REVIEW OF THE REGULATION OF CORPORATE INSOLVENCY PRACTITIONERS

REPORT OF THE WORKING PARTY

June 1997

ISBN 0 642 26109 1

Produced by Pirie Printers

CONTENTS

SCHEDULES

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABBC	American Bankruptcy Board of Certification
ALRC	Australian Law Reform Commission
ASC	Australian Securities Commission
ASCPA	Australian Society of Certified Practising Accountants
CAC	Corporate Affairs Commission
CALDB	Companies Auditors and Liquidators Disciplinary Board
ICAA	Institute of Chartered Accountants in Australia
IPAA	Insolvency Practitioners' Association of Australia
ITSA	Insolvency and Trustee Service, Australia
NCSC	National Companies and Securities Commission

PART I

INTRODUCTION

INTRODUCTION

BACKGROUND

1.1. On 22 December 1993, the then Commonwealth Attorney-General, the Honourable Michael Lavarch MP, announced the establishment of a working party to review the regulation of corporate insolvency practitioners ('the Working Party').

1.2. The Working Party's mandate is to consider and make recommendations as to whether any changes should be made to the current system for the registration, appointment and remuneration of insolvency practitioners, as well as to the procedures for responding to complaints about the conduct of corporate insolvency administrations.

1.3. The members of the Working Party are:

- Ms Veronique Ingram, Assistant Secretary, Companies and Accounting Policy Branch, Business Law Division, The Treasury (Chair);[1]
- Mr David Crawford, Partner, KPMG Peat Marwick;
- Mr Peter James-Martin, Director, Markets, Australian Securities Commission;
- Mr Robert McKenzie, Partner, Clayton Utz, Solicitors; and
- Mr Terry Taylor, Partner, Ferrier Hodgson and President of the Insolvency Practitioners' Association of Australia.[2]

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1 Ms Ingram succeeded Mr Brian O'Callaghan, former Assistant Secretary of the Companies and Accounting Policy Branch, in May 1995. The Companies and Accounting Policy Branch was moved from the Attorney-General's Department to the Treasury following the change of the Federal Government in March 1996.

2 Secretarial support for the Working Party was provided by officers of the Corporate Insolvency Section of the Companies and Accounting Policy Branch of the Business Law Division of the Treasury.

1.4. The impetus for the review stemmed from recommendations made in reports by the Australian Law Reform Commission[3] and the former Trade Practices Commission[4] to the effect that changes should be made to the current system of regulation of insolvency practitioners.

CONSULTATION

1.5. In undertaking its review, the Working Party was asked to consult with a wide range of interested parties and organisations. In early November 1994, an advertisement was placed in a national financial newspaper advising that the Working Party intended to release a discussion paper canvassing relevant issues and seeking expressions of interest from persons or bodies wishing to be consulted on the project. The Working Party followed up the advertisement by writing directly to interested parties inviting preliminary submissions about the issues which should be considered in the discussion paper, and welcoming any brief remarks or comments on key issues which should be addressed in the paper.

1.6. After considering preliminary responses regarding the issues that should be dealt with, the Working Party released a discussion paper in January 1995 ('the Discussion Paper'),[5] which highlighted the issues the Working Party would canvass in the review. Copies of the Discussion Paper were forwarded to interested parties for comment. Naturally, many responses came from insolvency practitioners. However, comments were also received from lawyers, academics, government authorities and major creditors. A list of respondents to the Discussion Paper is at Schedule 1.

1.7. The comments received in response to the Discussion Paper have been considered and taken into account by the Working Party in preparing this report.

SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS

1.8. This section summarises the key findings and recommendations made by the Working Party in this report.

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3 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, AGPS Press, Canberra, 1988.

4 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy.*

5 Australia, *Review of the Regulation of Corporate Insolvency Practitioners, Discussion Paper, January 1995: Paper prepared by a Working Party appointed by the Commonwealth Attorney-General.*

Corporate and Personal Insolvency Regulatory Systems (Chapter 4)

1.9. The Government should examine further the costs and benefits of establishing a merged regulatory framework for personal and corporate insolvency with separate 'tickets' for each area of practice.

Registering Authority (Chapter 5)

1.10. The registration function for corporate insolvency practitioners should continue to be carried out by the Australian Securities Commission ('the ASC'). If, in the longer term, a merger of the regulatory systems for personal and corporate insolvency proceeds, the registration function should be carried out by a statutory board.

Registration Requirements (Chapter 6)

Categories of Practitioners

1.11. The two categories of official and registered liquidators may need to be retained in the short term. In the longer term, the distinction should be removed in favour of a system whereby the court may sanction any nominated registered liquidator to perform a court-ordered administration.

Registration for Specific Administrations

1.12. The Government should consider amending the Corporations Law to extend the ASC's discretion to allow persons with specialised expertise relevant to one-off administrations to conduct those administrations, notwithstanding that they are not registered liquidators.

Entry Requirements

1.13. The entry requirements for registered liquidators should be broadened so that persons with various combinations of qualifications and experience would be eligible to apply for registration. In addition, all applicants should be required to successfully complete a specialised course or examination in insolvency practice, or demonstrate equivalent knowledge, as approved by the registering authority, and satisfy 'fit and proper person' requirements.

1.14. To be a registered liquidator, membership of a professional organisation should not be a mandatory requirement, but the registering authority should be allowed to streamline applications from members of relevant professional organisations (such as

the Insolvency Practitioners Association of Australia, the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants of Australia and the legal professional bodies) in order to facilitate the registration process.

1.15. The registering authority should have powers to waive part some or all of the entry requirements (except the 'fit and proper person' requirements) in exceptional cases. In particular, transitional arrangements should allow exemptions from the requirements for a very small number of senior lawyers with significant insolvency experience.

1.16. The amount of work generally available to official liquidators should not be a factor in determining whether a person should be granted official liquidator status.

1.17. The current requirements concerning supervised experience and resources for applicants seeking official liquidator status should be retained, for the present, pending the abolition of the official liquidator class. However, the practice in New South Wales of admitting regional practitioners to a separate 'country list' of official liquidators is anomalous and all future applicants in New South Wales should be required to satisfy the usual requirements for official liquidator status.

General Supervision (Chapter 7)

Ethics and Professional Standards

1.18. The law should not mandate adherence to a code of conduct and ethical standards by insolvency practitioners.

Continuing Education

1.19. There should be an ongoing requirement for practitioners to undergo continuing professional education as agreed between the professional bodies and the ASC. The professional bodies and the ASC would specify continuing education programs administered by the professional bodies and review these at least every two years.

Ongoing Work Experience

1.20. The ASC should be permitted to require a registered liquidator who does not perform any substantive insolvency work over a period of five years [or an official liquidator who does not perform any substantive insolvency work over a period of two years], to show cause why his or her registration (or official status) should not be cancelled.

Surveillance

1.21. The ASC should retain its complaints-based surveillance program and examine the feasibility of reviving the surveillance program it previously operated. The ASC and the professional bodies should examine whether there is scope for greater mutual education and cooperation in the surveillance area.

Insurance

1.22. The current system whereby the ASC allows practitioners to take out professional indemnity insurance instead of security deposits on condition that practitioners comply with requirements of a professional body is working satisfactorily. It does not require any immediate change except to expand it to encompass the legal professional bodies. In the long term, professional indemnity insurance could be expressly recognised as an ongoing requirement of registration in legislation and facilities used to monitor compliance, for example, by requiring practitioners to submit details of insurance on the annual statement or having a professional body certify maintenance of cover to the ASC.

Ongoing Reporting

1.23. The utility of the periodic report required to be prepared by practitioners would be enhanced if it:

- was made into an annual statement, rather than triennial; and
- required practitioners to provide, in addition to personal particulars:
  - certification of professional development courses undertaken;
  - a summary of insolvency work undertaken; and
  - details of professional indemnity insurance.

1.24. For ongoing periodic reporting requirements which overlap with requirements imposed by the professional bodies, there could be a streamlined system whereby practitioners could comply merely by providing evidence of continuing membership of a professional body.

1.25. Failure to comply with the ongoing requirements in respect of such matters would allow the ASC to issue a notice requiring the practitioner to show cause why he or she should not be deregistered and the ASC should have powers to deregister a practitioner if not satisfied with the response.

Discipline and Remedial Supervision (Chapter 8)

Disciplinary Procedures

1.26. The statutory disciplinary procedure involving the ASC, the Companies Auditors and Liquidators Disciplinary Board ('the CALDB') and the appeal mechanism to the Administrative Appeals Tribunal should be retained for conduct matters**.** However, the professional accounting and legal bodies should also have a right to bring a matter before the CALDB. Administrative matters should be dealt with by the registering authority, which is currently the ASC.

Penalties

1.27. The CALDB should be given greater flexibility in the penalties it may impose and should be given powers to enforce orders made during the pre-hearing period and to use mediation and arbitration.

Inquiries and Reports

1.28. The ASC's powers to carry out inquiries into conduct should remain. However, consideration should be given to whether the ASC should be permitted to exercise compulsive powers for this purpose, or at least be given an express power to request the court to exercise its own compulsive powers for this purpose. The ASC should also retain its existing powers to submit reports to the court and apply for remedial orders.

1.29. The ASC's general powers to report misfeasance, neglect or omissions to the Court and to apply to the Court for orders where an administrator is managing company affairs in a manner prejudicial to the interests of creditors, removing the administrator and in cases of fraud, negligence or breach of trust are appropriate and should be retained. These powers provide a significant degree of flexibility to enable the ASC under the scrutiny of the court to ensure that any person adversely affected by the default of an administrator may be compensated.

1.30. The provisions of the Corporations Law concerning the role of the court in supervising practitioners should be reviewed.

Appointment (Chapter 9)

1.31. In the long term, consideration be given to changing the Corporations Law framework to minimise the distinction between court-ordered and voluntary liquidations in terms of the qualifications and appointment of liquidators. The Working Party envisages that these changes would see the abolition of the category of official liquidator altogether.

1.32. The rules relating to the selection of liquidators by the court should be made part of the Corporations Law in order to establish uniformity across jurisdictions.

Selection System

1.33. The system for appointments of corporate insolvency practitioners by the court should be based on nomination by the petitioning creditor with a 'back up' rotation system if the nomination is not or cannot be made successfully. The court should be given power to reject a nomination on its own motion or on the application of an interested party.

Entry on the backup rotation system should be compulsory for all official liquidators pending abolition of that class and/or establishment of a funding mechanism for assetless administrations.

Remuneration (Chapter 10)

Reporting Obligations

1.34. The ASC should work together with the professional bodies to develop guidelines that assist practitioners identify the types of possible misfeasance which practitioners must report to the ASC and provide some indication of the level of detail that the ASC expects in reports.

Fee Setting

1.35. The ASC, in consultation with the relevant professional bodies, should consider appropriate means to educate creditors and practitioners about the different methods of fee setting available and the rights which creditors have with regard to establishing fees so as to encourage greater involvement by creditors in fee setting.

1.36. The notices to creditors of a meeting to determine fees of insolvency practitioners should set out a proposal for remuneration as well as a summary of the creditors' rights to vary the proposal.

1.37. Where time-based methods are used to determine fees, the practice of 'capping' fees should be encouraged.

1.38. The method of calculating hourly rates in the Guide to Hourly Rates published by the Insolvency Practitioners Association of Australia should be better explained, particularly in connection with overheads and disbursements.

Fee Review

1.39. Creditors should be given greater education about existing fee review mechanisms. The formal review mechanisms should be extended to encompass all types of corporate insolvency administrations. Consideration should be given to empowering the CALDB to hear and make appropriate orders in relation to fee disputes in consultation with the professional bodies (particularly the Insolvency Practitioners Association of Australia).

1.40. The informal mediation system dealing with fee disputes, currently administered by the professional bodies, should be encouraged to continue.

Assetless Administrations

1.41. A levy should be imposed on all companies, either at the time of incorporation or as part of the annual return fee, as a means of funding assetless administrations. The fund should be administered by the ASC and should apply to compulsory liquidations where there are no assets. It should provide liquidators with enough funds to prepare a report to creditors and a report to the ASC.

1.42. The ASC should liaise with practitioners to develop guidelines about the content of reports, particularly in cases of assetless companies, which should serve to avoid needless work on the part of the practitioners.

Duties and Responsibilities of Controllers (Chapter 11)

1.43. The burden of the administrative requirements on controllers and managing controllers should be reduced while still maintaining an adequate level of protection for third parties by addressing both the scope, and the content, of the obligations.

1.44. The ASC should become the source of public information concerning controllerships and the Gazettal requirements should be abolished.

1.45. All controllers should be required to notify the ASC and the chargor company that they have been appointed over corporate property and the nature of the property concerned.

1.46. All controllers should be required to provide a ‘status update’ every six months after appointment which details the property still subject to the controllership and any property which has been disposed of or returned.

1.47. All controllers should be required to provide a final report to the ASC when an appointment has lapsed due to disposal or return of the assets concerned and, where applicable, provide a report on sale proceeds and dispersal of proceeds.

1.48. Managing controllers should be redefined to include only those controllers who have taken control or possession of the whole or substantially the whole of a company's assets or those controllers who actually exercise powers of management (with the question of what is substantial left to the common law).

1.49. The company officers should be responsible for preparing and lodging a report as to affairs when a controller is appointed and, if an extension of time is needed, they should be required to apply to the ASC (rather than to the controller).

1.50. Controllers other than managing controllers should be required to lodge a notice with the ASC commenting on the report as to affairs provided by the company officers within one month of receiving the report.

1.51. Managing controllers should be required to prepare and lodge a separate report as to affairs within two months of appointment and that report should include comments on the report as to affairs prepared by the company officers.

1.52. Only managing controllers should be subject to a requirement to open a separate bank account where they have received money which is required to be accounted for.

1.53. Managing controllers should be required to report possible misconduct on the part of company officers to the ASC.

1.54. The suitability of the forms required to be lodged by controllers should be reviewed.

PART II

CURRENT POSITION

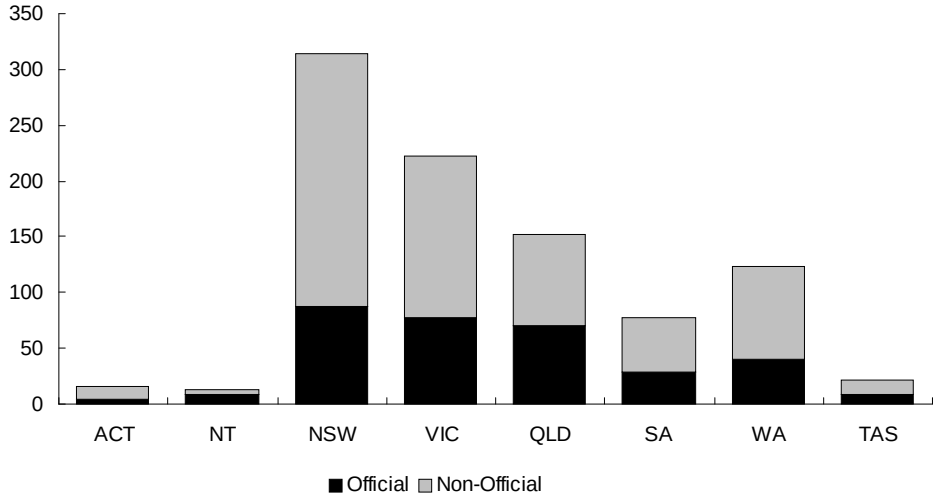
PROFILE AND ROLE OF INSOLVENCY PRACTITIONERS

2.1. In order to understand the issues that arise in relation to the regulatory system for insolvency practitioners, it is desirable to have some knowledge of the business environment in which they operate and the role that they play in the insolvency system. This chapter outlines those matters, focusing on the role of insolvency practitioners in the various procedures available under corporate and personal insolvency laws.

PROFILE

2.2. As at September 1996, there were 939 registered liquidators in Australia. Of those, 327 were also appointed by the ASC as official liquidators. Chart 2.1 below provides a breakdown of these figures by jurisdiction.

