January 2010 that the law would be amended to provide that the reference to ‘(iii)’ in subsection 161A(3) be amended to ‘(iv)’ and the reference to ‘(iv)’ in subsection 161A(2) be amended to ‘(iii)’.

290.
This reform would be progressed in an unamended form.

PERSONS NOT TO ACT AS RECEIVERS

291.
Section 418 of the Corporations Act provides that persons having certain relationships with a company are disqualified from acting as a receiver over the company’s property.

292.
One such relationship is that of a ‘senior manager’, be it of the company, one of its mortgagees or a related body corporate.

293.
Concerns have been raised by stakeholders that this term may be wide enough to include a ‘receiver and manager’. **ANY STAKEHOLDER IN A RECEIVERSHIP, WHO IS AN UNSECURED CREDITOR, WILL KNOW THAT THIS PROPOSED EXEMPTION IS ONLY INTENDED TO BENEFIT THE SECURED CREDITOR(S) AND THE APPOINTED IP. I STEADFASTLY OPPOSE THIS PROPOSED EXEMPTION AND I WOULD INCLUDE ALSO A CONTROLLER IF SO APPOINTED, TO BE ALSO INCLUDED AS A PERSON UNABLE TO ACT IN THOSE CIRCUMSTANCES.**

294.
It was announced in January 2010 that the law would be amended to provide that, in section 418, a ‘senior manager’ does not include a ‘receiver and manager’.

295.
This reform would be progressed in an unamended form.

FIRST MEETING OF CREDITORS IN A VOLUNTARY LIQUIDATION

296.
As a result of the 2007 amendments, subsection 497(1) of the Corporations Act requires a liquidator to ‘cause’ a meeting of the creditors to be ‘convened’ within 11 days.

297.
The wording of this section did not achieve the intended result. The policy intention was that the section would require the liquidator to hold the meeting within 11 days as explained in the Explanatory Memorandum to the Insolvency Act. The word ‘convene’ means to arrange the holding of a meeting.

298.
It was announced in January 2010 that the law would be amended to give effect to the original intention that the meeting would be held within 11 days.

299.
This reform would no longer be progressed as initial creditor meetings would no longer be held by default in voluntary liquidations. However, reforms are proposed to set up a low voting threshold to trigger an initial meeting in a creditors’ voluntary liquidation (see paragraph 188).

LODGEMENT OF A REPORT AS TO AFFAIRS

300.
Directors are required to provide a RATA of the company in the prescribed form to a liquidator.

301.
It was announced in January 2010 that the law would be amended to provide for the lodgement of this form with ASIC.

302.
This reform would be progressed in conjunction with additional reforms to the RATA (see paragraphs 227 to 236).

CHAIRING OF A FIRST MEETING OF CREDITORS

303.
The general rule for the selection of a chairperson for a creditors’ meeting is contained in regulation 5.6.17 of the Corporations Regulations. It states that if a meeting is convened by ‘a liquidator … that person, or a person nominated by that person, must chair the meeting’.

304.
The 2007 reforms amended subsection 497(1) of the Corporations Act, in part, to provide that the initial creditors’ meeting in a voluntary liquidation would be convened by the liquidator, rather than the company. However the 2007 reforms did not remove subsection 497(8) which states that, in respect of a section 497 meeting, ‘the creditors may appoint one of their number or the liquidator to preside at the meeting’.

305.
It was announced in January 2010 that the law would be amended to provide that there be no exception for section 497 meetings to the general rule contained in regulation 5.6.17 and subsection 497(8) would therefore be repealed. **IF ANYTHING THE REFORM SHOULD BE EXTENDED TO ALLOW FURTHER CREDITOR INVOLVEMENT. AT LEAST s.497(8) SHOULD BE RETAINED.**

306.
This reform would no longer be progressed as initial creditor meetings would no longer be held by default in voluntary liquidations (see paragraph 187).

BANKRUPT INELIGIBLE

307.
The definition of 'insolvent under administration' in section 9 of the Corporations Act, while effective in specifying the correct meaning of an insolvent under administration, does so by first defining it as meaning a bankrupt (under local or foreign law). It then states that a bankrupt includes persons subject to controlling trusteeships, personal insolvency agreements or equivalent foreign proceedings. Although subject to personal insolvency administration, such persons are not technically 'bankrupts'.

308.
Although section 9 implies a meaning for 'bankrupt' that differs from that in the Bankruptcy Act, there are a range of sections in the Corporations Act that on their face use the term in accordance with its Bankruptcy Act meaning.

309.
It was announced in January 2010 that the definition of insolvent under administration would be amended so that it does not internally define 'bankrupt' in a manner inconsistent with its definition in the Bankruptcy Act and its use throughout the Corporations Act. The meaning of insolvent under administration would remain unaltered.

310.
This reform would be progressed in an unamended form.

COURT POWER IN THE EVENT OF REINSTATEMENT

311.
Subsection 601AH(1) of the Corporations Act provides ASIC with the power to reinstate a company that has been deregistered. Subsection (2) provides a similar power to the Court.

312.
Subsection (3) provides the Court with a power to validate any acts done during deregistration and to make any other orders it considers appropriate. However, as drafted, this power appears to apply only to subsection (2) reinstatements.

313.

