
**EXPOSURE DRAFT:
INSOLVENCY LAW REFORM BILL 2013
(PRIMARY AMENDMENTS)**

**CONSULTATION
EXPLANATORY DOCUMENT**

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AA Fund	Assetless Administration Fund
AAT	Administrative Appeals Tribunal
ASIC	The Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
Bankruptcy Regulations	<i>Bankruptcy Regulations 1996</i>
Bill	Insolvency Law Reform Bill 2013
CALDB	The Companies Auditors and Liquidators Disciplinary Board
COI	Committee of inspection
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
Insolvency practitioner	Collective term for both registered liquidators and registered trustees
ITSA	The Insolvency and Trustee Service Australia
options paper	<i>Options Paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia, Australian Government, June 2011</i>
proposals paper	<i>Proposals Paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia, Australian Government, December 2011</i>
Senate Inquiry Report	<i>The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework, Senate Economics References Committee, September 2010</i>
The Acts	The Corporations Act and the Bankruptcy Act

General outline

Outline

The Insolvency Law Reform Bill 2013 (the Bill) amends the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *Bankruptcy Act 1966* (Bankruptcy Act) to:

- align and modernise the registration and disciplinary frameworks that apply to registered liquidators and registered trustees;
- align and modernise a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations;
- improve the powers available to the corporate regulator to regulate the corporate insolvency market and the ability for both regulators to communicate in relation to insolvency practitioners operating in both the personal and corporate insolvency markets.

Date of effect: The Bill commences on Royal Assent.

The amendments are expected to commence on Proclamation. Timing of commencement is subject to the outcomes of consultation, as well as the drafting and legislative processes. Based on passage of the legislation during the 2012/13 financial year, indicative timing is for the majority of the amendments to commence in September 2013. However, the amendments to the processes regarding the registration and discipline of insolvency practitioners are not expected to commence until February 2014. The new director disqualification provisions are also not expected to commence until February 2014.

Proposal announced: The package was announced by the Government on 14 December 2011.

Compliance cost impact: The reforms are expected to have a low impact on business regulation.

Summary of regulation impact statement

Regulation impact on business

Impact: A Regulation Impact Statement (RIS) was completed for the amendments. The RIS was published on the website of the Office of Best Practice Regulation on 18 January 2012.

Chapter 1

Registration and discipline of practitioners

Outline of chapter

1.1 The Insolvency Law Reform Bill 2012 (the Bill) amends the Bankruptcy Act and Corporations Act (the Acts) to introduce a new schedule setting out common rules regarding the registration, regulation, discipline and deregistration of corporate and personal insolvency practitioners. In particular, the Bill amends the Acts to provide common rules regarding:

- the physical registers of insolvency practitioners;
- registering insolvency practitioners;
- insurance obligations of insolvency practitioners;
- annual trustee returns required to be lodged by insolvency practitioners;
- requirements for practitioners to notify regulators of prescribed events;
- the discipline of insolvency practitioners; and
- registration and disciplinary Committees.

Context of amendments

1.2 The regulation of insolvency practitioners, particularly corporate insolvency practitioners, has been the subject of a number of reviews in the past two decades by a range of bodies including the Australian Law Reform Commission in 1988 (the *General Insolvency Inquiry* (commonly known as the Harmer Report)); the *Working Party to review the regulation of corporate insolvency practitioners* in 1997; the Parliamentary Joint Committee on Corporations and Financial Service in 2004; and most recently the Senate Economics References Committee (Senate Committee) that released its report, *The regulation, registration*

and remuneration of insolvency practitioners in Australia: the case for a new framework in September 2010 (the Senate Inquiry Report).

1.3 The Senate Inquiry was established to consider the practices of liquidators in conducting external administrations, including their remuneration, as well as the role of ASIC in overseeing the corporate insolvency profession. Submissions to the Senate Inquiry identified a wide range of regulatory failures in relation to the regulation of liquidators, and in particular expressed concerns regarding: the process for the registration of new liquidators; the process for the discipline and deregistration of insolvency practitioners who had engaged in misconduct; and the regulatory tools available to ASIC, and the obligations of ASIC, to actively oversee the profession.

1.4 The Senate Inquiry Report was critical of a number of areas of the current regulatory framework for corporate insolvency, including the current registration and discipline frameworks, insurance obligations, and remuneration of registered liquidators. The Senate Committee was also critical of ASIC's performance in the regulatory oversight of registered liquidators. The Senate Inquiry gave voice to creditor discontent following recent high profile cases of fraud and negligence by members of the corporate insolvency industry.

1.5 Australia has always had separate personal and corporate insolvency systems. This includes separate laws, regulators, agencies responsible for policy development, and ministerial responsibility. The Senate Inquiry Report highlighted the current divergence between the regulatory systems for corporate and personal insolvency and expressed a desire for greater harmonisation of the two. The Government considered the areas for reform identified by the Senate Committee through an options paper, *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*, in June 2011.

1.6 In an interim response to the Senate Inquiry Report, the Government noted that it did not accept the Senate Committee recommendation that the corporate insolvency arm of ASIC be transferred to ITSA to form a new personal and corporate insolvency regulator. The Government did however recognise that providing for greater alignment of the laws that govern insolvency administration and insolvency practitioner regulation would benefit insolvency practitioners, creditors, shareholders, regulators and other stakeholders.

Summary of new law

1.7 The reforms create a new Schedule to the Corporations Act and Bankruptcy Act that substantially aligns the registration process for registered liquidators and registered trustees.

1.8 The reforms to the registration system for insolvency practitioners align the standards required of potential practitioners before being able to be considered for registration. The newly aligned registration process based upon the existing Bankruptcy Act provisions will replace the current systems for registration of liquidators and registered trustees.

1.9 There would be a single class of practitioner in corporate insolvency (although registrations may be conditional or restricted to some kinds of administration). The separate class of official liquidator, as well as debtor company specific registration, would be removed. Registered liquidators would be able to perform all functions currently restricted to official liquidators. [These reforms will be released as part of the forthcoming consequential amendments portion of the Bill]

1.10 The reforms to the insurance obligations of insolvency practitioners will significantly strengthen the penalties attached to not holding adequate and appropriate insurance, improve the regularity with which practitioners are required to show evidence of their insurance to the regulators, and allow for the insurance obligations for insolvency practitioners to more easily be amended in light of the insurance markets prevailing at a relevant period of time.

1.11 The reforms to the annual trustee return obligations on insolvency practitioners will facilitate aligned reporting obligations by insolvency practitioners to their relevant regulators. All insolvency practitioners will now be required to lodge an annual practitioner return, setting out generic information about the practitioner, as well as a return setting out information on each administration undertaken by the practitioner during the financial year.

1.12 Insolvency practitioners will now be obligated to inform their respective regulator when the trustee becomes aware of prescribed significant events that would result in the practitioner automatically being deregistered by law, the practitioner being able to be deregistered by a regulator without reference to a Committee, or the practitioner ceases to have adequate and appropriate insurance.