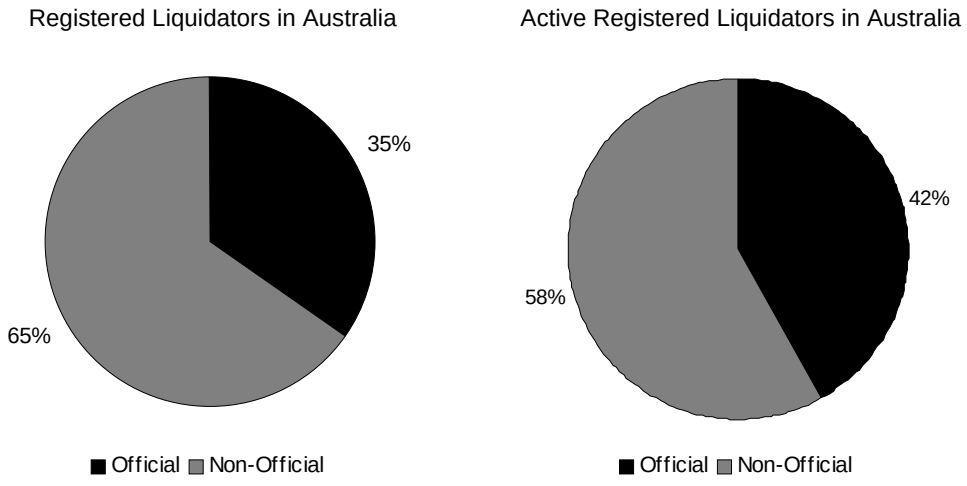
Chart 2.1: Registered Liquidators in Australia (Sept 1996)



2.3. The proportion of registered liquidators who are official liquidators is relevant to the issue of whether to retain the official liquidator class, which is discussed later in this report.

2.4. Although the figures above reflect the numbers of practitioners qualified as registered liquidators, they are somewhat misleading because many liquidators do not regularly accept corporate insolvency appointments. Statistics from the ASC indicate that a significant proportion of registered liquidators have not taken on any new appointments since 1 January 1991. The proportion of non-active practitioners is, in most jurisdictions, between 20 per cent and 30 per cent, giving an overall proportion of 26.6 per cent. A study by the ASC in two selected jurisdictions indicated that very few, if any, of the non-active practitioners are official liquidators. This was not confirmed in all jurisdictions but it could fairly be assumed that trend would apply uniformly. Chart 2.2 below illustrates how the overall breakdown of official/non-official registered liquidators varies if the number of non-official registered liquidators is discounted by 25 per cent on the grounds that a similar proportion would be inactive.

Chart 2.2



2.5. One point to note in relation to these statistics is that it is possible that the practitioners who have not accepted any appointments are, nevertheless, engaging in corporate insolvency work under the supervision of another person (such as an official liquidator in the same firm). However, the ASC has advised that it is more likely that such persons have ceased to engage in regular corporate insolvency work, since most of the persons concerned are partners of a firm.

ROLE

2.6. The role that the insolvency practitioner plays in any given administration will depend on whether it is an administration of corporate or personal property and the type of administration involved. This section outlines the various types of administrations available under corporate insolvency and personal bankruptcy laws and the role the insolvency practitioner plays in each.

Corporate Insolvency

2.7. Generally, corporate insolvency practitioners are appointed to corporations (usually companies) which are in financial difficulty or are insolvent. Their main task is to devise and implement a plan for the recovery of the company, or arrange for the winding up of the company in a manner which, as far as possible, maximises the returns to the company's creditors and members.[6]

If corporate reconstruction must be considered, insolvency practitioners:

- analyse the viability of the company within its market environment;
- choose a course of action for the company from among a range of possible options for the company's reconstruction;
- negotiate approval, and then implement, manage and monitor the plan; and
- simultaneously manage the day to day operations of the company.

2.9. Where a company is wound up, an insolvency practitioner must:

- arrange for the orderly realisation, collection and sale of assets of the company, as well as the subsequent disposition of assets to creditors according to their relative priorities; and
- investigate the company's affairs and report on the stewardship of directors and, where necessary, take legal proceedings to recover assets from other parties on behalf of the company.

2.10. The tasks outlined above may involve assessing and analysing:

- an industry and its performance;

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6 These general remarks may not apply to practitioners appointed to act as receivers, receiver and managers or other controllers of corporate property. In such cases the practitioner is appointed over certain assets or classes of assets and their role is usually more limited.

- the placement and performance of particular products within a market;
- the structure and performance of a company's resource markets;
- organisational structures within a company;
- management performance and capabilities;
- labour relations and work practices;
- profitability both in terms of past performance and forecasts of future performance;
- asset structures and valuations, debt and capital structures, cash flows, risk exposure and the prospects of a company being able to obtain finance; and
- likely impacts of future Government policy or regulatory initiatives.[7]

Successful completion of the tasks require well-developed interpersonal skills. Commonly corporate insolvency practitioners are called upon to chair meetings and negotiate with employees, company officers and creditors regarding controversial and complex issues.

2.11. The legal responsibilities of the corporate insolvency practitioner are determined primarily by the provisions of the Corporations Law. Under the Corporations Law, an insolvency practitioner may be a:

- liquidator;
- provisional liquidator;
- receiver, receiver and manager or other controller;
- voluntary administrator or administrator of a deed of company arrangement; or
- scheme manager.

The legal responsibilities of the practitioner in any particular case will depend upon the type of administration concerned.

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7 See generally Australian Society of Certified Practising Accountants, The Institute of Chartered Accountants in Australia and the New Zealand Society of Accountants, *Competency Based Standards for Professional Accountants in Australia and New Zealand: Discussion Paper prepared by Professor WP Birkett*, Link Publishing, Sydney, 1993 at pp. 125–164.

Liquidators

2.12. Liquidation, or winding up, is a procedure by which a corporation is ultimately dissolved. Generally, upon liquidation, the liquidator takes complete control of the corporation from the directors.[8] The objective of a winding up is to bring about an end to the corporation in an orderly and equitable manner which obtains the maximum return possible for creditors and members. The main tasks of a liquidator during the winding up are to:

- investigate the corporation's financial affairs and prepare a report on those affairs (including possible recovery actions available to the corporation);
- call in and realise the corporation's assets (including, where appropriate, bringing actions to recover assets which have been disposed of improperly); and
- distribute the proceeds to creditors who properly prove their claims in the priority set down in the Corporations Law.

2.13. A liquidator is required to report not only to the creditors and members of the corporation, but also to the ASC.[9] In specified circumstances, there is a particular responsibility to report suspected breaches of the Corporations Law by company officers.[10]

Types of Liquidation

2.14. There are essentially three different types of winding up under the Corporations Law:

- members' voluntary;
- creditors' voluntary; and
- compulsory.

8 Subsections 471A(1), 495(2), Corporations Law.

9 Sections 476, 508, 509, 533, 539, Corporations Law.

10 Section 533, Corporations Law.

2.15. *Members' voluntary winding up* can only be used by solvent corporations. The directors are required to make a declaration to the effect that the corporation is capable of paying its debts in full within a period of 12 months.[11] A corporation enters a members' voluntary winding up following a special resolution by the members of the company in favour of winding up the corporation.[12] The members of the company decide who will be appointed as liquidator and what the remuneration will be.[13] Generally only **registered liquidators** may be appointed, except in the case of a winding up of a proprietary company.[14] There are restrictions on related parties being appointed, even if they are registered liquidators.[15]

2.16. *Creditors' voluntary winding up* may be used where a corporation is not solvent. A corporation may enter a creditors' voluntary winding up where the directors are unable to make a declaration of solvency or where a declaration is made but it later becomes apparent that the company is not solvent.[16] On the same day, or the day after, a meeting of members to consider a special resolution to wind up the corporation, a creditors' meeting is held.[17] The creditors may nominate a liquidator and if the nomination is different to the nomination by members, the creditors' choice will prevail.[18] Generally only **registered liquidators** may be appointed and there are restrictions on related parties being appointed, even if they are registered liquidators.[19] A corporation may also enter a creditors' voluntary winding up directly from voluntary administration through deeming provisions in the Corporations Law and, in those circumstances, the administrator or deed administrator is deemed to be nominated as the liquidator for the purposes of the winding up.[20] The creditors or their representatives (on a committee of inspection) determine the remuneration to be paid to the liquidator.[21]

2.17. *Compulsory winding up* is effected by an order of the court.[22] It most often arises where a creditor petitions the court to have a corporation wound up on grounds of insolvency, relying on failure of the corporation to comply with a demand for

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11 Section 494, Corporations Law.

12 Subsections 495(1), 495(2), Corporations Law.

13 Subsection 495(1), Corporations Law.

14 Section 532, Corporations Law. The exception formerly only applied to an exempt proprietary company, but the section was recently amended by the *First Corporate Law Simplification Act 1995*.

15 Section 532, Corporations Law.

16 Subsections 496(6), (8), Corporations Law.

17 Subsection 497(1), Corporations Law.

18 Subject to an order of the court to the contrary—see subsection 499(2), Corporations Law.

19 Section 532, Corporations Law.

20 See sections 446A, 446B, Corporations Law.

21 Subsection 499(3), Corporations Law.

22 Section 459A, 461, Corporations Law.

repayment of a debt.[23] The liquidator is appointed by the court and is an officer of the court. Only **official liquidators** are eligible to be appointed.[24] Depending on the jurisdiction, the court will either appoint the creditor's nominee or appoint a liquidator from a list using a rotation system.[25] Remuneration is determined at first instance by agreement between the liquidator and the creditors, but if no agreement is reached, by the court.[26] Very often there are not enough assets to satisfy even the liquidator's remuneration, but the lack of property is not a ground for refusing a winding up application.[27] Although liquidators cannot be compelled to incur expenditure where there is not enough property for reimbursement,[28] liquidators of assetless companies must still carry out obligations such as lodging reports with the ASC.[29]

Provisional Liquidators

2.18. The objective of provisional liquidation is not to wind up the corporation, but to preserve the status quo and make inquiries about the affairs of the corporation pending a liquidation, or the entering into of some other form of external administration or, in some cases, return the company to the control of the directors.

2.19. Provisional liquidation is effected by an order of the court after the filing of a winding up application but prior to the making of a winding up order.[30] Usually an application for placing a corporation in provisional liquidation is made with some urgency, as it is most commonly used where there is a concern that the assets could be dissipated. The appointment of a provisional liquidator allows control of the corporation to be quickly removed from the directors and enables investigations to be carried out.

2.20. Provisional liquidators have powers to carry on the business of the corporation as well as other powers conferred under the Corporations Law, the relevant rules of court, or granted by court order.[31] The powers are similar but more limited than those available to liquidators. A provisional liquidator is an officer of the court and is subject to the court's control. Creditors, members or the ASC may apply to the court in

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23 Pursuant to Part 5.4. Part 5.4A deals with winding up by the court on grounds other than insolvency.

24 Subsection 472(1), Corporations Law.

25 See further discussion of appointment in Chapter 9.

26 Subsection 473(3), Corporations Law.

27 Subsection 467(2), Corporations Law.

28 Subsection 545(1), Corporations Law.

29 Subsection 545(2), Corporations Law.

30 Subsection 472(2), Corporations Law.

31 Subsections 472(3), (4), Corporations Law.

relation to the exercise or proposed exercise by a provisional liquidator of certain powers, including the power to carry on the corporation's business.[32]

2.21. Only **official liquidators** are eligible for appointment as provisional liquidators,[33] and remuneration is as determined by the court.[34] A provisional liquidator's role includes making inquiries about the corporation's financial position, assessing future prospects and reporting back to the court about possible courses of action, such as liquidation or voluntary administration. The provisional liquidator will also take control of the corporation's business during the provisional liquidation.[35]

Receivers, Receiver and Managers and Other Controllers

2.22. Receivers, receiver and managers and other controllers are most commonly appointed by secured creditors where the debtor corporation defaults on covenants set out in security documents. Their role is usually to take possession of certain property in which the creditor has an interest, with a view to using or disposing of the property in order to obtain the maximum possible return for the secured creditor.

Receivers and Receiver and Managers

2.23. A receiver is also a manager (that is, a 'receiver and manager') if they have powers to manage the affairs of the corporation, as well as to take possession of particular items of property.[36] Securities known as 'floating charges' commonly provide for the security interest to encompass the whole of the corporation's assets and undertaking. In those instances, the secured creditor will usually be entitled to appoint a receiver and manager who has wide powers to deal with the property and the affairs of the corporation concerned. Receiver and managers are more commonly appointed than receivers. Part 5.2 of the Corporations Law deals with receivers and receiver and managers alike, and the word 'receiver' is used in that Part to describe both.[37] Similarly, the discussion below dealing with receivers is also intended to cover receiver and managers, unless the contrary intention appears.

2.24. Privately appointed receivers are officers of the debtor corporation. However, they act in the interests of the secured creditor who appoints them. They are not responsible for distribution of any surplus assets. Distributions of surplus assets to unsecured creditors will usually be made by a liquidator or sometimes by the company itself. It is possible for a receiver and a liquidator to be appointed at the same time, but

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32 Subsection 472(6), Corporations Law.

33 Subsection 472(2), Corporations Law.

34 Subsection 473(2), Corporations Law.

35 Subsection 472(4), 471A(2), Corporations Law.

36 Section 90, Corporations Law.

37 Section 416, Corporations Law.

the liquidator does not have control over the secured property. If the liquidator or the court approves, the receiver may carry on the corporation's business during the winding up instead of the liquidator.[38]

2.25. In some circumstances a receiver may be appointed by the court. The Supreme Courts have wide powers to appoint a receiver whenever it is 'just and equitable' to do so.[39] The 'just and convenient' jurisdiction can be invoked in a variety of situations but the main categories are where a security is enforceable or the secured property is in jeopardy, where other property in the company's possession is in jeopardy, or where a receiver is sought for the purposes of equitable execution.[40] The rules of court in a number of jurisdictions expressly allow the court to appoint a receiver for the purpose of taking control of corporate property to satisfy a judgement.[41] The courts also derive powers to appoint receivers pursuant to special legislation. For example, section 260 of the Corporations Law allows the court to appoint a receiver or a receiver and manager if the company's affairs are being conducted in an oppressive manner. A receiver or receiver manager appointed by the court is an officer of the court.

2.26. The activities of receivers of corporate property have been regulated under companies legislation since 1984. The Corporations Law now contains a number of statutory powers and obligations.[42] Some of the relevant provisions deal exclusively with receivers, while others apply to controllers generally.[43] Section 420, which deals exclusively with receivers, provides that they have powers to do 'all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.' There are also a number of specific powers, which apply subject to any provision of the court order or instrument under which the receiver was appointed which operate to limit the statutory powers.

2.27. The ASC and the court have a general supervisory jurisdiction over the activities of receivers of corporate property.[44] Only **registered liquidators** are eligible for appointment as receivers of corporate property, and there are restrictions on related parties such as auditors or mortgagees acting as receivers of corporate property even if they are registered.[45]

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38 Section 420C, Corporations Law.

39 See, for example, section 67 of the *Supreme Court Act 1970* (NSW) and subsection 62(2) of the *Supreme Court Act 1958* (Vic).

40 See further O'Donovan, J. 1981, *Company Receivers and Managers*, Law Book Company, Sydney, pp. 223–233.

41 For example, see Supreme Court Rules of Victoria, Order 74.

42 For example, see sections 420 and 422, Corporations Law.

43 See below for discussion of provisions concerning controllers generally.

44 Sections 422–425, Corporations Law.

45 Section 418, Corporations Law.

2.28 Remuneration would usually be determined by the appointing party, but the court has power to fix or vary the amount, including retrospectively, on the application of a liquidator, voluntary administrator or deed administrator, or the ASC.[46]

Other Controllers

2.29. Under the Corporations Law, a controller is a receiver, or receiver and manager, or *any other person in possession or control of a corporation's property for the purpose of enforcing a charge*.[47] A managing controller is a receiver and manager, or *any other controller who has functions or powers of management of the corporation*.[48]

2.30. There are currently **no restrictions** on who may be a non-receiver controller and the court has no specific powers in relation to fixing remuneration of non-receiver controllers.