It was announced in January 2010 that the law would be amended to provide the Court with the power to make orders consequential to ASIC-initiated reinstatements as well as Court-initiated reinstatements.

314.
This reform would be progressed in an unamended form.

AUTOMATIC ADJOURNMENT OF A MEETING FOR NO QUORUM

315.
Regulation 5.6.16 of the Corporations Regulations provides that if there is no quorum at a meeting of creditors, the meeting is automatically adjourned for a period between 7 and 21 days, as determined by the chair of the meeting.

316.
This provision applies to the first meeting of creditors in a voluntary administration under section 436E. As a consequence, a section 436E meeting may be adjourned for 21 days, which could be inconsistent with the requirement to hold the second creditors' meeting in a voluntary administration between 15 business days and 30 business days from the commencement of the administration.

317.
It was announced in January 2010 that the law would be amended to provide that, if there is no quorum at the first meeting of creditors it should be automatically adjourned for a period of between 7 and 10 days, rather than 7 and 21 days.

318.
This reform would be progressed in an unamended form.

WHEN ADMINISTRATION BEGINS AND ENDS

319.
Paragraph 435C(3)(h) of the Corporations Act provides that the voluntary administration of an insurer would end when 'management of the general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the Insurance Act 1973 or Part 8 of the Life Insurance Act 1995'.

320.
The Life Insurance Act 1995 deals with 'life companies' and not 'general insurers'.

321.
It was announced in January 2010 that the section would be amended to refer to when management of a general insurer vests in a judicial manager of the company appointed by the Federal Court under Part VB of the Insurance Act 1973, or management of a life company vests in a judicial manager of the company appointed by the Federal Court under Part 8 of the Life Insurance Act 1995.

322.
This reform would be progressed in an unamended form.

WHEN ADMINISTRATOR MAY DISPOSE OF ENCUMBERED PROPERTY

323.
Section 442C of the Corporations Act sets out the rules for voluntary administrators and deed administrators regarding the disposal of third party property or company property which is subject to charges, liens or pledges.

324.
Paragraph 442C(2)(a) provides authority to administrators to dispose of company or third party property in the ordinary course of business. This is subject to subsection 442C(4) which gives the Court a power to make orders to prevent certain property disposals in the ordinary course of business from taking place. There appears to be a drafting error in this subsection.

325.
The subsection refers only to property ‘of the company’ and not to third party property. This is notwithstanding that the potential applicants for an order under subsection 442C(4) include the owner or lessor of the property in question (see paragraph 442C(5)(b)).

326.
It was announced in January 2010 that section 442C would be amended to provide that the Court has the power to make orders preventing the disposal of both company and third party property.

327.
This reform would be progressed in an unamended form.

CERTAIN NOTICES TO BE LODGED

328.
Both sections 465A and 470 of the Corporations Act impose obligations upon persons applying to wind up a company to lodge certain notices with ASIC. Although these sections do not appear to conflict (section 470 is merely more specific as to the requirements), they do unnecessarily overlap.

329.
It was announced in January 2010 that amendments would be made to the Corporations Act to eliminate this overlap and any possibility of conflict.

330.
This reform would be progressed in an unamended form.

CARRYING ON BUSINESS

331.
Section 477 of the Corporations Act provides that in a court-ordered liquidation the liquidator may carry on the business of the company ‘so far as is necessary for the beneficial disposal or winding up of that business’.

332.
In comparison, in a voluntary liquidation, section 493 provides that the company must 'cease to carry on its business except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business'.

333.
There appears to be no basis for the different wording between the two sections as they are intended to have the same effect.

334.
Additionally, it appears that section 477 also applies to voluntary windings up by operation of section 506. That is, both sections 477 and 493 apply to voluntary liquidations.

335.
It was announced in January 2010 that the law would be amended to provide for a single consistent rule that applies to all kinds of windings up.

336.
This reform would be progressed in an unamended form.

RESOLUTION THAT COMPANY BE WOUND UP VOLUNTARILY

337.
Section 491 of the Corporations Act provides that a company must, within seven days after the passing of a resolution for voluntary winding up, lodge a 'printed copy of the resolution'.

338.
Other provisions, such as subsection 507(11), merely refer to the lodgement of certain resolutions, with no reference to 'printed'.

339.
Concerns have been raised that the reference to 'printed' may be read as being unnecessarily restrictive, in particular given the practice of electronically lodging these resolutions.

340.
It was announced in January 2010 that the lodgement requirement in section 491 would be amended to refer to the lodgement of notice of the resolution in a prescribed form, without use of the term 'printed copy'.

341.
This reform would be progressed in an unamended form.

LODGEMENT WITH ASIC OF DECLARATIONS OF RELATIONSHIP

342.
External administrators in either a voluntary administration or a creditors' voluntary winding up must make declarations to creditors about relevant relationships and/or indemnities. **THIS SHOULD BE EXTENDED TO IPs**

APPOINTED IN ALL EXTERNAL ADMINISTRATIONS. IT IS PARTICULARLY RELEVANT TO DEEDS OF APPOINTMENT IN RECEIVERSHIPS.

343.
It was announced in January 2010 that the law would be amended to provide for the lodgement of these declarations with ASIC.

344.
This reform would be progressed in an unamended form. **AMENDMENT AS RECOMMEDED AT 342 TO BE INCLUDED IN THE REFORM.**