1.13 The reforms to the disciplinary frameworks applying to insolvency practitioners align the processes applying to registered liquidators and registered trustees. The reforms provide the new capacity

for the regulators to deregister or suspend a practitioner directly without referral to a Committee on certain objectively determinable grounds.

1.14 The reforms will apply the current three-person committee approach currently operating under the Bankruptcy Act to the registration and discipline of registered liquidators. The procedures of a Committee under both systems would be based upon the procedures that currently apply to personal insolvency Committees.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current corporate law</i>	<i>Current bankruptcy law</i>
<p>The regulators would work co-operatively in relation to persons who become both registered trustees and registered liquidators under the Acts. The failure to do so would not affect a decision or outcome.</p> <p style="text-align: right;"><i>Sch 2, Pt 2, Div 4</i></p>	<p>There is currently no corresponding law.</p>	<p>There is currently no corresponding law.</p>
<p>The regulators may establish and maintain a register of insolvency practitioners registered under their Act.</p> <p style="text-align: right;"><i>Sch 2, Pt 2, Div 6</i></p>	<p>ASIC may establish and maintain a register of insolvency practitioners registered under the Corporations Act.</p> <p style="text-align: right;"><i>1286</i></p>	<p>The Inspector-General must update the National Personal Insolvency Index in relation to the details of registered trustees.</p> <p style="text-align: right;"><i>Div 13 Bankruptcy Regulations (Bankruptcy Regs)</i></p>
<p>An individual will apply to either ASIC or ITSA to be registered as a liquidator or trustee. If the application is properly made, and fee paid, the regulator will convene a committee to consider the application within six months. The committee will consist of the regulator, a practitioner appointed by the IPA, a person appointed by the Minister.</p> <p>The committee will interview the applicant, and may require the applicant to sit an exam. The committee must</p>	<p>An individual will apply to ASIC to be registered as a liquidator. If the application is properly made, and the prescribed fee paid, ASIC will consider whether the applicant satisfies the prescribed criteria under the Act.</p> <p style="text-align: right;"><i>1282</i></p> <p>A registered liquidator will not be able to conduct court-ordered liquidations, provisional liquidations, or cross-border insolvency matters unless registered as</p>	<p>An individual will apply to the Inspector-General to be registered as a trustee. If the application is properly made, and fee paid, the Inspector-General will convene a committee to consider the application within six months. The committee will consist of the regulator, a practitioner appointed by the IPA, a representative of the Attorney-General's Department.</p> <p>The committee will interview the applicant, and may require the applicant to sit an</p>

<p>register the applicant if the applicant satisfies the prescribed criteria both under the Act and the Regulations. The committee may decide that the applicant's registration be subject to conditions.</p> <p>When advised by the committee to register the applicant, the regulator must register the person upon the payment of the stipulated fee and the production of evidence that the person has taken out appropriate insurance.</p> <p>The registration has effect for three years.</p> <p>The regulations may prescribe conditions applying to the registration of all, or a class of, practitioners.</p> <p style="text-align: right;"><i>Sch 2, Pt 2, Div 8.B</i></p>	<p>an 'official liquidator'.</p> <p style="text-align: right;">1283</p> <p>There is no capacity for ASIC to place conditions on the registration of a registered liquidator.</p> <p>A registered liquidator remains registered until that registration is cancelled by CALDB, the Court or the practitioner resigns.</p>	<p>exam. The committee must register the applicant if the applicant satisfies the prescribed criteria under the Act. The committee may decide that the applicant's registration be subject to conditions.</p> <p>When advised by the committee to register the applicant, the Inspector-General must register the person upon the payment of the stipulated fee.</p> <p>The registration has effect for three years.</p> <p style="text-align: right;"><i>154A, 155, 155A, 155B, 155C</i></p>
<p>An insolvency practitioner whose registration has conditions imposed upon it may apply to the regulator to have those conditions varied. The application must be considered by a committee convened for that purpose within 60 days. The regulator must give effect to the decision of the committee.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 8.C</i></p>	<p>There is currently no corresponding law.</p>	<p>A registered trustee whose registration has conditions imposed upon it may apply to the Inspector-General to have those conditions varied. The application must be considered by a committee convened for that purpose within 60 days. The Inspector-General must give effect to the decision of the committee.</p> <p style="text-align: right;"><i>155E, 155F</i></p>
<p>Where a practitioner wishes to continue practicing after the initial three year registration period, the person must apply to have their registration renewed. The regulator must renew the person registration where the application is properly made,</p>	<p>There is currently no corresponding law.</p>	<p>Where a registered trustee wishes to continue practicing after the initial three year registration period, the person must apply to have their registration renewed. The Inspector-General must renew the registration where the application is received</p>

<p>the person can evidence their insurance, and the person has completed any necessary continuing professional education obligations.</p> <p>If the person is a registered trustee, they must also not owe more than the prescribed amount of estate charges.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 8.D</i></p>		<p>before the expiration of the person's registration.</p> <p>The Inspector-General would not be able to renew the registration if the person owes more than \$50 of estate charges or penalties.</p> <p style="text-align: right;"><i>155D</i></p>
<p>A person that represents that they are a registered insolvency practitioner, that is not a registered insolvency practitioner, commits an offence.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 8.E</i></p>	<p>There is currently no corresponding law.</p>	<p>There is currently no corresponding law.</p>
<p>An insolvency practitioner must maintain adequate and appropriate professional indemnity and fidelity insurance. If a practitioner fails to comply they commit an offence. Where the person intentionally or recklessly fails to comply the maximum penalty is 1,000 penalty units; otherwise the penalty is 60 penalty units.</p> <p>The regulators may make legislative instruments determining what is considered adequate and appropriate.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 10</i></p>	<p>A registered liquidator must maintain adequate and appropriate professional indemnity and fidelity insurances. If a practitioner fails to comply they commit an offence. The offence is strict liability and the penalty is 5 penalty units.</p> <p style="text-align: right;"><i>1284</i></p>	<p>A registered trustee must maintain adequate and appropriate professional indemnity and fidelity insurances.</p> <p>Proof of retaining these insurance policies is required to extend the practitioners registration.</p> <p style="text-align: right;"><i>155A; Reg 8.04 Bankruptcy Regs</i></p>
<p>An insolvency practitioner must lodge an annual return in relation to their practice during that year. A practitioner commits an offence, punishable by five penalty units, if they fail to do so.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 12</i></p>	<p>A registered liquidator must lodge an annual return in relation to their practice during that year. A practitioner commits an offence, punishable by five penalty units, if they fail to do so.</p> <p style="text-align: right;"><i>1288</i></p>	<p>A registered trustee is not required to lodge an annual practitioner return.</p>