2.31. The Corporations Law does, however, provide for matters such as the liability of controllers for debts incurred, duties of care in relation to powers of sale, duties in relation to bank accounts and accounting records and a managing controller's obligation to prepare and lodge accounts relating to the corporation's affairs.[49] The court and the ASC have powers to inquire into controllers' actions and require controllers to make good any loss suffered.[50] The court is given powers to remove a controller for misconduct.[51]

2.32. The obligations of non-receiver controllers are discussed in detail in Chapter 11.

Voluntary Administrators and Administrators of Deeds of Company Arrangement

2.33. Prior to the introduction of the recommendations contained in the Harmer Report, the options available for insolvent companies under companies legislation were:

- receivership;
- liquidation;

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46 Section 425, Corporations Law.

47 Section 9, Corporations Law.

48 Section 9, Corporations Law.

49 There has criticism to the effect that some of the new obligations are too onerous and inappropriate in some circumstances. For further discussion of this issue, see Chapter 11.

50 Section 423, Corporations Law.

51 Section 434A, Corporations Law.

- schemes of arrangement; and
- official management.

2.34. In the Harmer Report, the Australian Law Reform Commission considered that the existing regimes for dealing with the affairs of a company in financial difficulty were too conservative. These regimes did not encourage a constructive approach to corporate insolvency by, for example, focusing on the possibility of saving the business (rather than saving the company) and preserving employment prospects. The Commission stated that:

> 'A constructive approach to corporate insolvency requires the preservation, if practical and possible, of the property and business of the company in the brief period before creditors are in a position to make an informed decision. This assists in an orderly and beneficial administration whether creditors decide to wind the company up or accept a compromise. An ordered form of administration of the affairs of an insolvent person is at the centre of insolvency law—whether, in the case of an insolvent company, that law offers the prospect of a winding-up or continuation of the corporate business. This approach is similar to that taken by insolvency law inquiry bodies in many overseas countries, such as the United States of America, Canada, the United Kingdom and some of the European nations...
>
> The Commission does not suggest that its approach will result in the salvation of failed companies or even companies which show signs of failing. Nonetheless, the aim is to encourage early positive action to deal with insolvency. It will be worthwhile and a considerable advantage over present procedures if it saves or provides better opportunities to salvage even a small percentage of the companies which, under the present procedures, have no alternative but to be wound up.'[52]

2.35. The voluntary administration reforms recommended by the Commission became part of a package of insolvency reforms contained in the *Corporate Law Reform Act 1992*. The Act abolished the official management regime, and replaced it with the voluntary administration scheme now contained in Part 5.3A of the Corporations Law. The scheme commenced on 23 June 1993.

2.36. The objective of Part 5.3A, as stated in section 435A of the Law, is to allow the

> 'business, property and affairs of an insolvent company to be administered in such a way that:

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52 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 53 and 54.

– maximises the chances of the company, or as much as possible of its business, continuing in existence; or

– if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.'

2.37. The voluntary administration scheme has become an increasingly popular form of external administration which has resulted in these administrations forming a significant, if not the major, part of the practice of most insolvency practitioners.

2.38. The primary purpose of the legal framework set out in Part 5.3A is to provide a flexible and relatively inexpensive procedure which gives a company breathing space so that it can attempt a compromise or arrangement with its creditors aimed at saving the company or the business and maximising the return to creditors. If successful, the arrangement will be set out in a deed of company arrangement, which binds the company and the creditors. If these attempts fail, the legislation facilitates the transition to winding up.

Voluntary Administrators

2.39. An independent administrator, who must be a **registered liquidator**,[53] may be appointed to take over the affairs of a company by:

- a majority of the company's directors—where those directors believe the company to be insolvent, or that it is likely to become insolvent at some time in the future;[54] or
- a liquidator or provisional liquidator of the company;[55] or
- a chargee entitled to enforce a charge over the whole or substantially the whole of the company's property.[56]

Most voluntary administrators are appointed by directors.

2.40. The remuneration of administrators is determined by the creditors or, if the creditors do not make a determination, by the court.[57]

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53 Section 448B, Corporations Law.
54 Section 436A, Corporations Law.
55 Section 436B, Corporations Law.
56 Section 436C, Corporations Law.
57 Section 449E, Corporations Law.

2.41. The appointment of an administrator has some immediate and important consequences. On appointment, control of the company and its property, business and affairs are vested in the administrator.[58] The administrator acts as the company's agent, and the powers of all other officers of the company are not exercisable except with the administrator's written approval.[59] The administrator has power to remove directors from office and appoint new directors.[60] The administrator also has a duty to report possible offences or misconduct of company officers to the ASC and cooperate with any investigation the ASC may institute.[61]

2.42 The primary task for the administrator is to investigate the financial position of the company with a view to making a recommendation to a meeting of creditors about what should be done with the company. Having formed such an opinion, the administrator is required to call a meeting of creditors to determine the company's future. Generally the meeting will have to be held within 28 days (in the usual case) or 35 days (where Christmas or Easter intervenes) of the administrator's appointment.

2.43. A number of reports and statements must accompany the notice of the meeting, including the details of any proposed arrangement with the creditors recommended by the administrator.[62] The administrator must send the creditors a statement containing opinions as to whether it would be in the interests of the company's creditors:

- to execute a deed of company arrangement;
- for the administration to end; and
- for the company to be wound up.[63]

2.44. The administrator must also send to creditors an opinion regarding whether there are any transactions which might be voidable and which might enable a liquidator to recover money, property or other benefits.[64]

58 Section 437A, Corporations Law.
59 Sections 437B, 437C, Corporations Law.
60 Section 442A, Corporations Law.
61 Section 438D, Corporations Law.
62 Subsection 439A(4), Corporations Law.
63 Section 438A, Corporations Law.
64 Regulation 5.3A.02, Corporations Regulations.

2.45. The administrator is required to chair the meeting.[65] The creditors may resolve at the meeting to:

- execute a deed of company arrangement;
- terminate the administration; or
- have the company wound up.[66]

Deed Administrators

2.46. The creditors may decide to enter into a deed of company arrangement. Most deeds will be in one of two forms, or a combination of both. In a moratorium type of deed, the creditors agree to accept payment at a later time, usually in instalments. In a compromise deed, the creditors agree to accept less than 100 cents in the dollar in full satisfaction of their claims. In many cases, compromise deeds will provide that some third party will make a contribution to the assets of the company. The Corporations Law sets out what a deed of company arrangement must contain, although the requirements are extremely flexible.[67]

2.47. The administrator of the company will become the administrator of the deed of company arrangement unless the creditors resolve otherwise.[68] Only a **registered liquidator** may be appointed a deed administrator.[69] Remuneration is fixed by creditors or, if no determination is made, by the court.[70]

2.48. The role of the deed administrator will be set out in the deed. A list of powers and functions is set out in prescribed provisions, but it is not necessary to include those in every deed. In the larger administrations it will usually be appropriate for the administrator to play a role in the management of the company's affairs. However, for smaller companies the deed administrator's role may be limited to, for example, making sure the deed is complied with. The day to day management of the company may be handed back to the directors while the deed administrator takes a much less active role.

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65 Subsection 439B(1), Corporations Law.

66 Section 439C, Corporations Law.

67 See section 444A, Corporations Law, Schedule 8A of the Corporations Regulations.

68 Subsection 444A(2), Corporations Law.

69 Section 448B, Corporations Law.

70 Section 449E, Corporations Law.

Transition to Winding Up

2.49. It may be that the creditors, at the meeting decide that the company should be wound up. In that case, the company will be deemed to have entered into a creditors' voluntary winding up and the administrator will be deemed to have been appointed as the liquidator of the company.[71]

2.50. A transition into a creditors' voluntary winding up will also be deemed to occur where:

- the company fails within 21 days to execute a deed of company arrangement agreed upon by the creditors;[72] or
- creditors terminate a deed of company arrangement and resolve that the company should be wound up.[73]

Scheme Managers

2.51. The Corporations Law provides for a mechanism by which a corporation may enter into a legally enforceable scheme of arrangement or compromise with its creditors.[74] This arrangement or compromise must be approved by creditors at meetings duly convened in accordance with the Corporations Law and sanctioned by order of the court.[75] An application to the court to order the necessary meetings to consider a scheme of arrangement or compromise may be made by the corporation, a creditor, a member or a liquidator.[76]

2.52. The scheme may provide for the appointment of a scheme manager to oversee the implementation of the scheme. This will often involve ongoing involvement with the affairs of the corporation. Some of the reporting obligations of receivers and receiver managers also apply to scheme managers.[77]

2.53. Only **registered liquidators** can be appointed as scheme managers, although there are limited exceptions which allow certain bodies corporate to administer a scheme.[78] Related persons such as auditors or mortgagees may not administer a scheme, even if they are registered liquidators.[79] The court and the ASC have a

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71 Paragraph 446A(1)(a), subsection 446A(4), Corporations Law.
72 Paragraph 446A(1)(b), Corporations Law.
73 Paragraph 446A(1)(c), Corporations Law.
74 See Part 5.1, Corporations Law.
75 Subsection 411(4), Corporations Law.
76 Subsection 411(1), Corporations Law.
77 Paragraph 411(9)(a), Corporations Law.
78 Subsections 411(7), 411(8), Corporations Law.
79 Subsection 411(7), Corporations Law.

supervisory role and are permitted to investigate the conduct of a scheme manager in the same way that they may investigate the conduct of a liquidator.[80]

2.54. The high cost of meeting the procedural requirements and the significant involvement of the court, together with the introduction of the voluntary administration scheme, have resulted in a declining use of schemes of arrangement so that they are now used rarely, if ever, for the sole purpose of effecting compromises with creditors. However, as the scheme of arrangement provisions may also be used for other purposes involving members' rights such as reconstructions which involve varying share structure or amalgamations, a scheme of arrangement may be more suitable than other forms of external administration in those particular circumstances.

Personal Insolvency

2.55. Personal insolvency in Australia is governed by the *Bankruptcy Act 1966 (Cth).* The objective of bankruptcy legislation is essentially to allow action to be taken by a non-corporate insolvent debtor or their creditors, so that the bulk of the debtor's property can be taken and used to pay creditors in proportion to the amounts owed. Once the procedure has been followed and provided there has been no misconduct on the part of the debtor, the law allows the debtor to be released from the burden of the debts and to make a fresh start.[81]

Bankruptcy Proceedings

2.56. Bankruptcy is commenced by either a debtor's petition or a creditor's petition. On acceptance of a debtor's petition by the Official Receiver, a debtor automatically becomes bankrupt.[82] Where a creditor has petitioned the court for the bankruptcy of the debtor and the court exercises its discretion and accepts the petition, a sequestration order against the bankrupt's estate will be made and the debtor will be bankrupt from the date of the order.[83]

2.57. When a debtor becomes bankrupt, their property (subject to some exceptions) becomes vested in the **registered trustee** who has consented to be trustee of the estate.[84] If a registered trustee has not consented to be trustee of the estate, the property vests in the Official Trustee in Bankruptcy.[85] Registered trustees are private

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80 Paragraph 411(9)(b), Corporations Law.

81 D. Rose QC, *Lewis Australian Law of Bankruptcy, 10th ed*, 1994, Law Book Company Ltd, Sydney, p. 1.

82 Paragraph 55(4A)(b), *Bankruptcy Act 1966.*

83 Section 43, *Bankruptcy Act 1966*.

84 Paragraph 58(1)(a), subsection 156A(3), *Bankruptcy Act 1966*.

85 Paragraph 58(1)(a), section 160, *Bankruptcy Act 1966.*

insolvency practitioners registered as trustees under the *Bankruptcy Act*. Of the bankruptcy administrations commenced in 1995–96, they performed only 7 per cent, with the remaining 93 per cent being performed by the Official Trustee.[86]

2.58. The role of a trustee in bankruptcy has been described in the following terms:

> 'The getting in, administration and distribution of a bankrupt estate is often a long and intricate task requiring close attention to accounts and sometimes the running of a business. All this requires executive and commercial expertise. Registered trustees are therefore usually chartered or public accountants.
>
> The trustee is the representative of the creditors and has the duty to administer the estate in their interests, subject to the Act and to other legislation, and to the directions of the court and meetings of creditors. The trustee must act with due dispatch and have adequate knowledge and understanding of the bankrupt estate. The trustee should apply to the court for directions where there is a real doubt, not reasonably capable of solution by reference to the committee of inspection or meetings of creditors, and especially if, after taking competent legal advice, there is a real doubt on a legal question.
>
> Trustees, although not strictly officers of the court, are treated as subject to the standards of behaviour to be expected from such an officer. Thus they must be completely honest and impartial in the exercise of any discretions vested in them. They are governed by the law relating to trustees in general, except in so far as their position is modified by the Act or other special legislation.'[87]

2.59. The duties of trustees contained in the *Bankruptcy Act* have been recently amended to reflect contemporary expectations and practices.[88] The duties include:

- notifying creditors of the bankruptcy;
- determining whether the estate includes property that can be realised to pay dividends to creditors;
- reporting to creditors within three months of the date of the bankruptcy on the likelihood of receiving a dividend before the end of the bankruptcy;

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86 *Bankruptcy Act 1996* — Annual Report 1995-96, AGPS, Canberra, 1996, p. 12.

87 D. Rose QC, cited above, p. 29.

88 The *Bankruptcy Act* has been recently amended by the *Bankruptcy Legislation Amendment Act 1996.*

- providing information concerning the administration of the estate to a creditor who makes a reasonable request;

- determining whether a bankrupt has transferred property that is void against the trustee; and

- taking appropriate steps to recover property for the benefit of the estate.[89]

2.60. The creditors may appoint a committee of inspection, consisting of three to five creditors or their representatives, for the purpose of advising and superintending the trustee.[90] When all the property is collected, the trustee must determine the claims of creditors, declare a final dividend and distribute the property in the order of priority laid down in the *Bankruptcy Act*.[91]

2.61. Creditors may by resolution fix the remuneration of the trustee. The trustee may be remunerated by way of a commission based on a percentage of the money received, but the percentage may not exceed a prescribed quantum.[92] Trustees may not accept any other benefits or derive any other financial advantage from estate transactions, or give up their remuneration to debtors or others.[93]

2.62. If the creditors fail to fix the remuneration of the trustee, the trustee is to be remunerated in accordance with a scale of charges published by the Insolvency Practitioners Association of Australia ('the IPAA').[94]

2.63. The *Bankruptcy Act* provides for minimum remuneration of registered trustees in bankruptcy cases. Where the total remuneration paid to a registered trustee is less than $1109.00, the trustee is entitled to be paid an additional amount equal to the shortfall.[95] If a bankrupt's estate contains insufficient funds to pay the trustee, the trustee may recover the outstanding amount by court action from the bankrupt as a debt due to the trustee.[96]

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89 Subsection 19(1), *Bankruptcy Act 1966*.

90 Section 70, *Bankruptcy Act 1966*.

91 Subsection 145(2), *Bankruptcy Act 1966*.

92 Subsection 162(2), *Bankruptcy Act 1966* and Regulation 8.07, Bankruptcy Regulations.

93 Section 165, *Bankruptcy Act 1966*.

94 Subsection 162(4), *Bankruptcy Act 1966* and Regulation 8.08, Bankruptcy Regulations. The IPAA scale is discussed in detail in Chapter 10.

95 Subsection 161B(1), *Bankruptcy Act 1966*.

96 Subsection 161B(2), *Bankruptcy Act 1966*. This amount, however, is not to be paid to the trustee in addition to those amounts payable under section 162.

2.64. The regulations governing remuneration of bankruptcy trustees contain a formal facility for the bankrupt or a creditor to challenge remuneration claimed by the trustee if dissatisfied with the amount of the claim.[97] In the event of a challenge, the trustee must provide a taxing officer with a detailed bill of costs.[98] The taxing officer conducts a taxation hearing at which certain items may be disallowed or reduced in amount if the taxing officer considers that the amount charged has been unreasonably high, if the costs or disbursements were incurred or made improperly, unreasonably, negligently or unnecessarily, or if disbursements cannot be proved to the satisfaction of the taxing officer.[99] There is a fee for a taxation which is payable by the person requesting the taxation.[100]

Arrangements with Creditors

2.65. Like corporate insolvency laws, personal insolvency laws contain provisions whereby insolvent persons may avoid formal bankruptcy proceedings by making a binding arrangement with their creditors. These arrangements may be preferable to bankruptcy for both debtors and creditors and they are used extensively. The relevant provisions are located in Part X of the *Bankruptcy Act* and these arrangements are commonly known as Part X administrations.