<p>An insolvency practitioner must notify their respective regulator where prescribed events occur that would affect the ability of the practitioner to continue to practice. Where a practitioner intentionally or recklessly fails to notify the relevant regulator within 5 business days after the person could reasonably be expected to be aware that the event has occurred, the person commits an offence punishable by 100 penalty units.</p> <p><i>Sch 2, Pt 3, Div 14</i></p>	<p>A registered liquidator must inform ASIC about a change to their name, registered address, or the firm for which they work.</p> <p><i>1287</i></p>	<p>A registered trustee must inform the Inspector-General as soon as practicable where the trustee:</p> <ul style="list-style-type: none"> • is convicted of an offence involving fraud or dishonesty; • becomes bankrupt, • enters as a debtor into an insolvency administration, under the law of a foreign country. <p><i>161A</i></p>
<p>The regulators may direct a practitioner to lodge, or correct an inaccurate, practitioner or administration statement. Where the practitioner fails to comply with the direction within two weeks, the regulator may suspend the ability of the practitioner to accept any new appointments until the practitioner complies.</p> <p><i>Sch 2, Pt 3, Div 16.B</i></p>	<p>There is currently no corresponding law.</p>	<p>There is currently no corresponding law.</p>
<p>The registration of an insolvency practitioner that becomes an insolvent under administration, becomes a party as a debtor under a debt agreement, or dies is automatically cancelled.</p> <p><i>Sch 2, Pt 3, Div 16.C</i></p>	<p>If an insolvency practitioner becomes an insolvent under administration, ASIC may cancel the registration of the practitioner.</p> <p><i>1290A</i></p>	<p>If a registered trustee becomes bankrupt, becomes a party (as debtor) to a debt agreement or signs an authority for a trustee or solicitor to be their controlling trustee, the trustee's registration is cancelled.</p> <p><i>182</i></p>
<p>The regulators may, by giving a written notice, suspend or cancel the registration of an insolvency practitioner where the practitioner:</p>	<p>ASIC may cancel the registration of a registered liquidator who is an insolvent under administration, is disqualified from managing a company, or has fails to maintain adequate and</p>	<p>There is currently no corresponding law.</p>

<ul style="list-style-type: none"> • is disqualified from managing companies; • ceases to have adequate and appropriate professional or fidelity insurance; • has their registration under the other insolvency framework cancelled or suspended; • is convicted of an offence involving fraud or dishonesty; • requests it. <p>A registered trustee may also be suspended or cancelled directly by the Inspector-General where the person owes more than a prescribed amount of estate charges; or the person fails to repay remuneration owing as a result of a review by the Inspector-General.</p> <p style="text-align: center;"><i>Sch 2, Pt 3, Div 16.D</i></p>	<p>appropriate insurance.</p> <p style="text-align: center;">1290A</p>	
<p>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:</p> <ul style="list-style-type: none"> • 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 (for example, is no longer actively practicing as an insolvency practitioner); or • is no longer residing in Australia. 	<p>Where ASIC believes that a liquidator has breached his or her obligations under the Corporations Act, ASIC would refer the matter to CALDB.</p> <p>A liquidator’s registration may be cancelled or suspended where CALDB determines that the practitioner:</p> <ul style="list-style-type: none"> • has failed to carry out or perform their duties and functions; • is not otherwise a fit and proper person; • has failed to lodge an annual statement; • is disqualified from 	<p>The Inspector-General may issue a show cause notice to a practitioner and make a referral to a Committee where the Inspector-General believes that the trustee:</p> <ul style="list-style-type: none"> • has breached his or her duties (including breaching a standard prescribed regulations); • no longer has qualifications required for registration; or • has contravened a condition. <p>A committee, consisting of the relevant regulator, a practitioner appointed by the IPA, and a representative of the Attorney-General’s</p>

<p>A committee, consisting of the relevant regulator, a practitioner appointed by the IPA, and a person appointed by the relevant Minister, would consider the matter.</p> <p>The committee may then decide to:</p> <ul style="list-style-type: none"> • deregister the practitioner; • suspend the practitioner’s registration; • suspending the practitioner’s ability to accept new appointments; • impose a condition on a practitioner’s registration; • issue a public admonishment or reprimand; and • prevent the practitioner from operating as an employee, agent, or consultant for another insolvency practitioner for up to 10 years. <p>Where the committee makes a decision in relation to a disciplinary matter ASIC must give effect to that decision, and update the appropriate register.</p> <p>Consequential amendments will be made removing the discipline of liquidators from the responsibilities of CALDB.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 16.E</i></p>	<p>managing corporations;</p> <ul style="list-style-type: none"> • is no longer residing in Australia; • is incapable, because of mental infirmity, of managing his or her affairs. <p style="text-align: right;"><i>1292</i></p>	<p>Department, would consider the matter.</p> <p>The committee may decide to:</p> <ul style="list-style-type: none"> • deregister the practitioner; or • impose a condition on a practitioner’s registration. <p>Where the committee makes a decision in relation to a disciplinary matter, the Inspector-General must give effect to that decision.</p> <p style="text-align: right;"><i>155H, 155I</i></p>
<p>Prescribed professional or industry bodies would be able to refer their concerns regarding an insolvency practitioner’s conduct to the regulators. Where a regulator</p>	<p>A professional or industry body, like any other person, is able to make a complaint to the regulator.</p> <p>However, ASIC must not disclose information given to</p>	<p>A professional or industry body, like any other person, is able to make a complaint to the regulator.</p>

<p>receives such a notice, it would be required within 60 days to conduct a preliminary assessment of the notification and decide:</p> <ul style="list-style-type: none"> • to take no further action; • to issue a show cause notice to the identified practitioner; or • to take further action. <p>If a Regulator decided to take no further action in relation to a notification it would be required to give written notice of the decision to the referring prescribed body.</p> <p>Where a representative of the prescribed body makes a notification to a regulator, the representative would be protected from civil, criminal and administrative liability provided the notification was made in good faith.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 16.F</i></p>	<p>it in connection with the performance of its functions or the exercise of its powers.</p>	
<p>The regulators must update the registers to reflect suspension, cancellation or conditions imposed on practitioners.</p> <p>ASIC must also appoint a replacement liquidator to an existing administration upon suspension or cancellation of the current liquidator's registration.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 16.G</i></p>	<p>ASIC must cause to be entered in the Register particulars of any suspension of the registration of the practitioner and any other action taken concerning undertakings made by the practitioner.</p> <p style="text-align: right;"><i>1286</i></p> <p>There is currently no corresponding law relating to the appointment of a replacement liquidator.</p>	<p>The Inspector-General must update the National Personal Insolvency Index in relation to the details of registered trustees.</p> <p style="text-align: right;"><i>Div 13 Bankruptcy Regs</i></p>
<p>The Court will continue to have oversight of insolvency practitioners.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 17</i></p>	<p>The Court has general and specific powers to make orders in relation to practitioners in different types of external administration.</p> <p style="text-align: right;"><i>447A, 447E, 479, 482 and 511</i></p>	<p>The court has general and specific powers to make orders in relation to the conduct of trustees.</p> <p style="text-align: right;"><i>176, 179</i></p>

<p>Rules are made regarding the matters that a single committee may consider, about the effect of certain situations on the ongoing consideration of a matter by a committee, about the obligations of committee members to use information obtained.</p> <p>Rules regarding the procedure of a committee would be prescribed by regulations.</p> <p>The Minister would be able to appoint a pool of appropriate persons to be appointed by him as a member of a committee. The Minister's ability to appoint a person out of that pool may be delegated to an ASIC representative.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 18</i></p>	<p>There is currently no corresponding law.</p>	<p>If a committee member resigns, dies or their appointment is terminated, the Committee must be dissolved and a new committee established.</p> <p>A committee must take all reasonable measures to protect from unauthorized use information disclosed to it in confidence.</p> <p style="text-align: center;"><i>Reg 8.05G, 8.05O Bankruptcy Regs</i></p> <p>Rules regarding the procedure of a committee are prescribed by regulations.</p> <p>There is no capacity for a committee convened to consider more than one matter.</p>
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Application and transitional provisions

1.15 The amendments to the processes regarding the registration and discipline of insolvency practitioners are not expected to commence until February 2014.

1.16 The consequential and transitional amendments portion of the Bill is currently being drafted and will be released shortly.

Chapter 2

Specific rules relating to external administrations

Outline of chapter

1.17 The Bill also amends the Acts to introduce a new schedule setting out common rules regarding:

- Remuneration and other benefits received by the insolvency practitioner;
- The handling of administration or estate funds;
- The provision of information by insolvency practitioners during an external administration or bankruptcy;
- The meetings of creditors during an external administration or bankruptcy;
- Committee of inspection formed as part of an external administration or bankruptcy; and
- The external review of the administration of an estate or insolvency.

Context of amendments

1.18 Complaints made during the Senate Inquiry regarding the high cost of, and the feeling of general creditor powerlessness during, external administrations reflected deeper concerns regarding the efficiency and effectiveness of corporate insolvency administration governance, including in the areas of:

- practitioners' and stakeholders rights and responsibilities to communicate with each other;
- the removal and replacement of practitioners from specific administrations; and
- the approval of practitioners remuneration.

1.19 The submissions to the Options Paper, as well as subsequent consultation with industry participants and other stakeholders, further reflected the concerns with the current corporate regulation in these areas.

1.20 A persistent concern during the Senate Inquiry was that there appears to be little indication of active price based competition occurring between corporate insolvency practitioners. This reflects issues around the law and practice involving the approval of remuneration for practitioners, as well as the difficulty and costliness of removing poorly performing practitioners.

1.21 With the removal of the official liquidator as part of these reforms, the current inefficiency for obtaining approval of minimal remuneration for insolvency practitioners in an assetless administration or low-asset administration may derive greater importance. While a liquidator is currently able to draw down up to \$5,000 where he or she has called a meeting of creditors but failed to obtain approval for remuneration because of a lack of quorum, the liquidator (and ultimately the estate) is required to incur the expense of convening a creditors meeting, regardless of the potential for achieving a quorum. In contrast, registered trustees are able to draw down up to \$5,000 without approval. This figure reasonably reflects the essential tasks which every trustee or liquidator must undertake.

1.22 The corporate and personal insolvency regulatory frameworks currently provide procedural rules regarding: the treatment of estate monies; the obligation on registered liquidators and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and ITSA respectively; the keeping of books and the period of time for which those books must be retained. The current divergence in rules and requirements for personal and corporate insolvency create unnecessary complexity and costs for creditors and insolvency practitioners, making it difficult for creditors of individuals as well as companies to understand how the different regimes apply without an in-depth knowledge of both frameworks. This lack of knowledge and expertise is not something that creditors can easily address and it imposes both financial and time costs on creditors to obtain the information they need to protect their interests in a corporate or personal insolvency.

1.23 The divergence also limits the ability for practitioners to easily move between corporate and personal insolvencies as the different approaches to account and record keeping increases costs and the administrative burden on practitioners.

1.24 Personal and corporate insolvency laws contain a number of mechanisms designed to ensure that stakeholders are appropriately informed of debtors' affairs and the process of insolvency administrations.

These mechanisms impose obligations upon practitioners to provide specified types of information and rights for stakeholders to make ad hoc requests for information.

1.25 Creditors and members in a corporate insolvency currently possess limited opportunities to remove a liquidator or administrator once they are appointed, regardless of poor performance or misconduct. Other than in limited predetermined circumstances, only the Court may remove a liquidator or administrator. Applications to, and hearings before, a Court represent a significant cost barrier to the possible removal of liquidators from an administration.

Summary of new law

1.26 While the majority of the rules in relation to remuneration will not be affected by the reforms, the current rights of practitioners to claim remuneration in relation to a given administration will be consolidated, substantially aligned and simplified across all forms of insolvency. The capacity for the Court to review remuneration determinations will also be consolidated into a single section and aligned.

1.27 Both 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. Insolvency practitioners would also be prevented from accepting gifts and benefits, giving up part of their remuneration to another person or acquiring property from the insolvency administration.

1.28 The reforms substantially align the rules for: handling administration or estate funds across all forms of insolvency administration; and keeping, auditing and destroying administration or estate records.

1.29 The obligations on insolvency practitioners administering corporate and personal insolvencies to report to their respective regulators on those administrations would be aligned, adopting the current bankruptcy requirement for a single return covering all administrations or estates to be lodged annually.

1.30 The reforms align and enhance the creditors' rights to request information, as well as regarding meetings during an external administration or bankruptcy. Creditors, and members with a financial interest, would be able to make reasonable requests for information that

practitioners would be obliged to meet. Default reporting obligations regarding the debtor affairs and administrations will be prescribed by regulations, but creditors would be able to replace those obligations by imposing their own reasonable reporting requirements.

1.31 The reforms will also enable creditors to require an insolvency practitioner to convene a meeting of the creditors whenever: resolved by the creditors or COI; requested by at least 25 per cent of creditors; or so requested by at least 10 per cent of creditors who have lodged sufficient security for the cost of holding the meeting. In order to maintain a common approach to the drafting of the Corporations Act and Bankruptcy Act provisions, the rules regarding meetings of creditors in both corporate and personal insolvency will now be prescribed by regulations. The law would also be aligned to the current personal insolvency position, which allows resolutions without meetings for all kinds of resolution.

1.32 The reforms substantially align the rules governing committees of inspection in liquidations, voluntary administrations, deeds of company arrangement, bankruptcies, controlling trusteeships and personal insolvency agreements. This includes the rules regarding the functions afforded to COIs and their potential membership. A person authorised by more than 10 per cent of the potential votes in an administration would have a right to select a member of a COI; while employees would have a right to select a member of a COI where the selection is supported by 50 per cent of employees.

1.33 The reforms will allow for ASIC and the Court to appoint a registered liquidator to undertake a review and report on all or part of an external administration. The terms of such a review would be determined on a case-by-case basis. Creditors, ASIC and the Court will also have the power to appoint a cost assessor to assess and report on the reasonableness of the remuneration and costs incurred during a portion or all of an administration. This reform is Corporations Act specific, given the extensive powers available to the Inspector-General to undertake these functions under the Bankruptcy Act.