2.66. The types of Part X administrations are:

- Deeds of Assignment;
- Deeds of Arrangement; and
- Compositions.

2.67. Significant changes to Part X arrangements have been recently introduced. The *Bankruptcy Act* allows a debtor who wants his or her affairs dealt with under Part X to authorise a registered trustee, a solicitor or the Official Trustee to call a meeting of the debtors' creditors and take control of the debtor's property.[101] The period of control by that person will continue until:

- the creditors pass a resolution that the property of the debtor ceases to be subject to control;
- the debtor and trustee make a deed of assignment or deed of arrangement following a special resolution of creditors;

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97 Regulation 8.09, Bankruptcy Regulations.
98 Regulation 8.09, Bankruptcy Regulations.
99 Regulation 8.11, Bankruptcy Regulations.
100 Subregulation 8.11(6), Bankruptcy Regulations.
101 Subsection 188(1), *Bankruptcy Act 1966*.

- the creditors accept a composition;
- four months pass since the authority became effective;
- the court releases the property from control;
- the debtor becomes a bankrupt; or
- the debtor dies.[102]

2.68. A controlling trustee in relation to a debtor will be a registered trustee, a solicitor or the Official Receiver.[103] The functions of a registered trustee and solicitor are aligned and solicitors who become controlling trustees will assume control of a debtor's property in the same manner as a registered trustee.[104] Where an authority is made, a charge is created over the debtor's property thereby providing the trustee with greater control.[105]

2.69. The controlling trustee must call a meeting of the debtor's creditors[106] and the meeting must be held within 35 days after the debtor signs the authority or 45 days in the case of authorities signed in December.

2.70 When the creditors have received all the relevant information and reports from the trustee, generally they will resolve at the meeting to take one of the following courses of action:

- release the debtor's property from control of the trustee;
- require the debtor to execute a deed of assignment or deed of arrangement to be administered by a registered trustee nominated by the creditors;
- accept a composition to be administered by a registered trustee nominated by the creditors; or
- require the debtor to present a debtor's petition for bankruptcy within seven days.[107]

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102 Subsection 189(1A), *Bankruptcy Act 1966.*
103 Sections 187, 188, 192, *Bankruptcy Act 1966*.
104 Subsection 187(1), *Bankruptcy Act 1966*.
105 Subsection 189AB, *Bankruptcy Act 1966*.
106 Subsection 190(1), *Bankruptcy Act 1966*.
107 Section 204, *Bankruptcy Act 1966.*

2.71. At the meeting, creditors are required to nominate either one or more registered trustees, or the Official Trustee, as the trustee of a deed or composition.[108] A resolution at the meeting which purports to appoint a person as trustee of a deed or composition will be void if the person has not consented in writing to the appointment or nomination. A person who has been appointed or nominated as trustee will have to give the Official Receiver a copy of their written consent.[109] This will allow the trustee's details to be entered in the National Personal Insolvency Index.[110]

2.72. During the period in which the trustee has control over the property, the court may make a range of orders which have the effect of imposing a stay on creditors after the debtor has become bankrupt.[111]

2.73. Controlling trustees are required to prepare a report as to the debtor's affairs which summarises and comments upon information regarding the debtor's affairs which is available to the trustee. Where a debtor has provided the trustee with a proposal that his or her affairs be administered under a deed of assignment, deed of arrangement or composition, the controlling trustee must express an opinion whether the creditors' interests would be better served by accepting the proposal or by the bankruptcy of the debtor.[112]

2.74. The controlling trustee is empowered to make further investigations about the debtor's affairs, carry on the debtor's business, and deal with the debtor's property while it is under the trustee's control.[113]

2.75. The controlling trustee or any person affected by an act of the controlling trustee can apply to the court for directions on matters relating to the control of the debtor's property. The court can make any orders it thinks just.[114]

2.76. The obligation on controlling trustees to keep accounts, and the requirements relating to the remuneration of trustees, are now governed by the provisions in Part VIII of the *Bankruptcy Act*.[115]

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108 Subsections 204(4), (5), (8), *Bankruptcy Act 1966*.

109 Section 215A, *Bankruptcy Act 1966*.

110 *Explanatory Memorandum* to the Bankruptcy Legislation Amendment Bill 1996 (Senate), paragraph 158.3.

111 Subsection 189AA(1), *Bankruptcy Act 1966.*

112 Section 189A, *Bankruptcy Act 1966*.

113 Section 190, *Bankruptcy Act 1966.*

114 Subsections 190(4A), (4B), *Bankruptcy Act 1966*.

115 Section 210, *Bankruptcy Act 1966*.

2.77. After the trustee and debtor have executed a deed, or where a resolution has been passed accepting a composition, the trustee must notify each creditor of the debtor as soon as practicable.[116]

Debt Agreements

2.78. The *Bankruptcy Act* now contains a new simple form of insolvency administration known as 'Debt Agreements'. This new regime has been introduced to assist persons with low levels of debt, income and assets who wish to avoid becoming bankrupt but who are unable to afford to enter into Part X arrangements.

2.79. A debtor who has debts which do not exceed a threshold amount[117] can propose a debt agreement which may provide for any matter relating to the debtor's financial affairs,[118] for example:

- payment of less than the full amount of the debt;
- periodic payments; or
- a moratorium on payment.

2.80. A debt agreement proposal must be submitted by the debtor to the Official Trustee for processing.[119] Once accepted for processing, that fact is recorded on the National Personal Insolvency Index and a stay on enforcement and execution against the debtor comes into effect.[120] Processing entails obtaining the views of creditors, for or against the proposal, by way of a meeting or by voting letters.[121] The proposal must be approved by a special resolution of creditors before it will be effective as a debt agreement.[122]

2.81. The processing function, and other powers and functions of the Official Trustee in relation to the proposal (such as power to deal with the debtor's property) can be delegated by the Official Trustee to a registered trustee if the trustee and the debtor consent.[123] The Official Trustee or registered trustee do not necessarily have a role like a trustee in administering debt agreements once they have been approved. The

116 Section 218, *Bankruptcy Act 1966*.
117 The threshold amount can be varied by regulation. Currently it is approximately $52,800.
118 Subsection 185C(3), *Bankruptcy Act 1966*.
119 Section 185C, *Bankruptcy Act 1966*.
120 Section 185F, *Bankruptcy Act 1966*.
121 Section 185A, *Bankruptcy Act 1966*.
122 Section 185B, *Bankruptcy Act 1966*.
123 Section 185Y, *Bankruptcy Act 1966*.

agreement may provide for debtors to make payments to creditors directly or perhaps by some other person on behalf of the debtor.[124]

2.82. In order to ensure costs of debt agreements remain low, there are restrictions on remuneration for registered trustees in connection with the agreements. Registered trustees cannot receive any remuneration for processing debt agreements. However, they may charge fees in respect of performing other functions delegated to them by the Official Trustee, such as selling an asset, if this is provided for in the agreements.[125] The remuneration of Official Trustees is also regulated.[126]

2.83. The effect of a debt agreement is to release the debtor from debts which would have been be provable in bankruptcy if the debtor had become a bankrupt at the time the debt agreement is registered on the National Personal Insolvency Index.[127]

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124 Explanatory Memorandum to Bankruptcy Legislation Amendment Bill 1996 (Senate), paragraph 48.

125 Section 185Z, *Bankruptcy Act 1966.*

126 Section 163, *Bankruptcy Act 1966* provides that the Official Trustee's remuneration is as prescribed by regulation.

127 Section 185J, *Bankruptcy Act 1966.*

REGULATORY FRAMEWORK

PURPOSE OF REGULATION

3.1. The description of the role of insolvency practitioners in the previous chapter demonstrates the considerable responsibilities held by those persons. Clearly, it is important to ensure that practitioners have high levels of competence, diligence and integrity,[128] so that returns are maximised and affected parties can rely on the expertise and judgement of the practitioners.[129]

3.2. The regulatory regime is intended to:

- ensure that practitioners have appropriate high levels of competence and skills;
- ensure the integrity and independence of practitioners; and
- provide a procedure for effectively dealing with complaints and discipline.

These aims must be balanced against the desirability of having the regulatory system operate at a reasonable cost and without unnecessarily interfering with the market for practitioners' services.

HISTORICAL SUMMARY

3.3. Before discussing the details of the regulatory framework for corporate insolvency practitioners, it is instructive to recount briefly the history of the current classes and registration requirements. The summary below focuses on the law in New South Wales.[130]

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128 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 930.

129 Trade Practices Commission, *Study of the professions; Final report—July 1992, Accountancy*, p. 65.

130 The summary is drawn in part from the judgments of Kirby P and McHugh JA in *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. v Attalex Pty. Ltd.* (1984) 2 ACLC 752.

3.4. The early position in Australia was that any 'suitably qualified' and disinterested person was eligible to be appointed as a liquidator.[131] The petitioning creditor nominated a person to act as liquidator and the court would generally appoint the nominated party unless the court was not satisfied the person could properly perform the role because of a lack of ability or independence. This was in accordance with the rule laid down in England in 1868 by Malins V.C. in *Re the General Provident Assurance Company*[132] who, in the course of his judgement, stated that:

> 'These discussions, which constantly occur, as to the appointment of liquidators, are perfectly wearying and disgusting. The time of the Court is occupied, and the most improper scenes take place in my chambers, in consequence of there being a contention as to who shall be appointed liquidator. I shall take this matter into my own hands, and lay down the rule that whoever is proposed to be appointed liquidator by the party having carriage of the order, if I feel that he is a respectable and fit and proper person, shall be sanctioned and appointed by the chief clerk.'

Persons with a possible conflict of interest, such as debtors[133] and shareholders[134] of the company concerned, were not usually eligible.

3.5. In New South Wales, this position changed in 1890 with the decision of Manning J. in the case of *In re The Wentworthville Estate Land and Building Co Ltd.*[135] In that case, the petitioners wished to have an accountant appointed as liquidator, but the company wished to have one of the official assignees appointed. Official assignees were the equivalent of today's official receivers. They were public officials appointed by the Governor and Executive Council at the request of a Judge pursuant to the bankruptcy legislation[136] and their primary role was to administer the bankrupt estates of individuals. The bankruptcy legislation provided for supervision and control by the Judge, who had powers to inquire into their conduct.[137]

3.6. Manning J. was asked by the company to consider once and for all whether it was appropriate for accountants in the private sector to be allowed to conduct company liquidations. His Honour gave the following judgement:

> 'I really cannot see the difference between the winding up of a company and of an [individual's] estate...It seems to me that *prima facie* the official assignees, who have devoted their time to winding up estates, often of a

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131 *Re London & Australia Agency Corp.* (1874) 29 LT 417.

132 (1868) 19 LP 45.

133 *Re Provisional and Suburban Bank Ltd.* (1879) 5 VLR (E) 159.

134 *Re Northumberland & Durham District Banking* (1858) 2 De. G & J. 508.

135 (1890) 1 BC 50.

136 Section 86 *Bankruptcy Act 1887 (NSW).*

137 Sections 91–101 of the *Bankruptcy Act 1887 (NSW).*

> very large and complicated nature, and who have a staff of officers trained to deal with these matters, are better able to carry them out than private individuals, and I will now make it a rule that, *prima facie* an official assignee shall be appointed. If a person desires anyone else he must shew that there is some very good reason for it. The onus ought to rest on him to shew that it is more beneficial to the company that another person be appointed....I am of the opinion that companies would be wound up much more expeditiously and economically by the official assignees as liquidators than by those outside of the Court, and there being no special circumstances in this case why one of the official assignees should not be appointed official liquidator, I appoint Mr Morris, the person nominated by the company, official liquidator...'[138]

3.7. At the time of Manning J.'s judgement in *Wentworthville*, there were three official assignees in New South Wales. However, when they became only two, they made an arrangement between themselves for the sake of convenience which was accepted by the court whereby they would be appointed in rotation.[139] This arrangement continued until 1911 when one of the official assignees told the court they no longer wished the rotation system to continue. In the case of *In re General Motor Company Limited*,[140] Rich A.J., after consultation with the Chief Justice and the Chief Justice in Equity, ruled that, in the future, the rotation system would no longer operate because it was too great a limitation on the discretion of the court provided for in the Companies Act. However, the *Wentworthville* case would be followed in that appointments would still be made from within the ranks of the official assignees unless there were special circumstances which justified the appointment of some other person. In the course of his judgement, Rich A.J. remarked that:

> 'It is very desirable that a body of permanent official liquidators should be appointed...As the late Mr Justice Manning pointed out, '...companies would be wound up much more expeditiously and economically by the official assignees as liquidators by those outside the court.' In England, on the making of a winding up order the official receiver becomes *ipso facto* provisional liquidator, and he is the official liquidator unless and until a liquidator is appointed in his place. In Victoria, under the recent consolidating Act, provision is made for the appointment by the Governor in Council of a permanent body of official liquidators. Similar provisions might well be adopted here in the bill which I understand is being drafted to amend the Companies Act.'[141]

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138 (1890) 1 BC 50 at 51.

139 *In re General Motor Company Limited* (1911) 28 WN 77.

140 Note 139 above.

141 Note 139 above.

3.8. The practice of appointing only liquidators who were official assignees except in special circumstances was reconsidered in 1926 in *Re Austral Knitting Mills Ltd*.[142] Long Innes J., in deciding that case, made it clear that the court had an unfettered discretion in respect of appointment of liquidators and, in exercising that discretion, the pertinent consideration is: 'What do the interests of the parties concerned in the winding up require?', and the court should make every effort to make an order which will best serve those interests. His Honour went on to say:

> 'I should think that in no case would the Court be disregardful of those interests if it appointed any one of the official assignees. I am not, however, going to lay down that the official assignees have a monopoly in this Court of appointments to the position of official liquidator. Where a petitioner nominates one of the official assignees I should think, speaking for myself, that the appointment would go almost as a matter of course. Where the person having the carriage of the winding up order nominates a person to be the official liquidator, who is a properly qualified and fit and proper person, I do not think that in many cases the Court would have to inquire into the comparative qualifications of that person and of some other person who may be nominated by another party; but the Court may occasionally be called on to do so. Again speaking for myself, and with all respect to Malins V.C., I need only say that when the occasion does arise, I do not think that the fact that the task of making such a selection as will be in the best interests of the parties affected will in some ways be an unpleasant one, is a sufficient reason why the Court should adopt an arbitrary rule which may result in an order which will not be in the best interests of the parties concerned in the winding up. If in any particular case the dispute becomes disgusting, I shall hope to find means to confine it within proper limits; but if that prove impossible I shall not be the first judge who has been both wearied and disgusted when discharging judicial duties.'[143]

Companies Act 1936 (NSW)

3.9. Rich A.J.'s call in the 1911 *General Motors* case for the appointment of a body of official liquidators in New South Wales was finally answered with passage of the *Companies Act 1936*. Under that Act, no more than two official liquidators could be appointed by the Governor for the purpose of voluntary and court-appointed liquidations.[144] In 1938, Long Innes J. issued a practice note stating that he interpreted the relevant provision to mean that any person who accepted an appointment as

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142 (1926) 23 WN 131.

143 (1926) 23 WN 131 at 132.

144 Subsection 227(2) *Companies Act 1936 (NSW).*

official liquidator was bound to act in any winding up if appointed to do so by the court, and there was no need for a special consent to be obtained in each case.[145]

3.10. At this time, there was still no registration system for persons other than official liquidators and it was still possible for other persons to be appointed to conduct court-ordered liquidations. Occasionally 'one-off' appointments were made in cases where there had been special requests.[146]

Uniform Companies Acts

3.11. The Uniform *Companies Acts 1961* introduced the two-tiered regulatory framework upon which the existing system is based. Under that legislation, no person was permitted to be appointed liquidator of a company (except in the case of a members' voluntary winding up of an exempt proprietary company) unless they were a registered liquidator.[147] Registered liquidators were not eligible for appointment if they were related to the company by way of holding an office, employment, or were indebted to the company or a related company for more than a specified sum.[148] The registration function was performed by the Companies Auditors Board in each State and Territory.[149]

3.12. The registration requirements for liquidators differed slightly between jurisdictions.[150] In Victoria, a registered company auditor could be registered as a liquidator if the Board was satisfied as to the experience and ability of the applicant. The requirements for registration as a company auditor in Victoria were:

- membership of the Institute of Chartered Accountants in Australia ('the ICAA') or the Australian Society of Accountants (later to become the Australian Society of Certified Practising Accountants, 'the ASCPA'); or
- registration as an auditor in another jurisdiction or under a previous Victorian enactment; or
- successful completion of a three year course in accounting and a 2 year course in commercial law at an Australian University; or

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145 (1938) 55 WN 112.

146 *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. v Attalex Pty. Ltd.* (1984) 2 ACLC 752 at 772.

147 Section 10 Uniform *Companies Acts*, re-enacted in 1971 as section 277A.

148 See note 147 above.

149 The Companies Auditors Board was established under section 6 of the Uniform *Companies Acts 1961*. In New South Wales and Queensland the existing Public Accountants Registration Boards were made to constitute the Companies Auditors Board.

150 The legislation included requirements not only for general registration but also registration for the purposes of a 'one-off' liquidation—subsection 9(5) of the Uniform *Companies Acts 1961*.

- a certificate in accountancy from a prescribed Institute of Technology or Technical College; or
- demonstration to the Board's satisfaction of a thorough knowledge of accounts and auditing and the provisions of the companies legislation and other prescribed subjects; and
- satisfying the Board of general conduct and character and sufficient practical experience in accountancy and ability to act as a company auditor.[151]

3.13. In New South Wales, it was not necessary to be a registered auditor to gain registration as a liquidator, but applicants had to be registered public accountants under the *Public Accountants Registration Act 1945* and practising as a public accountant. Like the Victorian legislation, the New South Wales legislation provided for an additional requirement that the Board had to be satisfied as to experience and ability of applicants in respect of liquidations.[152]

3.14. Despite the differences in wording of the provisions between jurisdictions, the requirements were, in practice, very similar. A commentator on the provision imposing the requirements[153] remarked that:

> 'With the increasing sophistication in Australian commercial life during the past decade there has grown, and will continue to grow, a greater awareness of the need for proper and adequate experience and capacity in an applicant for registration as a company auditor or liquidator. This section does not define or indicate the nature and extent of experience and capacity necessary, except by reference to the Public Accountants Registration Act where that Act is in force...However, in practice, the several Boards have, by maintaining communication with each other operated—and do—operate upon substantially uniform requirements as to experience and capacity. These requirements have, very properly, included practical experience in accountancy, a knowledge of the uniform enactment and capacity to act as a company auditor or liquidator...The Boards prefer the experience of involvement in actual liquidations as the best indication of probable capacity properly to perform liquidations; although the experience and capacity needed for registration as a liquidator is not necessarily practical experience of the conduct of liquidations, but such experience and capacity as will fit the applicant for

151 Subsection 9(1), *Companies Act 1961* (Vic).

152 Subsection 9(3), *Companies Act 1961* (NSW).

153 Section 9, Uniform *Companies Acts 1961*.

> the office of liquidator: see *White v Companies Auditors Board* [1964] VR 743.'[154]

3.15. It is notable that registration needed to be renewed annually.[155] The Boards were given powers to inquire into the 'conduct, character and ability' of registered liquidators and, upon finding that a registered liquidator had engaged in discreditable conduct or was incapable of performing the duties of a registered liquidator, were empowered to impose various punishments including cancellation or suspension of registration.[156]

3.16. In addition to the introduction of a registration system for liquidators, the Uniform *Companies Acts* allowed the Minister to appoint as many registered liquidators 'as he thinks fit' as official liquidators for the purpose of winding up companies and assisting the court in winding up proceedings. The Minister could require security for performance of an official liquidator's duties and could revoke the appointment at any time.[157] The Minister was the Attorney-General, who would be assisted in this responsibility by the relevant Corporate Affairs Commission ('the CAC').

3.17. Like the current legislation, there were no express requirements for appointment as an official liquidator. However, in practice, no registered liquidator would have been appointed an official liquidator unless they had significant experience in liquidations, including court-appointed liquidations, and an established capacity to properly conduct them. Applicants were required to be persons 'of some maturity and...on whom the court is able to rely.'[158]

3.18. In New South Wales a practice was established (not supported by the legislation) of dividing the list of official liquidators into the 'A' and 'B' lists. Official liquidators on the 'A' list were appointed in rotation. They were required to provide a general consent and had to 'take the good with the bad' and accept remunerative and unremunerative appointments. The need to limit the number of practitioners on the 'A' list so as to ensure each received adequate remuneration appears to have been a factor in determining whether persons could be added to the list.[159] Practitioners on the 'B' list could only be appointed where they expressly consented and the court would not

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154 W.E. Paterson and H.H. Ednie, 1971, *Australian Company Law,* Vol 1, 2nd ed, Butterworths, Sydney, p. 1142.

155 Subsection 9(6), Uniform *Companies Acts 1961*.

156 Subsection 9(11), Uniform *Companies Acts 1961*.

157 Section 11, Uniform *Companies Acts 1961,* repealed and re-enacted as section 231 in 1971.

158 W.E. Paterson and H.H. Ednie, 1971, *Australian Company Law,* Vol 3, 2nd ed, Butterworths, Sydney, p. 2593.

159 See note 146 above.

appoint them unless it were persuaded that there were special circumstances which warranted departure from the usual practice.[160]

The Companies Code

3.19. The Companies Code of 1981 made some formal changes to the scheme under the Uniform *Companies Acts*. The registration function was transferred from the various Companies Auditors Boards to the National Companies and Securities Commission ('the NCSC'),[161] as was the power to register official liquidators.[162] The various State and Territory CACs actually performed the roles as delegates of the NCSC. A person registered as a liquidator or an official liquidator in a State or Territory was deemed to be registered as such in all the other jurisdictions.[163]

3.20. The requirements for registration as a liquidator were set out in the Code. They were:

- membership of specified professional bodies (including the ICAA and the ASCPA) **or** a three year accounting course and a two year commercial law course (including company law) OR other qualifications and experience which, in the opinion of the NCSC, are equivalent to those professional memberships/tertiary qualifications;

- satisfying the NCSC as to the experience of the applicant in connection with the winding up of corporations; and

- satisfying the NCSC that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.

3.21. There were no express requirements for registration as an official liquidator and the NCSC could register as many official liquidators as it thought fit.[164] The NCSC was also given plenary powers to cancel or suspend registration as an official liquidator.[165] In New South Wales, the 'A' and 'B' lists of official liquidators

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160 *Re Stewden Nominees No 4 Pty Limited* (1975) 1 ACLR 185; (1975–1976) ACLC ¶40-224.

161 Section 17, Companies Code.

162 Section 21, Companies Code.

163 Section 29, Companies Code.

164 Section 21, Companies Code.

165 Section 30C, Companies Code.

continued to operate under the Code, [166] although this was not the case in other jurisdictions.[167]

The Corporations Law

3.22. The two-tiered classification system of registered and official liquidators was retained under the Corporations Law which commenced in 1991.[168] Aside from some administrative changes substituting the ASC for the NCSC, the provisions under the Corporations Law regarding regulation of corporate insolvency practitioners are very similar to those which applied under the Companies Code.

REGULATORY STRUCTURE

3.23. The separate regulatory structures in place for personal and corporate insolvency practitioners are outlined in this part.

Corporate

3.24 The regulatory framework for corporate insolvency practitioners may be divided into those parts dealing with registration and those dealing with supervision and discipline.

Registration

3.25. There are currently two classes of liquidators; registered and official. A registered liquidator may perform a number of insolvency roles, not only that of a liquidator. As discussed above, to perform some roles it is necessary to be not only a registered liquidator, but also an official liquidator. The registration of liquidators and official liquidators is administered by the ASC.

Corporations Law

3.26. Under the Corporations Law, an application for registration as a (registered) liquidator may be approved by the ASC where:

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166 *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. V Attalex Pty. Ltd.* (1984) 2 ACLC 752 at 773.

167 See further the material on appointment in Chapter 9.

168 The entry requirements for each of the classes are discussed in detail later in this chapter.

- the applicant:
  - is a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States;
  - holds tertiary qualifications in accounting and commercial law; or
  - has other qualifications and experience that in the opinion of the ASC are equivalent to the above qualifications; and
- the ASC is satisfied:
  - as to the experience of the applicant in connection with the winding up of bodies corporate; and
  - that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.[169]

3.27. The ASC is required to give an applicant an opportunity to be heard in relation to their application.[170] Where the ASC refuses registration, written reasons must be provided within 14 days.[171] The ASC's decision is reviewable by the Administrative Appeals Tribunal ('the AAT').[172]

3.28. While there are no specific provisions which deal with the criteria for registration as an official liquidator, the ASC has power to register a person who is a registered liquidator as an official liquidator.[173] The ASC has the discretion to register as many official liquidators as it thinks fit.[174] There is no right of appeal where the ASC declines to register a person as an official liquidator.[175]

3.29. It is possible for a person to apply to the ASC to be the liquidator of a specific body corporate for the purposes of a 'one-off' administration.[176] The ASC may approve such an application where it is satisfied that the applicant has sufficient experience and ability, and is a fit and proper person, to act as a liquidator of the body, having regard to the nature of the relevant insolvency administration.[177]

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169 Section 1282, Corporations Law.
170 Subsection 1282(10), Corporations Law.
171 Subsection 1282(11), Corporations Law.
172 Section 1317B, Corporations Law.
173 Subsection 1283(1), Corporations Law.
174 Subsection 1283(2), Corporations Law.
175 *Pipkin v Corporate Affairs Commission* (1987) 11 ACLR 433 per O'Loughlin J.
176 Paragraph 1279(c), Corporations Law.
177 Subsection 1282(3), Corporations Law.

3.30. The ASC is required to maintain a register of all persons who are registered liquidators, or liquidators of a specified body corporate.[178] The details which must be entered in the register for registered liquidators include:

- the name of the person;
- the day the person was registered;
- the address of the person's business;
- the name of the firm under which the person practices; and
- particulars of any suspension from registration.[179]

3.31. The ASC must also maintain a Register of Official Liquidators, containing the name of the persons so registered and any other details the ASC thinks appropriate.[180]

3.32. Once registered, a liquidator remains on the register until they die or the registration is cancelled by the ASC or the Companies Auditors and Liquidators Disciplinary Board ('the CALDB').[181] A person may request the ASC to have their registration as a registered or official liquidator cancelled voluntarily.[182] Compulsory suspensions and cancellations by the ASC and the CALDB are discussed later in this report.[183]

3.33. The Registers of Liquidators and Official Liquidators are available for inspection and members of the public may make copies of, or take extracts from, the registers.[184] The registers are maintained on the ASC's ASCOT database and the fee for inspection is currently $7.00.[185]

ASC Policy and Practice

3.34. The ASC has issued Policy Statements to explain the criteria it will apply in exercising its discretions under the above provisions in the Corporations Law.[186] The combined effect of these provisions in the Corporations Law and the ASC policies on the registration of liquidators and official liquidators has been that only:

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178 Subsection 1286(1), Corporations Law.
179 Subsection 1286(1), Corporations Law.
180 Subsection 1286(2), Corporations Law.
181 Subsection 1282(8), Corporations Law.
182 Section 1290, Corporations Law.
183 See Chapter 8.
184 Subsection 1286(4), Corporations Law.
185 Item 31, Corporations (Fees) Regulations.

- accountants with corporate insolvency experience under the direct supervision of an official liquidator can become registered liquidators and therefore be eligible to perform corporate insolvency work;

- official liquidators can perform court ordered liquidations; and

- registered liquidators working under the direct supervision of official liquidators can expect to gain the experience necessary to satisfy the ASC's criteria for registration as official liquidators.

Supervision and Discipline

3.35. Currently four bodies share responsibility for the supervision and discipline of corporate insolvency practitioners—the ASC, the court, the CALDB, and the professional bodies.

The ASC

3.36. Under the Corporations Law, the ASC has various obligations in relation to the supervision and discipline of corporate insolvency practitioners.

Triennial Statements

- Registered liquidators are required to lodge triennial statements with the ASC which contain information including:

- the name of the liquidator and the firm name or other name used in practice;

- the place(s) of practice;

- a statement regarding residency, disciplinary action, conviction of offences or other matters which may result in disqualification; and

- a list of liquidations conducted since registration or the date of registration, whichever is more recent.[187]

3.38. These statements must be lodged every three years from the date of registration unless the ASC grants an extension.[188] In addition, the ASC is empowered to require a registered liquidator to lodge a statement in respect of any specified period.[189]

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186 The details of the ASC's policy statements are discussed in detail in Chapter 6.

187 Form 908, Corporations Regulations.

188 Subsections 1288(3) and 1288(4), Corporations Law.

189 Subsection 1288(5), Corporations Law.

Inquiries

3.39. Where it appears to the ASC that a liquidator, or a provisional liquidator, is not faithfully performing their duties, or where a complaint is made to the ASC about the conduct of a liquidator, the ASC may inquire into the matter and take such action as it thinks fit.[190] The ASC has similar powers to inquire into the conduct of receivers and other controllers.[191]

Reports and Applications to the Court

3.40. Where the ASC considers that there has been misfeasance, neglect or omission on the part of a liquidator, provisional liquidator or controller, the ASC may report that matter to the court. The court may order the administrator concerned to make good any loss that the corporation has sustained because of the conduct, and may make such other orders as it thinks fit.[192]

3.41. It is also open to the ASC to use a general power to make an application to the court where it believes any person (including an external administrator) is guilty of fraud, negligence or breach of trust in relation to a corporation, where the corporation has, or is likely to, suffer loss or damage as a result.[193] On hearing the application (and giving the person an opportunity to present evidence), the court may make such orders as it thinks appropriate, including orders that the person concerned pay or transfer money to the corporation, or compensate the corporation.[194]

Applications to the CALDB

3.42. The ASC may apply to the CALDB to have the registration of a liquidator suspended or cancelled where the person has:

- failed to lodge triennial statements;
- ceased to be resident in Australia; or
- failed to carry out or perform adequately and properly the duties of a liquidator or any duties and functions required to be carried out or performed by a registered liquidator, or is otherwise not a fit and proper person to remain registered as a liquidator.[195]

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190 Subsection 536(1), Corporations Law.
191 Subsection 423(1), Corporations Law.
192 Subsections 423(2), 536(2), Corporations Law.
193 Subsection 598(2), Corporations Law.
194 Subsections 598(3), 598(4), Corporations Law.
195 Subsection 1292(2), Corporations Law.

Similar powers to make an application to the CALDB apply in relation to liquidators of a specified body corporate.[196] The powers of the CALDB in dealing with these applications by the ASC are discussed below.

Other Matters

3.43. The ASC also has comprehensive powers in relation to official liquidators. The registration of official liquidators is subject to suspension or cancellation by the ASC at any time.[197]

3.44. The ASC is responsible for administering a system of compensation by use of security deposits lodged by registered liquidators. A compliance-based surveillance program for registered liquidators was also administered by the ASC. However, that program recently ceased due to budgetary constraints. The ASC still responds to complaints against liquidators.

The CALDB

3.45. The CALDB is established under the ASC Law.[198] It holds hearings to determine whether or not auditors or liquidators appearing before it have committed breaches of the Corporations Law, have failed to properly carry out their duties as auditors and liquidators or are otherwise not fit and proper persons to be registered.

3.46. All applications to the CALDB must be brought by the ASC. If the CALDB determines that an auditor or liquidator is at fault, it can impose a penalty ranging from admonishment or reprimand to a suspension or cancellation of registration. The CALDB may also impose orders for costs, but it does not have power to make orders imposing pecuniary penalties.

3.47. The role of the CALDB is discussed in more detail in Chapter 8.

The Courts

3.48. Although lower courts have recently been given jurisdiction over certain aspects of insolvency matters,[199] the roles played by the courts in the supervision and discipline of insolvency practitioners is still the exclusive domain of the Supreme and Federal Courts. The powers of the court to discipline insolvency practitioners vary according to the type of administrator/administration concerned.