1.34 Finally, the reforms align the rights of creditors to resolve to remove an insolvency practitioner and appoint a replacement without recourse to the Court. The powers to the Court to inquire and make orders, including for the removal of a practitioner, have also been aligned across all forms of insolvency administration.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current corporate law</i>	<i>Current bankruptcy law</i>
<p>An insolvency practitioner may claim remuneration as specified in a remuneration determination or, where the practitioner is the first practitioner appointed, a minimum fee of \$5,500 indexed to the CPI.</p> <p>A remuneration determination may be made by the creditors, a COI if one has been established, or otherwise the Court.</p> <p>Where a practitioner's remuneration is determined on a time-cost basis, the practitioner must seek a cap of that portion of the remuneration.</p> <p>The Court may review a remuneration determination.</p> <p><i>Sch 2, Pt 3, Div 22.B</i></p>	<p>The remuneration of a liquidator must be approved by a COI, the creditors, or the court.</p> <p>The creditors are taken to have passed a resolution determining that the liquidator is entitled to remuneration of \$5,000, where: the administration is a winding-up; the practitioner has convened a meeting; but the resolution did not pass due to a lack of quorum.</p> <p><i>473, 449E</i></p>	<p>The remuneration of the trustee may be fixed from time to time by resolution of the creditors or a COI.</p> <p>If the remuneration is not fixed by the creditors or COI, the trustee may apply to the Inspector-General to decide the trustee's remuneration.</p> <p>If the total remuneration payable to a trustee is less than \$5,000, the trustee is entitled to be paid additional remuneration equal to the shortfall.</p> <p><i>161B, 162</i></p>
<p>The remuneration of a provisional liquidator will be determined by the Court, COI or creditors.</p> <p><i>Sch 2, Pt 3, Div 22.C</i></p>	<p>The remuneration of a provisional liquidator is determined by the Court.</p> <p><i>473(2)</i></p>	N/A
<p>ASIC may determine the remuneration of a practitioner when winding up an abandoned company.</p> <p><i>Sch 2, Pt 3, Div 22.D</i></p>	<p>ASIC may appoint, and determine the remuneration of, a liquidator to wind up an abandoned company.</p> <p><i>489EC</i></p>	N/A
<p>An insolvency practitioner will be barred from making any arrangement whereby a benefit is received, either directly or indirectly, in addition to the remuneration to which he or she is entitled.</p> <p>An insolvency practitioner</p>	<p>A registered practitioner is a company officer, and is therefore subject to the officers' duties. A practitioner must not therefore improperly use their position or gain an advantage.</p> <p><i>180-184</i></p>	<p>A trustee is barred from making any arrangement whereby a benefit is received, either directly or indirectly, in addition to the remuneration to which he or she is entitled.</p> <p>A trustee who contravenes</p>

<p>must disclose employment or engagement of related entities before entering into the arrangement.</p> <p>A breach of these obligations is a strict liability offence punishable by up to 50 penalty units.</p> <p><i>Sch 2, Pt 3, Div 22.E</i></p>		<p>the obligation is guilty of contempt of court.</p> <p><i>165, 166</i></p>
<p>Subdivision F includes some provisions dealing with trustee remuneration and the Inspector-General's power for review, reflecting the current provisions in bankruptcy.</p> <p><i>Sch 2, Pt 3, Div 22.F</i></p>	<p>N/A</p>	<p>Two trustees who act in succession may divide the remuneration and expenses between them by agreement and with the endorsement by resolution of the creditors.</p> <p>A trustee who is succeeded by another trustee must prepare accounts of his or her receipts and payments and provide them to the creditor and successive trustee.</p> <p>The regulations may provide for the Inspector General to review costs for services provided by a third party in relation to the administration of a bankrupt's estate.</p> <p><i>164, 167</i></p>
<p>An insolvency practitioner must open an administration bank account within 5 days. Payments in and out of the administration account must be legitimately related to the administration.</p> <p>Where a practitioner fails to bank administration moneys in excess of \$50 within 5 days, the practitioner must personally pay penalty interest into the administration account.</p> <p><i>Sch 2, Pt 3, Div 24</i></p>	<p>A liquidator must open an administration account, and pay into the account any administration funds received within 7 days of receipt.</p> <p>A breach of these requirements is an offence punishable by 5 penalty units.</p> <p><i>reg 5.6.06 Corps Reg</i></p>	<p>A trustee must pay all estate funds into an administration account. Only administration funds may be paid into the account.</p> <p>If a trustee retains administration funds exceeding \$50 for more than 5 days, the practitioner is liable to pay interest of 20% per annum; and the Court remove the practitioner from his or her office.</p> <p><i>section 169, 170</i></p>

<p>An insolvency practitioner must lodge an annual administration return with the respective regulator within 35 days after the end of the financial year.</p> <p>The practitioner must notify the creditors of the lodgment with the next communication made.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 26.B</i></p>	<p>A liquidator must lodge a prescribed form setting out attaching copies of the receipts and payments for each company that the liquidator has administered during the year.</p> <p style="text-align: right;">539</p>	<p>A trustee must, within 35 days after the end of the year, give the Inspector-General a return in relation to the administration of all estates that the trustee administered during the year.</p> <p style="text-align: right;">170A</p>
<p>An insolvency administrator must keep proper books for every matter.</p> <p>ASIC or the Court may cause the books to be audited. ASIC may do so on its own initiative, at the request of the company, creditor or contributory.</p> <p>Where an insolvency practitioner is replaced, the books of the administration are to be transferred to the new insolvency practitioner appointed.</p> <p>A practitioner must retain administration books for five years (in a corporate matter) and seven years (in a personal matter), unless the consent of the regulator is obtained.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 26.C</i></p>	<p>A liquidator must keep proper books.</p> <p>ASIC may appoint an auditor to audit a liquidator's account for an administration.</p> <p>A practitioner must retain administration books for a period of 5 years after the deregistration of the company, unless the consent of ASIC is obtained.</p> <p style="text-align: right;">531, 539, 542</p>	<p>A trustee must keep proper books.</p> <p>The Inspector-General may audit, or appoint an auditor, a trustee's account for an administration.</p> <p>A trustee must retain administration books for a period of either 6 years (when no property realised or dividend distributed) or 15 years (when property has been realised and the trustee was remunerated).</p> <p style="text-align: right;">173, 175, 312</p>
<p>Creditors may request that an insolvency practitioner provide information. The request may be made through a resolution, or on an ad hoc basis. Where the request is reasonable, the practitioner must comply with the request.</p> <p>A request would not be reasonable where there are</p>	<p>Within 25 or 30 business days of the commencement of a voluntary administration, a liquidator is required to provide a report to creditors that sets out, among other things, the state of the company's business, assets, affairs and finances, as well as what options are in the creditors' best interests.</p>	<p>A trustee must give information to a creditor who reasonably requests it.</p> <p>The registered trustee must give each creditor of the bankrupt a notice stating the fact and date of the bankruptcy, and a summary of the statement of affairs of the bankrupt, within 28 days of receiving the statement of</p>

<p>insufficient funds to cover the costs of completing the request. However, it would be reasonable if the requester paid the costs of the information provision.</p> <p>Default reporting requirements will be prescribed through regulations. These default requirements may be amended by creditor resolution or the COI.</p> <p><i>Sch 2, Pt 3, Divs 26.D and 28</i></p>	<p>There is no initial reporting requirement in a court ordered winding up.</p> <p>A liquidator is required to hold a meeting of creditors in a voluntary winding up:</p> <ul style="list-style-type: none"> • within 11 days; • annually, where the administration proceeds for longer than 12 months (or alternatively provide a comprehensive report); and • at the completion of an administration. <p><i>439A; 497; 508; 509</i></p>	<p>affairs.</p> <p>The trustee must also report to creditors within 3 months of the bankruptcy on the likelihood of creditors receiving a dividend before the end of the bankruptcy.</p> <p><i>19; reg 4.14 Bankruptcy Regs</i></p>
<p>The Commonwealth Government department or agency responsible for the General Employee Entitlements and Redundancy Scheme (GEERS) will have the same rights to request information as a creditor.</p> <p><i>Sch 2, Pt 3, Div 26.E</i></p>	<p>There is currently no corresponding law.</p>	<p>There is currently no corresponding law.</p>
<p>The regulators and the Court may direct an insolvency practitioner to provide information to a creditor where the creditor has requested the information, and the request was reasonable.</p> <p><i>Sch 2, Pt 3, Div 26.F</i></p>	<p>A registered liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.</p> <p><i>479</i></p>	<p>There is currently no corresponding law.</p>
<p>An insolvency practitioner must convene a meeting of creditors where: a COI so directs; the creditors so resolve; 25 per cent of creditors by value so direct in writing; 10 per cent of creditors by value so direct and security is provided for the costs of the meeting; or</p>	<p>A liquidator must convene a meeting of the creditors where: the creditors so resolve; 10 per cent by value of creditors so direct in writing and security is provided for the costs of the meeting.</p> <p><i>479</i></p>	<p>A registered trustee must convene a meeting of creditors where: the creditors so resolve; 25 per cent of creditors by value so direct in writing; or by less than 25 per cent by value so direct in writing and security is provided for the costs of the meeting.</p>

<p>directed by the regulator.</p> <p>A liquidator must also convene a meeting where 5 per cent of creditors unrelated to the company so direct, where the direction is given in the first two weeks of the winding up.</p> <p>The regulators and the agency responsible for GEERS may attend any meeting of creditors.</p> <p>Resolutions of creditors may be made via circular resolutions without the need for the holding of a meeting.</p> <p align="right"><i>Sch 2, Pt 3, Div 28</i></p>		<p>The Inspector-General may attend a creditors meeting.</p> <p>Resolutions of creditors may be made via circular resolutions without the need for the holding of a meeting.</p> <p align="right"><i>12, 64, 64ZBA</i></p>
<p>Creditors (and contributories in a corporate insolvency) may appoint a COI, as well as determine the membership and procedures of the Committee.</p> <p>Where a group of minority creditors representing 10 per cent by value is otherwise unable to influence the creditors as a whole to appoint their representative to the COI, those creditors will have a right to appoint a representative.</p> <p>Employees owed entitlements would also have a right to appoint a representative to the COI.</p> <p>A COI may advise, assist and give direction to an insolvency practitioner. It may also monitor the conduct of the administration and undertake any other functions given to them under the law. A practitioner must have regard to any such direction.</p>	<p>Creditors and contributories may appoint a COI, as well as determine the membership and procedures of the Committee.</p> <p>A member of a COI is barred from making any arrangement whereby a benefit, profit, advantage is received or an administration asset is purchased, either directly or indirectly, without the leave of the Court.</p> <p>The function of a COI in a voluntary administration is to consult the administrator regarding administration matters, and receive and consider reports by the administrator.</p> <p>An administrator must report to the committee about matters relating to the administration when a committee reasonably requires.</p> <p align="right"><i>436F, 548, 551</i></p>	<p>Creditors may appoint a COI, of not more than 5 and not less than 3 persons.</p> <p>The COI is established for the purpose of advising and superintending the registered trustee.</p> <p>A member of a COI must not either directly or indirectly become a purchaser of any part of the property of the bankrupt.</p> <p align="right"><i>70, 72</i></p>

<p>The COI may request that an insolvency practitioner provide information. Where the request is reasonable, the practitioner must comply with the request.</p> <p>A member of a COI will be barred from making any arrangement whereby a benefit, profit, advantage is received or an administration asset is purchased, either directly or indirectly, without the leave of the Court.</p> <p>ASIC may attend a meeting of a COI.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 30</i></p>		
<p>The Court may inquire into, and make orders regarding, a bankruptcy or external administration, including the removal of a practitioner from a matter.</p> <p>In making any order, the Court may take into account the effect of the order on public confidence in the insolvency industry as a whole.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 32.B</i></p>	<p>The Court may inquire into the conduct of a registered liquidator regarding an external administration, including the removal of a practitioner from a matter. In relation to court ordered windings up, an order for removal requires cause to be shown.</p> <p style="text-align: right;"><i>449B, 473, 503</i></p>	<p>The Court may inquire into the conduct of a trustee in relation to a bankruptcy and remove the trustee from office or make such orders as it thinks proper.</p> <p style="text-align: right;"><i>179</i></p>
<p>In personal insolvency, the Inspector-General may carry out a review of the remuneration, costs and expenses of the trustee in relation to a regulated debtor's estate.</p> <p>In a corporate external administration, the creditors may resolve, or a liquidator may agree, to appoint a reviewer to review and report on the reasonableness of the remuneration and costs incurred in an external</p>	<p>There is currently no corresponding law.</p>	<p>A bankrupt or creditors in a bankruptcy may apply to the Inspector-General for a review of the remuneration incurred in a bankruptcy.</p> <p style="text-align: right;"><i>Pt 8, Div 4, Subdiv 4, Bankruptcy Regs</i></p>

<p>administration.</p> <p>ASIC and the Court may also appoint a reviewer to review and report on reasonableness of the remuneration and costs incurred, or any other matter relating to an external administration.</p> <p>The purpose of the report is to provide information for interested parties to exercise their rights in relation to the administration, such as to remove the liquidator or challenge the liquidator's remuneration. The review is not determinative of the issues considered.</p> <p>The costs of the review will form part of the expenses of the administration, unless so agreed with the liquidator. The Court may make any orders it deems fit in relation to the review.</p> <p>The reviewer must be a registered insolvency practitioner. The regulations will prescribe, amongst other things, the duties of a reviewer.</p> <p style="text-align: right;"><i>Sch 2, Pt 3, Div 32.C</i></p>		
<p>Creditors may remove an insolvency practitioner through a resolution. Creditors may also resolve to appoint a replacement.</p> <p>The Court may only reinstate the appointment of the practitioner where it is satisfied that the removal was an improper use of the power. For example, where the removal of the practitioner was an attempt to prevent, delay or frustrate an</p>	<p>In a members' voluntary winding up, creditors may remove a liquidator at the first meeting of creditors required to be held within 11 days of the commencement of the winding up.</p> <p>In a voluntary administration, the administrator may be removed: at the first meeting of creditors held within 8 days after the commencement of the administration; or upon the</p>	<p>Creditors may remove an insolvency practitioner appointed by them through a resolution. Creditors may also resolve to appoint a replacement.</p> <p style="text-align: right;">181</p>

action being taken against a group of creditors under Part 5.7B of the Corporations Act.	decision of the creditors to enter into a deed of company arrangement or wind up the company in insolvency.	
<i>Sch 2, Pt 3, Div 32.D</i>	There is no ability for creditors to remove an official liquidator appointed in a court-ordered winding up without an order of the Court.	
	<i>436E, 444A, 446A, 473, 496, 499</i>	

Application and transitional provisions

1.35 Based on passage of the legislation during the 2012/13 financial year, the amendments about the specific rules relating to external administrations are expected to commence from September 2013.