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196 Subsection 1292(3), Corporations Law.

197 Subsection 1291(1), Corporations Law.

198 Section 202, ASC Law.

199 See Schedule 1, *Corporate Law Reform Act 1994*.

Inquiries

3.49. Like the ASC, the court has powers to inquire into a matter where it appears to the court that a liquidator or a provisional liquidator is not faithfully performing his or her duties.[200] Such an inquiry may be carried out on the receipt of a complaint by *any person*,[201] but the court will only commence an inquiry where material is presented which suggests it is in the public interest to conduct an inquiry.[202] The court may at any time require a liquidator or a provisional liquidator to answer any inquiry in relation to a winding up.[203] Similar powers exist in relation to receivers and other controllers of corporate property,[204] but not in relation to voluntary administrations.

3.50. As officers of the corporation, receivers, receiver and managers, administrators, deed administrators, liquidators and provisional liquidators are all subject to summons by the court to attend mandatory examinations on oath about any matter relating to the management, administration, winding up or other affairs of the company which they administer.[205] The court is required to issue a summons for examination only where an 'eligible applicant' applies for the summons. Eligible applicants include the ASC and persons authorised by the ASC, liquidators, provisional liquidators, administrators and deed administrators.[206]

Orders for Removal

3.51. Upon completion of an inquiry in relation to a liquidator, receiver or other controller the court may take such action as it thinks fit.[207] This may include the removal of the insolvency practitioner from office where it is considered in the best interests of the administration to do so.[208]

3.52. In cases of voluntary winding up, the court has express power to remove a liquidator and appoint another liquidator 'on cause shown'.[209] A similar position exists in relation to liquidators appointed by the court.[210]

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200 Subsection 536(1), Corporations Law.

201 The phrase 'any person' is to be interpreted literally—see *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 1 ACSR 79 at 83.

202 *Burns Philp Investments Pty Ltd v Dickens* (1993) 11 ACLC 272.

203 Subsection 536(3), Corporations Law.

204 Section 423, Corporations Law.

205 Section 596A, Corporations Law.

206 Section 9, Corporations Law.

207 Subsection 536(1), Corporations Law.

208 *Re Timberlands Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq)* (1979) 4 ACLR 259 at 286.

209 Section 503, Corporations Law.

210 Subsection 473(1), Corporations Law.

3.53. A corporation may apply to the court for the removal of a receiver or other controller. An order may be made where the court is satisfied that the controller has been guilty of misconduct in connection with performing or exercising the controller's functions or powers.[211]

3.54. The court may remove an administrator, or a deed administrator, and appoint someone else as administrator on the application of a creditor or the ASC.[212]

Other Orders

3.55. Members or creditors of a company, or the liquidator of a company, may apply to the court for orders requiring a controller to comply with statutory obligations to lodge returns, accounts or other documents.[213] Members or creditors of a company, or the ASC, may make similar applications to the court in relation to a liquidator or a provisional liquidator.[214]

3.56. The court has a general power to make orders on the application of a creditor, member or the ASC in circumstances where it is satisfied that an administrator or deed administrator has done, is doing, or proposes to do, some act, or make some omission, that would be prejudicial to the interests of some or all of the company's creditors.[215]

3.57. A person aggrieved by an act, omission or decision of a receiver, receiver and manager, liquidator, provisional liquidator, administrator, deed administrator, or person administering a compromise or scheme of arrangement may appeal to the court. The court may make such orders and give such directions as it thinks fit, in order to modify the act or decision, or remedy the omission.[216]

3.58. As mentioned in the previous chapter, the court also has powers to review the remuneration of insolvency practitioners.

3.59. Finally, on the application of an 'eligible applicant' (as described above), the court may exercise its general powers to make orders against any person (including insolvency practitioners) where it is satisfied that the person is guilty of fraud, negligence or breach of trust in relation to a corporation and where the corporation has, or is likely to, suffer loss or damage as a result.[217] On hearing the application (and giving the person an opportunity to present evidence), the court may make such orders

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211 Section 434A, Corporations Law.
212 Section 449B, Corporations Law.
213 Section 434, Corporations Law.
214 Section 540, Corporations Law.
215 Section 447E, Corporations Law.
216 Section 1321, Corporations Law.
217 Subsection 598(2), Corporations Law.

as it thinks appropriate, including orders that the person concerned pay or transfer money to the corporation, or compensate the corporation.[218]

The Professional Bodies

3.60. The vast majority of corporate insolvency practitioners are members of a professional body such as the IPAA and/or the ICAA and the ASCPA. These bodies also play a role in the supervision and discipline of practitioners through codes of conduct and ethics, investigative and disciplinary committees, professional development activities and ongoing supervision through Quality Assurance Programs. The role of the professional bodies in the regulatory framework is discussed in detail later in this report.

Personal

3.61. The vast majority (about 93 per cent) of recently commenced bankruptcies are administered by Official Receivers, rather than registered trustees.[219] However, Part X administrations are administered almost exclusively by registered trustees. Debt agreements, which are now found in Part IX of the *Bankruptcy Act*, have not been in place long enough to determine the extent to which registered trustees will be involved in this form of personal insolvency administration. The discussion here will focus on the aspects of the regulatory scheme governing private insolvency practitioners, who must be registered under the *Bankruptcy Act* as trustees in bankruptcy in order to administer bankruptcies, Part X arrangements and debt agreements.

Registration Procedure

3.62. The *Bankruptcy Act* has recently been amended and significant changes have been effected to the procedure for registering trustees.[220] Individuals may apply to the Inspector-General to be registered as a trustee.[221] The application for registration must be in the approved form and be accompanied by information or documents prescribed in the regulations.[222] The application must also be accompanied by the prescribed fee.[223]

3.63. Upon receiving an application, the Inspector-General must convene a committee consisting of the Inspector-General, an officer of the Attorney-General's Department

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218 Subsections 598(3), (4), Corporations Law.

219 *Bankruptcy Act 1966* — Annual Report 1995-96, AGPS, Canberra, 1996, p. 12.

220 The changes were implemented in the *Bankruptcy Legislation Amendment Act 1996*.

221 Subsection 154A(1), *Bankruptcy Act 1966.*

222 Subsections 154A(2) and 154A(3), *Bankruptcy Act 1966.*

223 Paragraph 154A(3)(b), *Bankruptcy Act 1966.*

and a registered trustee chosen by the IPAA, to consider the application and interview the applicant.[224] Within 60 days of the interview, the committee must make a decision whether or not to register the applicant.[225] The committee must register the applicant if it is satisfied that the applicant:

- has relevant qualifications, experience, knowledge and abilities prescribed by the regulations;
- takes out insurance against liabilities that the applicant may incur working as a registered trustee;
- does not have any convictions for an offence involving fraud or dishonesty in the ten years prior to making the application;
- has not been a bankrupt or a party (as debtor) to a debt agreement or Part X administration within 10 years before making the application; and
- has not had his or her registration as trustee cancelled within 10 years before making the application on the grounds that he or she:
  - contravened conditions imposed by the committee on his or her practice as trustee;
  - failed to exercise the powers of a registered trustee properly; or
  - failed to carry out the duties of a registered trustee properly.[226]

3.64. If the applicant does not have the requisite qualifications, experience, knowledge and abilities prescribed by the regulations, the committee still has the discretion to decide in favour of registration.[227] However, if the applicant does not satisfy any of the criteria other than this one, the committee **must not** register the applicant.[228]

3.65. The committee may approve registration on conditions.[229] The *Bankruptcy Act* requires the committee to give the applicant and the Inspector-General a report outlining the committee's decisions and reasons for them.[230]

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224 Section 155, *Bankruptcy Act 1966*.
225 Subsection 155A(1), *Bankruptcy Act 1966.*
226 Subsection 155A(2), *Bankruptcy Act 1966.*
227 Subsection 155A(3), *Bankruptcy Act 1966.*
228 Subsection 155A(4), *Bankruptcy Act 1966.*
229 Subsection 155A(5), *Bankruptcy Act 1966.*
230 Subsection 155A(6), *Bankruptcy Act 1966.*

3.66. The Inspector-General must give effect to the decision of the committee to register the applicant, subject to the applicant paying the prescribed fee.[231] Registration is effected by the Inspector-General entering prescribed details in the National Personal Insolvency Index.[232]

3.67. Registration remains effective for three years.[233] An extension of the period must be granted by the Inspector-General if the person applies to the Inspector-General for an extension of time before the person's registration expires and the person pays the registration fee specified in the regulations.[234]

Qualifications

3.68. There have been recent changes to the prescribed qualifications. Previously, one of the alternative registration requirements was membership of a 'prescribed body'.[235] The bodies prescribed under the Bankruptcy Rules were:

- the ASCPA;
- the ICAA; and
- a number of comparable bodies in New Zealand, Canada, the United Kingdom and the United States of America.[236]

3.69. Membership of a 'prescribed body' is no longer a registration criterion. The regulations now specify that the applicant must have the following qualifications, experience, knowledge and abilities in order to be registered as a trustee:

- completion of a degree or diploma or similar qualification from an Australian university, college of advanced education or other Australian tertiary university of an equivalent standard in which the person completed an accountancy course of not less than two years or a course of study in commercial law of not less than two years;
- employment in a relevant field for a period of not less than two years in the preceding five years; and

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231 Section 155C, *Bankruptcy Act 1966*.

232 Subsection 155C (2), *Bankruptcy Act 1966*.

233 Subsection 155C(4), *Bankruptcy Act 1966*.

234 Section 155D, *Bankruptcy Act 1966*.

235 Subparagraph 155(3A)(a)(i), *Bankruptcy Act 1966*, repealed by the *Bankruptcy Legislation Amendment Act 1996.*

236 Former paragraph 61A(a) and Part 1 of Schedule 2, Bankruptcy Rules.

- the ability to perform satisfactorily the duties of a registered trustee.[237]

3.70. Employment in a relevant field includes:

- assisting a liquidator or trustee in the performance of their duties;
- providing advice in relation to bankruptcy matters; or
- experience in insolvency administrations outside bankruptcy.[238]

Supervision and Discipline

3.71. This section deals with matters of general supervision and control relating to possible misconduct by registered trustees.

Safeguards Against Misconduct by Trustees

3.72. Division 4A, Part VIII of the *Bankruptcy Act* previously contained a number of rules governing the compulsory examination of registered trustees before the Registrar. This Division was recently repealed[239] and no alternative procedure was introduced as other supervisory and registration mechanisms regarding trustees were considered adequate safeguards against misconduct by trustees.[240]

3.73. The *Bankruptcy Act* allows the Inspector-General to request that the registered trustee provide a written explanation why the trustee should continue to be registered where the Inspector-General believes that the trustee:

- no longer possesses a qualification or ability prescribed by the regulations as one necessary for registration;
- has been convicted of an offence involving dishonesty;
- is not insured against liabilities that he/she may incur, or has incurred, working as a registered trustee;
- is no longer practicing as a registered trustee;
- has contravened conditions imposed on the trustee by the committee; or

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237 Regulation 8.02(1), Bankruptcy Regulations.

238 Regulation 8.02(2), Bankruptcy Regulations.

239 Schedule 1, *Bankruptcy Legislation Amendment Act 1996*.

240 *Explanatory Memorandum* to the Bankruptcy Legislation Amendment Bill 1996 (Senate), paragraph 130.1.

- has failed to exercise the powers or carry out his/her duties as trustee properly.[241]

3.74. The Inspector-General must convene a meeting of the committee where the registered trustee does not provide an explanation within a reasonable time or the Inspector-General is not satisfied by the reasons given by the trustee. The committee must have regard to the factors outlined above.[242]

3.75. If the committee decides that the trustee should continue to be registered, it may impose conditions on the registration or modify any existing conditions. Alternatively, the trustee's registration may be unconditional.[243]

3.76. The *Bankruptcy Act* previously required registered trustees to give the Registrar a triennial statement which contained prescribed information. This requirement has been abolished and has been replaced with a requirement for a registered trustee who is convicted of an offence involving fraud or dishonesty to give the Inspector-General written notice of the conviction and the nature of the offence as soon as practicable.[244] In addition, where a registered trustee becomes bankrupt or enters as a debtor into an insolvency administration under the law of a foreign country, notice must be given to the Inspector-General as soon as possible.[245]

3.77. The *Bankruptcy Act* also provides for the automatic cancellation of a trustee's registration without the need for an application to be made to the court or consideration by a committee where the trustee becomes a bankrupt or executes an authority for a controlling trustee to call a meeting of the debtor's creditors to take control of the debtor's property.

3.78. Furthermore, the court may make one of the following orders where an application is made by the Inspector-General or a creditor and the court believes that the trustee is guilty of a breach of duty in relation to a bankrupt's estate or affairs:

- that the trustee make good any loss sustained as a result of the breach;
- that the Inspector-General cancel the person's registration as trustee; or
- any other order the court considers just and equitable in the circumstances.[246]

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241 Section 155H, *Bankruptcy Act 1966*.

242 Subsections 155H(2)-(4), *Bankruptcy Act 1966*.

243 Subsections 155I(2), (3), *Bankruptcy Act 1966*.

244 Subsection 161A(1), *Bankruptcy Act 1966*.

245 Subsection 161A(2), *Bankruptcy Act 1966*.

246 Subsections 176(1), (2), *Bankruptcy Act 1966*.

3.79. On the application of the Inspector-General, a creditor or the bankrupt (or debtor), the court may inquire into the conduct of a trustee and may do one or both of the following:

- remove the trustee from office; or
- make such other order at it thinks proper.[247]

Accounts and Audit

3.80. Under the *Bankruptcy Act*, a registered trustee must keep accounts and records sufficient to exhibit a correct account of the administration of the estate, and creditors may inspect the accounts and records at any reasonable time.[248] The Inspector-General in Bankruptcy may, on his or her own motion or at the request of a creditor or the debtor, audit or cause the accounts to be audited and the trustee must cooperate in the audit.[249] The cost of the audit is borne by the estate.[250]

3.81. In practice, registered trustees are subject to two types of audit*:* routine and special. Routine audits are programmed visits to trustees by officers of the Insolvency and Trustee Service Australia ('ITSA'). The officers conduct random financial and compliance audits of the administrations under the trustee's control. An inspection of each registered trustee with active estates is conducted every two years, and at least 10 per cent of the trustee's active administrations are examined.

3.82. Special audits are conducted in response to complaints received by ITSA in relation to particular administrations from creditors or debtors. The complaints mechanism is discussed immediately below.

Complaints

3.83. Complaints about the activities of registered trustees are usually dealt with in the first instance by ITSA, but the court also has various powers under the *Bankruptcy Act*.

3.84. Complaints received by, or referred by Ministers to, ITSA would usually be examined by ITSA's trustee regulation unit or ITSA's Secretariat Branch. If a less than satisfactory standard of administration is identified, there are basically three levels of remedial action which may be taken:

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247 Subsections 179(1), *Bankruptcy Act 1966.*

248 Section 173, *Bankruptcy Act 1966.*

249 Subsections 175(1), (5), *Bankruptcy Act 1966.*

250 Subsection 175(6), *Bankruptcy Act 1966.*

- counselling of the trustee by ITSA officers or the Official Receiver with a view to improvement of practice and procedure in the trustee's office;

- counselling by the Inspector-General in Bankruptcy personally about the expected level of improvement in administration; or

- making an application to the court seeking, for example, restitution of funds or deregistration of the trustee.

Professional Bodies

3.85. The above discussion has focussed on the supervision and disciplinary procedures available under the *Bankruptcy Act*. The vast majority of registered trustees would also be subject to the disciplinary procedures in place under the rules of one or more professional bodies such as the ASCPA or the ICAA. Those procedures are the same as those discussed above in the context of the regulatory structure for corporate insolvency practitioners.

PART III

OPTIONS FOR CHANGE

CORPORATE AND PERSONAL INSOLVENCY REGULATORY SYSTEMS

4.1. In this chapter, the desirability of merging the regulatory systems for personal and corporate insolvency practitioners is discussed.

EXISTING ARRANGEMENTS

4.2. The existing arrangements for registration and supervision are explained in detail in Chapter 3. There are separate institutional arrangements for corporate and personal insolvency practitioners, which are summarised in the following table:

Table 4.1: Existing Institutional Arrangement for Registration and Supervision

Institution	Functions (Corporate)	Functions (Personal)
ASC	Registration *Inquiries into conduct* Reports and applications to the Court *Applications to the CALDB* Extensive powers regarding official liquidators *Administration of security deposits*	Nil
ITSA (including the Inspector-General in Bankruptcy and committees convened by the Inspector-General)	Nil	Registration of trustees, including extending and terminating registration *Inquiries and investigations* Routine and special audits *Maintaining the National Personal Insolvency Index* Providing counselling services to trustees *Changing or removing conditions on registered trustee's practicing certificates*

Table 4.1: Existing Institutional Arrangement for Registration and Supervision continued

Institution	Functions (Corporate)	Functions (Personal)
ITSA	Nil	Routine and special audits *Investigation of complaints, counselling and applications to the Court for restitution of deregistration*
The CALDB	Disciplinary functions in response to application from the ASC	Nil
The Courts	Inquiries into conduct (similar to ASC) *Mandatory examinations and inquiries of practitioners* Orders for removal *Enforcement of duties and supervisory directions* Review of remuneration *Orders for compensation*	Inquiries into trustees conduct and orders concerning trustees including removal *Releasing registered trustees from trusteeships* Ordering trustees to make good any loss suffered as a result of a breach of duty *Removing registered trustees upon the application of a creditor and appointing a new trustee* Providing directions on matters relating to control of debtor's property.
Professional Bodies	Codes of professional conduct *Investigative and disciplinary powers regarding members* Maintenance of standards through education and quality surveys	Same as for corporate

MERGING THE SYSTEMS

4.3. Possibly the most fundamental issue facing the Working Party in the course of this review is whether the existing separate registration and supervisory systems for corporate and personal insolvency practitioners should be merged. A merged system was recommended by the Australian Law Reform Commission ('the ALRC') in the Harmer Report of 1988,[251] and in 1992 the former Trade Practices Commission recommended that consideration should be given to this issue.[252] In mid 1993, a

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251 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry,* (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 933.

252 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 73.

Committee of the ASCPA's Centre of Excellence for Insolvency and Reconstruction also considered the issue of registration of insolvency practitioners. Initially, the Committee was of the view that as long as liquidators were regulated under the Corporations Law and registered trustees under the *Bankruptcy Act*, it would be necessary to have two systems of registration. Subsequently, the Committee decided that it would be more efficient to manage the registration process through one system although there could be separate examinations, interviews or assessments for applicants seeking one type of registration or the other.

4.4 A number of submissions to the Working Party argued in support of merging the systems. It was suggested that the benefits of a merger would include:

- cost savings through economies of scale;
- a single database of registered practitioners;
- a common approach to registration procedures and guidelines;
- consistency in decision making and policy; and
- removal of anomalous situations, for example, where practitioners have their registration cancelled in one field but continue to be registered in the other.

4.5. Some submissions proceeded on the basis that since the skills involved in personal and corporate insolvency work were very similar, registration as a practitioner under a single system should allow a person to practice in both fields. However, it was also suggested that the demands of each field require quite different knowledge and it would therefore be appropriate for separate 'tickets' to be issued by a single registering authority for personal and corporate insolvency. This is similar to the type of system envisaged by the ASCPA Centre of Excellence in its 1993 Working Paper. The Working Party considers that a system with different 'tickets' would substantially overcome the concern expressed in other submissions that many practitioners would not need, and should not be required to have, skills sufficient to practice in both fields.

4.6. When preparing the Harmer Report, there was unanimous support for a merged system in the submissions received by the ALRC.[253] However, a significant number of the submissions received by the Working Party argued against a merger. These submissions emphasised that the experience and skills required in each area differed too significantly to be dealt with by the same body.

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253 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 933.

4.7. The ASC stated in its submission that the experience and skills required by corporate insolvency practitioners differ from those required for the majority of consumer credit bankruptcies. It illustrated this by noting many of the features of the Corporations Law that are not present in the *Bankruptcy Act*.

4.8. It was also suggested that private practitioners and ITSA officers have different experiences, practices and philosophies and any attempt to institute a single registration system would require a significant review of the manner in which ITSA operates.

4.9. One submission argued that the apparent similarities between the objectives of personal and corporate insolvency practitioners are largely illusory and that a joining of their regulation would lead to difficulties, including:

- non-business debtor considerations unfairly influencing the regulating authority's activities;
- varying standards of education, training and experience between ITSA and the practising profession;
- incompatibility between ITSA on the one hand and other members of the regulating authority because of differing objectives; and
- fundamental differences between ITSA and the practising profession.

Working Party Position

4.10. The Working Party's view is that a merged registration system with separate 'tickets', which recognises the different knowledge and technical skills required in each area, would be ideal. Having separate tickets for corporate and personal practice would overcome nearly all of the concerns with merging the systems, although issuing separate tickets would lessen some of the benefits that would otherwise be gained. In this regard, the Working Party considers that there would be significant advantages in the long term in bringing the corporate and personal insolvency law and practices closer together. A single registering authority for practitioners would be a significant move in that direction.

4.11. However, the Working Party acknowledges that the history of the separate systems and the current differences in practices and objectives impose practical barriers to the development of a single system encompassing registration and ongoing supervision.

4.12. An important consideration in this regard is the recent restructure of the system for personal insolvency practitioners. The *Bankruptcy Legislation Amendment Act 1996* included amendments which altered significantly the regulatory framework

in relation to personal insolvency. In particular, the amendments involved a transfer of responsibilities from the Courts and the Registrars in Bankruptcy to the Inspector-General in Bankruptcy and various committees appointed by the Inspector-General. The Court now plays no role in registration. A committee has power to inquire into possible misconduct and place restrictions on the type of matters a trustee may administer, the geographical area of the practice, or impose other conditions such as requiring the trustee to undertake a specialised course of professional training.

4.13. The recent changes address some of the shortcomings with the operation of the system, particularly in relation to the role of the courts. Making further changes to introduce a merged system at this stage would not provide certainty and stability in the personal insolvency regulatory framework.

4.14. The Working Party also acknowledges that, although there would be some efficiency gains in the longer term from a merged system, even with separate tickets, the extent of the savings are difficult to estimate. The development of a merged system would undoubtedly require considerable resources and may, at least initially, be more costly and less efficient than the current bifurcated approach as it would effectively lead to a third regulatory structure being established. In this regard, although some of the infrastructure for registration and regulation of practitioners currently existing under the ASC and ITSA could be dismantled or transferred to a new board, there are likely to be some parts which would, nevertheless, need to be retained. Further, the Working Party has some sympathy for concerns that the differences in approach between the corporate and personal practices may cause difficulties for a merged regulatory body, at least in the early stages.

4.15. The Working Party therefore recommends that the Government should examine further the costs and benefits of establishing a merged regulatory framework for personal and corporate insolvency with separate ‘tickets’ for each area of practice.

4.16. As the possibility of a merged regulatory framework is dependent upon a number of factors and may not be possible in the short term, the remainder of this report will proceed on the assumption that the present separate regulatory systems will be retained for the foreseeable future. In any case, most of the recommendations of the Working Party would apply regardless of whether separate systems for registration were retained or a merged system were ultimately adopted. In this regard, it seems clear that if an independent board were established to undertake registration of both personal and corporate insolvency practitioners it should also be responsible for their supervision.

REGISTERING AUTHORITY

5.1. In this chapter, the institutional arrangements for registration of corporate insolvency practitioners are considered.

JUSTIFICATION FOR A REGISTRATION SYSTEM

5.2. In some overseas jurisdictions there is no registration or licensing system for insolvency practitioners. In New Zealand, for example, any natural person (subject to certain exclusions regarding personal bankruptcy, insanity and relationship to the company) may act as a privately appointed liquidator.[254] However, the High Court of New Zealand may disqualify persons from acting as insolvency practitioners for persistent failure to comply with the relevant legislation. The position in New Zealand may be reviewed in this regard in the context of a wide ranging review of its insolvency legislation, although the Working Party understands that at this point there are no specific proposals to introduce occupational regulation of insolvency practitioners.

5.3. Another option, which is used in the United States of America, is the mechanism of certification. In the United States, there are no entry requirements to engage in insolvency work and sometimes teams comprising members from a number of professions are involved in an administration. Accountants are usually involved, but often lawyers take a lead role because the United States system is principally litigation driven. Although there is no statutory registration scheme, there is an organisation known as the American Bankruptcy Board of Certification ('the ABBC'), which is a non-profit organisation accredited by the American Bar Association. The ABBC's aim is to assist the public to identify those lawyers who have met certain rigorous standards laid down by the ABBC in relation to insolvency laws. In order to become certified, lawyers must pass the ABBC's examination. However, certification is voluntary only, and failure to become certified is not a bar to practising in the insolvency area.

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254 Compulsory appointments are initially made in favour of an 'Official Assignee' who is an officer of the Court and a public servant. Creditors and contributories may require another person to be appointed. In these circumstances, that person must provide certain information and security before taking up the appointment.

5.4. Would it be desirable for Australia to introduce a regime similar to New Zealand, where there are no licensing requirements, or that of the United States, which has voluntary certification only? Arguably, this approach would increase competition in the market for insolvency practitioners and reduce administrative costs.

5.5. There are three key arguments in support of maintaining registration requirements.[255] First, where there are no registration requirements, creditors and other relevant persons such as courts may have difficulty in making an informed choice about practitioners. Secondly, the consequences of poor administrations can impact severely on a large number of persons, including secured and unsecured creditors, directors, employees and shareholders. In a few cases an entire industry can be affected. However, few of the affected persons have any direct influence on the selection or supervision of the practitioner. Protecting the interests of those persons supports a system of registration, rather than certification. Finally, a registration system provides a mechanism to address the maintenance of professional independence and integrity of all insolvency practitioners.

5.6. So far as the apparent savings in administrative costs which could be gained by dispensing with the registration system are concerned, it should be noted that it is possible, if not likely, that more investigations and remedial action would be required to address complaints in relation to practitioners if unqualified persons were permitted to conduct all kinds of insolvency administrations. The potential for increased overall costs associated with the extra investigations and remedial action may offset the administrative savings made by removal of the registration system, although it is not possible to quantify the amounts involved with any kind of precision.

5.7. The extent of the anti-competitive impact of a registration system depends on the nature of the registration requirements and how they are applied. This issue is discussed in detail in Chapter 2.

5.8. The Working Party considers that dispensing with the registration system altogether in Australia is not an option which should be considered at this stage. The public interest considerations mentioned above justify the retention of some kind of registration system.

5.9. Currently, the ASC performs the registration function for registered and official liquidators. The details of the system are outlined in Chapter 2.

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255 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 70–71.

OPTIONS

5.10. In the Discussion Paper released by the Working Party, the following options regarding the appropriate authority which should undertake the registration function were identified:

I. maintain the present system of registration by the ASC in accordance with qualification requirements contained in the legislation and against experience criteria set by the ASC in consultation with professional bodies (with or without modifications to those requirements and/or criteria);

II. designate certain professional bodies to set registration requirements and/or to undertake the registration process, either by direct statutory conferral or under delegation from the ASC; or

III. establish a new statutory body to set registration criteria and determine eligibility for appointment.

I. Maintenance of Present System

5.11. The present system for registration involves general requirements set down in legislation administered by the ASC in accordance with more specific criteria set out in policy guidelines. A disadvantage with this system is that the ASC incurs significant administration costs. In this regard, it is arguable that the most suitable body to determine appropriate standards for entry and whether a person is fit to perform the role of an insolvency practitioner is a body comprised of persons who are highly familiar with that role themselves.

5.12. On the other hand, it can be argued that having an independent body undertake the registration function ensures that a more open, objective process will be followed.

II. Conferral of Registration Function on Professional Bodies

5.13. It would be possible to relieve the ASC of its registration functions and place responsibility for that role on one or more of the professional bodies by statutory conferral.

5.14. Although a number of professional bodies might theoretically be considered for this purpose, such as the ICAA, the ASCPA, the IPAA and (possibly) the professional

law bodies,[256] the Working Party considers it would be premature to spread responsibility for the registration functions by having more than one body with parallel responsibility. In particular, the Working Party considers that if the registration of liquidators were to be opened up to the legal profession, as recommended later in this report, it would be undesirable, at least initially, for there to be a multiplicity of registering bodies, bearing in mind that in respect of the legal profession there is a registering body in each State and Territory. The large number of potential registering bodies would lead to difficulties in maintaining consistency in the application and administration of the requirements.

5.15. Other matters which would need to be carefully considered if the registration functions were delegated to the professional bodies are the need for appeal procedures, funding arrangements and the position of persons who have a conscientious objection to becoming members of a professional organisation.

III. Formation of a New Statutory Registration Board

5.16. A further option would be to establish a new statutory board having responsibility for the registration function. Such a board might comprise representatives from the IPAA, the ICAA, ASCPA, the ASC, the Law Council of Australia (or the State/Territory legal professional bodies), and possibly also the Government.

5.17. The advantage of this approach would be that all relevant interest groups would have direct input into the process, particularly in relation to the issues of who are appropriate persons to practice as liquidators and what their standards of conduct should be. The main issue to be considered in relation to the establishment of such a board would be funding, both for the expenses of the board and those of any delegate.

5.18. It is worth noting here that the registration system in relation to registered trustees under the *Bankruptcy Act* was recently revised so that the registration function is now performed by a statutory committee. The functions of assessing applications for registration, assessing applications to change practising conditions, and deciding on termination of registration are now performed by committees consisting of the Inspector-General in Bankruptcy, an officer of the Attorney-General's Department and a representative appointed by the IPAA.[257]

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256 The professional law bodies would need to be considered if entry requirements were extended to include lawyers—see further below.

257 Sections 155, 155E, 155H, *Bankruptcy Act 1966.*

CONCLUSION

5.19. The Working Party is not aware that the current system has caused any major difficulties for applicants. The ASC has established administrative procedures to deal with applications for registration which are operating satisfactorily. It is the content of the requirements, rather than the identity of the administering body, which has been subject to most comment. It would be possible to allow bodies other than the ASC to have input in setting the requirements for registration without necessarily changing the institutional arrangements for administering them. Further, there are advantages in having an independent body responsible for the registration function to avoid any perceptions regarding lack of objectivity.

5.20. The Working Party considers that there would be merit in an independent board undertaking the registration function only if there was a merger of the registration and supervisory functions for corporate insolvency practitioners with the equivalents for personal insolvency practitioners. Without such a merger, the costs of establishing a new board would not seem to be justified.

5.21. The Working Party recommends that the registration function for corporate insolvency practitioners should continue to be carried out by the ASC. However, the registration function should be carried out by a statutory board if, in the longer term, a merger of the regulatory systems for personal and corporate insolvency proceeds.

REGISTRATION REQUIREMENTS

6.1. This chapter deals with the specific criteria for eligibility for registration. The issues discussed are the classification system of registered and official liquidators and the entry requirements, including educational and experience requirements.

FEATURES OF THE CURRENT SYSTEM

6.2. In the current system:

- corporate insolvency registration is governed by the Corporations Law and the policy and practice of the ASC; and
- there are two classes of practitioner, the registered liquidator and the official liquidator.

6.3. Options for changes to the institutional arrangements for the registration system are considered in Chapter 5. Two further key issues regarding registration were identified by the Working Party for the purpose of obtaining public comment:

- the classifications of insolvency practitioners; and
- the setting and content of entry standards.

CLASSIFICATION OF PRACTITIONERS

6.4. A threshold issue regarding the registration requirements for insolvency practitioners is whether the current classifications of registered and official liquidators should be retained.

6.5. In the Harmer Report, the ALRC recommended that, in place of the current system, there should be three classes of insolvency practitioners classified according to experience, skill and ability, along the following lines:

- Class A, who would be eligible for appointment to all administrations but would be the only class eligible for appointment in windings up ordered by the Court and under the voluntary administration regime;

- Class B, who would be precluded from the two administrations reserved to Class A practitioners, but would be eligible for any other insolvency work including bankruptcies, Part X administrations and receiverships; and

- Class C, who would only be eligible to administer a members' voluntary winding up where there is no element of insolvency or a debt payments plan.[258]

6.6. The intention of the Harmer Report recommendations was to take account of the range and complexity of insolvency work and the need to ensure competent practitioners were appointed to each administration, rather than to reduce anti-competitive effects. In its report on the accounting profession, the former Trade Practices Commission also recommended that consideration be given to establishing new classes of practitioners which recognise the varying degrees of complexity involved in administrations. This would allow persons with lesser qualifications and experience to perform the less complex administrations.[259] It was argued that the specific skill and experience requirements would be confined to those areas where the public interest requires them, thus gaining advantages in terms of efficiencies and cost savings.