1.36 The consequential and transitional amendments portion of the Bill is currently being drafted and will be released shortly.

Chapter 3

Regulator powers and miscellaneous amendments

Outline of chapter

1.37 The Bill amends the *Australian Securities and Investments Commission Act 2001* to provide ASIC with further powers to assist it in its oversight of the regulation of registered liquidators. In particular, the Bill amends the ASIC Act to:

- enable ASIC to require the provision of information and books as part of an ASIC proactive surveillance program;
- enable ASIC to provide administration information to a person with a material interest in the information; and
- improve the transparency of ASIC oversight of the corporate insolvency industry.

1.38 The Bill also amends the Bankruptcy Act to enable ITSA to provide information relevant to the administration of the corporate law to ASIC.

1.39 The Bill makes a range of miscellaneous amendments, including:

- amending the Acts to strengthen the penalties for breach of a bankrupt's or directors' obligations to provide a report as to affairs (RATA), or the books of the company, to an insolvency practitioner;
- amend the Corporations Act to provide a process for the automatic disqualification of directors that have failed to provide a RATA, or the books of the company, to a registered liquidator until they have complied with those obligations; and
- amend the Acts to enable the assignment of an insolvency practitioner's statutory rights of actions.

Context of amendments

1.40 The divergent regulatory approaches undertaken by ASIC and ITSA in relation to surveillance also affect the approaches that the respective regulators take to communicating with creditors. As part of ITSA's complaints handling processes, it may perform an examination of the file about which an allegation has been made and report the findings to the person who made the allegation. ASIC is constrained in the extent of any information that it might otherwise similarly provide.

1.41 ASIC currently conducts compliance and transaction reviews of registered liquidators where concerns are raised through complaints or other market intelligence. Significant concerns were raised during the Senate Inquiry regarding the absence of a proactive surveillance program for liquidators. The Senate Committee stated that the current approach to monitoring registered liquidators is inadequate and expressed concern that a complaints system alone cannot deter all misconduct.

1.42 Given the significant information, technical knowledge and technical skill asymmetries present in most insolvencies, creditors may not know when misconduct is occurring within an administration or may think it is occurring when it is not.

1.43 The current wording of some of the statutory powers to conduct investigations and to communicate the outcomes of those investigations under the *Australian Securities and Investments Commission Act 2001* is more restrictive than the commensurate powers for ITSA under the Bankruptcy Act.

1.44 Where a stakeholder's attempts to obtain information from a practitioner are improperly obstructed by an insolvency practitioner, there is no power for the regulators to direct insolvency practitioners to provide information or otherwise facilitate access by creditors (or other parties, such as the debtor in personal insolvency) to information and records.

1.45 However, currently there is limited scope for ASIC to communicate information or provide copies of records to relevant stakeholders that have been obtained through their regulatory activities or under their information gathering powers. In personal insolvency the Inspector-General can provide copies of reports that result from inquiries and investigations.

1.46 The personal insolvency regulator currently has extensive powers to obtain and disseminate information regarding personal insolvency matters.

1.47 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.

1.48 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.

1.49 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.

1.50 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 the breach to ASIC. Currently ASIC assigns such referrals 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.

1.51 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. 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. There is some uncertainty as to whether statutory rights of action arising under the Corporations Act may be sold, which is limiting the sale of such rights.

Summary of new law

1.52 The reforms empower ASIC to give a registered liquidator a written notice to give specified information or produce specified books to assist ASIC in the performance of its functions and the exercise of its powers in relation to the requirements imposed on registered liquidators and for other limited purposes.

1.53 ASIC would also be able to obtain information from any person who is believed to have information that is relevant to an inquiry or investigation regarding a liquidator's compliance with their obligations.

1.54 The reforms also empower ASIC to share information obtained or generated by it in the exercise of its powers or performance of its functions in relation to registered liquidators, the external administration of companies and the receivership of the property of a corporation. This information may be shared with a variety of people including the corporation, the external administrator or receiver, related entities of the corporation, creditors and those reviewing an external administration. Alternatively, ASIC would be able to direct registered liquidators to provide such information directly.

1.55 The Inspector-General, Official Receiver and Official Trustee will also be empowered to disclose confidential or protected information obtained in connection with the performance of its functions or the exercise of its powers, to prescribed Government agencies including ASIC and the Department of Education, Employment and Workplace Relations in order to further facilitate the efficient provision of information between these regulatory bodies.

1.56 In order to supplement the improved rights for creditors to require the calling of meetings, ASIC would be given a power to direct that a meeting of creditors be called. This new ability replicates a power currently available to the Inspector-General under the Bankruptcy Act.

1.57 The reforms introduce a new 'contingent' disqualification provision for directors that fail to comply with their obligations to provide a RATA or to provide the books and records of the company to the registered liquidator. The new process could be utilised by ASIC either as an alternative or in addition to criminal prosecution.

1.58 Under the new scheme, ASIC would provide a warning notice to the director. If the director did not comply with their obligations or provide a reasonable excuse, ASIC may then formally demand compliance by the director. If the director did not comply with the demand, ASIC would be required to file a notice of disqualification on the public record. Upon being recorded on the public register, the director would be prohibited from managing a company.

1.59 There would be a delay after lodgement and notice to the director before the suspension became effective, to enable directors to seek judicial review. In particular, a director would be able to approach a Court to prevent the disqualification from taking effect where the director has a reasonable excuse for not providing the RATA or the books and records.

1.60 The disqualification would come to an end upon a person complying with their lodgement obligations; upon the completion of the insolvency administration; or after three years of non-compliance.

1.61 A reasonable excuse would include where a director may not be able to provide records (because the records have been provided to a previously engaged voluntary administrator) or the director is only able to provide 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.

1.62 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.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current corporate law</i>	<i>Current bankruptcy law</i>
<p>ASIC may, by written notice, require the production of information or books regarding an external administration from a registered liquidator or any other person.</p> <p>The intentional or reckless failure to provide the requested books is an offence punishable by 100 penalty units or 2 year imprisonment.</p> <p>ASIC may provide information obtained from a practitioner to a person with an interest in the administration of a company,</p>	<p>ASIC may require the production books regarding an external administration from a registered liquidator. This does not require a belief of a breach or potential breach of the Corps Act.</p> <p style="text-align: center;"><i>29, 30 ASIC Act</i></p> <p>ASIC must not disclose information given to it in connection with the performance of its functions or the exercise of its powers.</p> <p>ASIC may provide information regarding the conduct of an insolvency</p>	<p>The Inspector-General may make such inquiries and investigations as he or she thinks fit with respect to any bankruptcy.</p> <p>The Inspector-General is empowered to compel practitioners to provide information regarding an administration, inspect or require the production of administration records.</p> <p>The Inspector-General may provide a report or information provided to it by a registered trustee to any person the Inspector-General</p>

<p>where: the information requested relates to the person's affairs to a material extent; ASIC has notified the practitioner that it will be providing the information; and is satisfied that any objections by the practitioner should not preclude the provision of the information to the person.</p> <p>ASIC may place conditions on the use of the information provided to a person. Where a person does not comply with any such condition, the person will be committing an offence punishable by 10 penalty units or three months imprisonment.</p> <p>ASIC may provide information regarding the conduct of an insolvency practitioner to a prescribed body, including a prescribed professional disciplinary body. The IPA will be listed as a prescribed body for the purposes of this provision.</p> <p>ASIC must report on its regulation of the insolvency industry in its annual report.</p> <p>The Inspector-General may provide information regarding a bankruptcy matter, or the conduct of a bankruptcy trustee, to another Government department or agency where the information will enable or assist that department or agency to perform its functions. This will include providing information to ASIC or the Department responsible for GEERS.</p> <p><i>Sch 2 (Further Amendments), Pt 1</i></p>	<p>practitioner to a prescribed professional disciplinary body.</p> <p>ASIC may provide information regarding a corporate insolvency matter, or the conduct of a liquidator, to another Government department or agency where the information will enable or assist that department or agency to perform its functions.</p> <p><i>127 ASIC Act</i></p>	<p>thinks fit.</p> <p style="text-align: right;"><i>12</i></p> <p>Where a trustee fails to comply with a direction or request, the Court may order the trustee to comply or if it thinks fit, make an immediate order for the committal of the trustee to prison.</p> <p style="text-align: right;"><i>30</i></p>
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<p>The penalty for failure to provide a RATA to an insolvency practitioner is aligned across all forms of insolvency. The maximum penalty for the offence is 50 penalty units.</p> <p>An insolvency practitioner must lodge a copy of the RATA in all forms of external administration.</p> <p>A person may be disqualified from managing a corporation where the person fails to provide a RATA or the books and records to a registered liquidator in an external administration and:</p> <ul style="list-style-type: none"> • the person receives a warning notice from ASIC; • the person receives a compliance notice from ASIC; and • the person does not comply with their obligations. <p>The warning notice will request that the director comply with their obligations, and enable the director to provide ASIC with information about why it is reasonable in the circumstances that the director not comply.</p> <p>If the person does not comply within two weeks following the warning notice, ASIC may choose to give the person a compliance notice.</p> <p>A person will then have four weeks to comply with their obligation to provide the documents. After that four week period, the director will be automatically disqualified</p>	<p>Where an officer of a company fails to provide a RATA to a liquidator in an external administration (other than a receivership) who requests it, the person is committing an offence.</p> <p>The maximum penalty for the offence is:</p> <ul style="list-style-type: none"> • in a voluntary administration - 50 penalty units, or 1 year imprisonment; • in a court ordered winding up – 25 penalty units; • in a creditors voluntary winding up - 10 penalty units; or 3 months imprisonment; <p style="text-align: right;"><i>438B, 475, 497, Sch 3</i></p> <p>There is no offence where a director fails to comply with their obligations regarding a RATA in a receivership.</p> <p style="text-align: right;"><i>428</i></p> <p>ASIC may apply to the Court to disqualify a person from managing a company where the person has been the director of two or more companies that have breached their obligations, and each time the person has failed to take reasonable steps to prevent the contravention.</p> <p style="text-align: right;"><i>206E</i></p>	<p>The Official Receiver may, by written notice, require a bankrupt to give the Official Receiver a statement of affairs within 14 days after receiving the notice.</p> <p>A failure to comply with the notice is an offence, punishable by imprisonment for 12 months.</p> <p style="text-align: right;"><i>77CA, 267B</i></p>
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<p>from managing a corporation.</p> <p>This disqualification will not take effect for two months, in order to give the director time to get the affairs of their company (or companies) in order or to apply to the Court to have the disqualification squashed. The Court may prevent the disqualification where it is satisfied that the person had a reasonable excuse for not providing the RATA or books and records to the liquidator.</p> <p>Where the Court determines that the non-compliance was reasonable, ASIC may not subsequently seek to disqualify the person in relation to the breach of obligations in relation to that company under this section.</p> <p>As this measure is aimed at obtaining compliance, the disqualification will end if: the person complies with their obligations; the external administration ends; or three years pass.</p> <p>However, where a person is disqualified three times under this provision, on the third occasion the disqualification will end after five years.</p> <p>A disqualified director may apply to the Court for leave to continue managing a corporation, despite their disqualification.</p> <p><i>Sch 2 (Further Amendments), Pt 2</i></p>		
<p>An insolvency practitioner may assign their statutory rights to commence proceedings. Where the</p>	<p>A liquidator of a company may sell or otherwise dispose, of in any manner, property of the company.</p>	<p>The property of the bankrupt vests in the bankruptcy trustee.</p> <p style="text-align: right;"><i>58, 116</i></p>

<p>action that the practitioner seeks to assign has already commenced, the approval of the Court is necessary.</p> <p>Any assignment of rights must be completed in accordance with the practitioner duties to the administration.</p> <p>A liquidator would be able to enter into contracts that operate for longer than three months required for activities funded out of AA Fund monies, without creditor approval.</p> <p>With the intended removal of the current final meeting in a corporate winding up, a liquidator must lodge a final account of a winding up with ASIC. ASIC must deregister a company three months after the lodgement of the account.</p> <p style="text-align: center;"><i>Sch 1 (Uniform Insolvency Practice Rules), Pt 4, Div 42;</i></p> <p style="text-align: center;"><i>Sch 2 (Further Amendments), Pt 3, Items 58, 60</i></p>	<p>Common law rights of action, vesting in the liquidator, are considered to be property of the company.</p> <p>An action relating to insolvent trading of a director may be brought by a creditor or a liquidator, while other actions relating to voidable transactions may only be brought by the liquidator.</p> <p style="text-align: center;"><i>477, 588FF, 588M</i></p> <p>A practitioner may not enter into any contract lasting longer than 3 months without creditor approval.</p> <p style="text-align: right;"><i>477</i></p> <p>Once the affairs of the company are fully wound up, the liquidator must convene a creditors meeting to consider a final account for the winding up. The final meeting must be held, regardless of whether a quorum is likely or obtained. 3 months after lodging a return with ASIC regarding the holding of the meeting, ASIC must deregister the company.</p> <p style="text-align: right;"><i>509</i></p>	
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Application and transitional provisions

1.63 The amendments relating to regulator powers and miscellaneous matters (other than the director contingent disqualification changes) are expected to commence from September 2013. The director disqualification reforms are expected to commence from February 2014.

1.64 The consequential and transitional amendments portion of the Bill is currently being drafted and will be released shortly.