6.7. The recommendations contained in those reports were made on the assumption that the corporate and personal insolvency systems would be merged. However, even if that option is not pursued, it is worthwhile considering whether further tiers of admission should be introduced into the corporate insolvency sphere.

Comment on the Classification System

6.8. The majority of submissions received by the Working Party argued strongly against the introduction of further tiers. However, there was some support for a phase-out of the existing tiers in favour of a single category of corporate insolvency practitioner.

Tiers Based on Complexity/experience Levels

6.9. The arguments in favour of introducing further tiers included the following:

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258 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry,* (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 943.

259 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 72–73.

- the existing system does not expressly classify insolvency practitioners based on skill and ability, but restricts their activities and the nature of the work they may perform according to whether they are registered or official liquidators;

- it is logical to differentiate between compulsory windings up and voluntary windings up, the latter cases requiring less dependence on knowledge of some elements of the Corporations Law;

- it is appropriate that a system be introduced so that certain insolvency practitioners are recognised in the market place as being able to conduct more complex liquidations.

6.10. The arguments advanced against the introduction of further tiers included:

- any system involving more than two levels of registration would be cumbersome and costly to administer, too prone to a wrongful appointment and would create confusion in the business community;

- any attempt to define types of insolvency administrations by their complexity is fruitless, because the complexity of an administration would not be entirely known until after the practitioner's appointment and investigations into the financial affairs of the company have commenced;

- those who are required to select the practitioner are unlikely to have the experience and ability to assess the complexity of the administration before they select the practitioner they believe to be the most appropriate for the job. Further, if a less experienced practitioner were appointed to an administration which becomes complex, it would be necessary to provide a mechanism for replacing that practitioner with a more experienced one;

- the creation of further tiers would serve to increase anti-competitive elements (at least in the upper levels) and increase the administrative burden; and

- it would not be beneficial to implement the classifications proposed in the Harmer Report because the law and practice since the report has moved on. In particular:

  – the proposed Class A practitioner is the equivalent of the current official liquidator;

  – the Class B liquidator is the equivalent of the current registered liquidator; and

– there is no need for a Class C practitioner because most members' voluntary liquidations involve either proprietary companies or the subsidiaries of public companies and as such do not require a registered liquidator.

A Single Class

6.11. A number of submissions advocated the phasing out of the distinction between registered and official liquidators so that there would be only a single class of corporate insolvency practitioner. It was argued that there is no corresponding tiered arrangement in the personal insolvency framework and there is no apparent reason for having it in the Corporations Law. Almost all those who argued in favour of a single class acknowledged that such a course would need to be pursued over a long period in order to allow time to ensure that all those registered were capable of performing all administrations to the requisite standards.

6.12. A number of issues would have to be resolved concerning formulation of entry criteria in implementing this proposal as one of the current criteria for becoming an official liquidator is registration as a registered liquidator[260] and to become a registered liquidator requires an applicant to work under the supervision of an official liquidator for a certain period.[261] Clearly, these entry criteria would not be workable if there were only to be one class of liquidator. If registered liquidators were permitted to perform all types of administrations, there may need to be a 'tightening up' of requirements to ensure that all registered persons are capable of performing court-ordered administrations in a manner acceptable to the Court. In this regard, it may be advisable not to allow existing practitioners to maintain their registration automatically, but require that they meet the new criteria. This would allow removal from the register of those practitioners who have not conducted an administration for some time.

6.13 One submission recommended the retention of the registered/official distinction, but with the following changes to the responsibilities of each category:

- registered liquidators should only be allowed to conduct voluntary liquidations; and

- official liquidators should be able to conduct all forms of corporate insolvency administrations.

260 ASC Policy Statement 24, *ASC Digest,* PS 9/17.

261 ASC Policy Statement 40, *ASC Digest,* PS 9/37.

This could mean, at least in the short term, that an additional number of official liquidators would need to be appointed. It would also result in diminished work for the vast majority of currently registered liquidators.

Working Party Position

6.14. The Working Party doubts that the introduction of more categories of insolvency practitioner would be of benefit. Unqualified persons are already permitted to conduct some types of solvent administrations. Attempting to draw distinctions between the other types of administrations based on the degree of complexity, so that a wider class of person may perform them, is fraught with difficulties. Any type of insolvency administration can become complex, whether or not it involves large sums of money. Further, the introduction of more tiers only increases complexity for the business community and the costs associated with administering the system.

6.15. The Working Party believes the proposal to phase out the existing tiers has merit as the concept of an official liquidator is largely outdated.[262] Although official liquidators are officers of the court, the types of administrations in which they are involved are not necessarily any more complex or onerous than administrations undertaken by registered liquidators. Indeed, with the advent of the voluntary administration system, court ordered liquidations are decreasing in significance and often involve cases where there are no assets for distribution.

6.16. The Working Party considers that it would be possible to allow any nominated registered liquidator to be eligible to undertake a court appointment if the court sanctions the appointment, rather than having a separate class of official liquidators. However, such a system would need to be phased in over a period of time, particularly if the existing entry requirements for registration are to be broadened.

6.17. The Working Party recognises that, in the short term, the two categories of official and registered liquidators may need to be retained. However, in the longer term, the distinction should be removed in favour of a system whereby the court may sanction any nominated registered liquidator to perform a court-ordered administration.

ENTRY REQUIREMENTS

6.18. The rationale behind imposing entry requirements on persons who wish to practice as insolvency practitioners is based on the desirability of ensuring that the

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262 See the discussion of the history of the official liquidator class in Chapter 3.

public and, in particular, creditors and shareholders can have confidence in the expertise and judgement of practitioners and be confident that returns to them will be maximised. This is clearly an important objective. However, it is also important that the restrictions imposed do not form unnecessary impediments to competition within the market for insolvency practitioners' services. Anti-competitive effects can result in unnecessarily high costs and reduced efficiency.

6.19. The current entry standards are contained in both the Corporations Law and ASC Policy Statements.

Corporations Law

6.20. Under the Corporations Law, an application for registration as a (registered) liquidator may be approved by the ASC where:

- the applicant:
  - is a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States; or
  - holds tertiary qualifications in accounting and commercial law; or
  - has other qualifications and experience that in the opinion of the ASC are equivalent to either of the above qualifications; and
- the ASC is satisfied:
  - as to the experience of the applicant in connection with the winding up of bodies corporate; and
  - that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.[263]

6.21. While there are no specific provisions which deal with the criteria for registration as an official liquidator, the ASC has power to register as an official liquidator a person who is a registered liquidator.[264] The ASC has the discretion to register as many official liquidators as it thinks fit.[265]

263 Section 1282, Corporations Law.

264 Subsection 1283(1), Corporations Law.

265 Subsection 1283(2), Corporations Law.

Current ASC Policy

6.22. The ASC has issued two Policy Statements to explain the criteria it will apply in exercising its discretions under the above provisions in the Corporations Law.

6.23. Policy Statement 40 sets out the following experience requirements for eligibility for registration as a liquidator:

- five years in public practice as an accountant;
- three years' continuous experience in a wide range of corporate insolvency work under the direction of an official liquidator; and
- two years' continuous full-time experience in the last five years in the supervision of corporate insolvency administrations.

Policy Statement 40 also states that the periods will be taken into account whether or not they are concurrent or overlapping. Further, it states that 'the ASC will also accept experience which is *equivalent* to the experience specified...above'.

6.24. Only registered liquidators are eligible for registration as official liquidators. To obtain registration as an official liquidator, a registered liquidator must satisfy the ASC that he or she possesses the necessary experience and resources to undertake court appointments. The main requirements in Policy Statement 24 are that the registered liquidator has:

- since registration, had at least two years' continuous experience in insolvency administrations, working at the most senior level, and under the direct supervision of an official liquidator;
- a demonstrated involvement in the liquidation of insolvent companies, including contribution to decisions taken in administering complex windings up ordered by the court; and
- staff and other resources sufficient to undertake court appointments.

6.25. In addition to being satisfied that an applicant for registration as an official liquidator has the necessary experience and resources, the ASC will take into account other relevant factors, including:

- the amount of work generally available to official liquidators;
- the need for official liquidators to be appointed to tasks with sufficient frequency to maintain satisfactory skills; and

- membership of, and participation in, programs of continuing education offered by professional organisations.

Broadening the Requirements

6.26 Although it is not strictly necessary that applicants for registration hold qualifications in accounting, it is unlikely that persons in occupations other than accounting would be able to fulfil the current experience requirements.

6.27. The former Trade Practices Commission argued that insolvency practice is only indirectly linked to the accountancy profession and, in fact, other skills are also usually required for a good insolvency administration, including management skills, negotiation skills, legal skills and sound business judgement.[266]

6.28. Persons in favour of broadening the entry criteria argue that, even though some level of accounting skills must be exercised in insolvency administrations, the skills required are not necessarily of a high order. In any event, there is no reason the necessary accountancy work could not be performed by someone other than an insolvency practitioner, just as, for example, administrators currently use external legal advisers. It is argued that the essential qualities required of an insolvency practitioner are an understanding of business and financial affairs which allows the practitioner to make an assessment of the business of the company concerned.[267] Those qualities are not necessarily confined to the accounting profession.

6.29. In its report on the accounting profession, the former Trade Practices Commission recommended that the present entry requirements to insolvency practice be broadened to allow competition from a wider pool of appropriately qualified practitioners. In particular, it recommended that consideration be given to broadening the category of persons who can be registered as liquidators and official liquidators by accepting experience gained as a trustee in bankruptcy or in other relevant fields of employment as meeting the experience qualification for registration as a liquidator for at least the less complex insolvencies. The Commission stated that persons who are currently excluded from obtaining registered or official liquidator status but who may be able to provide comparable services include:

- registered liquidators unable to obtain registration as official liquidators because they do not have the opportunity to work under direct supervision of an official liquidator;

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266 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 72.

267 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 71.

- trustees in bankruptcy who are not eligible for registration as liquidators;
- lawyers with experience in the legal side of insolvencies; and
- those with broader commercial experience who may have particular skills relevant to particular administrations.[268]

6.30. In the Harmer Report, the ALRC recommended that there be no requirement that a registered liquidator be a qualified and practising accountant, or a member of a professional body of accountants.

Comments

6.31. The Working Party received a number of submissions from lawyers and bodies representing lawyers supporting broader entry requirements. It was argued that lawyers with many years of experience in insolvency law and commercial practice would have the necessary skills to undertake liquidations and other administrations. It was proposed that membership of one or more of the legal professional bodies should be an alternative requirement to membership of an accounting professional body.[269] Further, experience as a lawyer working in the insolvency area should be considered appropriate criteria for registration as a liquidator.[270]

6.32. Other submissions, while in principle not opposed to broadening entry requirements, expressed concern at proposals which would water down existing standards. It was argued that entry standards are a vital part of maintaining the integrity of the profession and the confidence of the business community. Other professionals should be admitted only on the basis that they are able to meet appropriate standards.

6.33. There was support for the notion that a requirement such as successful completion of the IPAA's Insolvency Education Program should be mandatory.[271] Some submissions argued that continuing membership of the IPAA should be a requirement for registration as a liquidator.

6.34. The ASC supports the broadening of entry requirements but believes that before admitting further categories of persons to insolvency practice, more detailed work is required to identify the knowledge gaps that new entrants need to bridge.

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268 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 69.

269 This proposed change would be achieved by amending Regulation 9.2.01 of the Corporations Regulations to include the Law Council of Australia and/or its constituent bodies as prescribed bodies for the purpose of subparagraph 1282(2)(a)(i) of the Corporations Law.

270 This proposed change would involve amendment of ASC policy statements.

271 This program is described in paragraph 6.76.

6.35. A small number of submissions expressed concern about the proposal to broaden the entry requirements on the basis that the insolvency market is limited in size and there may not be enough work to go around if a significant number of additional persons become registered. It was argued that there must be sufficient work for liquidators to maintain their skills and provide worthwhile returns in order to retain the best people in the profession. Relaxing entry standards could lead to an increase in practitioners working on a part-time or limited scope basis which may dilute experience levels and the fee base of experienced practitioners. It would also increase opportunity for 'fly-by-night' operators and opportunists.

6.36. One commentator who was opposed to broadening the entry requirements questioned whether practitioners from another profession would have the ability and time to maintain the level of skill and technical knowledge required by two professions. Further, the continuing relevance of the conclusions reached in the Harmer Report and the former Trade Practices Commission report were questioned on the basis that recent changes in corporate law have resulted in greater demands being placed on practitioners by the community, the greater consulting and advisory role and the increased complexity of assignments now being faced by practitioners.

Working Party Position

6.37 As mentioned in the previous chapter, the Working Party believes that public interest considerations justify the maintenance of entry requirements for insolvency practitioners. In many cases, the consequences of a defective administration are significant and losses are shared by persons who do not have a direct input into the choice of the insolvency practitioner. These considerations weigh heavily in favour of retaining a registration system.

Registered Liquidators

6.38. Having considered the reports of the former Trade Practices Commission and the Australian Law Reform Commission and the comments received in response to its own Discussion Paper, the Working Party considers that, in the interests of increasing the level of competition in the corporate insolvency industry, there is some scope for the broadening of entry requirements to encompass persons from outside the accountancy profession without adversely impacting on standards.

6.39. The next step is to formulate options for how the entry requirements could be broadened. There are five types of entry requirements which the Working Party has considered in this regard:

- tertiary qualifications;
- experience;

- successful completion of specialised courses and/or examinations;
- membership of professional bodies; and
- 'fit and proper person' requirements.

The relevance of each when assessing the capability of persons to practice as corporate insolvency practitioners is discussed below.

Tertiary Qualifications

6.40. In assessing the capability of an applicant for registration as a corporate insolvency practitioner, tertiary qualifications in accounting and commercial law are used as an indicator that the applicant:

- has acquired knowledge in the area of study concerned; and
- has reached a certain minimum level of skill in the practical application of that knowledge.

6.41. There are two issues to be considered in determining whether tertiary qualifications in accounting and commercial law (or equivalent qualifications) should be retained as requirements for registration as a corporate insolvency practitioner. First, are the knowledge and skills acquired in obtaining those qualifications essential to properly perform the duties of a corporate insolvency practitioner? Secondly, is the only reasonable means of obtaining and demonstrating the successful acquisition of the necessary knowledge and skill by way of obtaining tertiary qualifications or their equivalent? If the answer to either or both of those questions is no, there may be grounds for modifying the requirement.

6.42. In relation to the first question, the Working Party considers that accounting and legal skills are essential to the proper conduct of an insolvency administration. However, it has sympathy with the argument that qualifications of a tertiary standard in both disciplines are not absolutely necessary. An administrator should be able to obtain external expert advice on specific accounting or legal issues, so long as the practitioner has the ability to correctly interpret and apply the advice received.

6.43. As to the second question, the Working Party considers that obtaining tertiary qualifications in accounting and commercial law is the preferable, but not the only, means of obtaining the necessary knowledge and skills in those disciplines. Potential applicants with expertise in law alone could acquire an adequate level of expertise in accounting through experience practising in corporate insolvency under supervision and/or by completing a course other than one leading to a tertiary qualification in accounting. Persons with extensive experience working in a corporate insolvency practice would also be likely to acquire the necessary level of knowledge of law and accounting.

Experience

6.44. Knowledge and skills acquired through education, tertiary or otherwise, is not a substitute for experience gained working on insolvency administrations under supervision of a competent insolvency practitioner(s). The current ASC policy requires a number of years experience working on corporate insolvency matters, some of which must be under the supervision of an official liquidator, in order for an applicant to be a registered (or official) liquidator. In this regard, the requirements are comparable with, for example, entry requirements for legal practitioners. Those rules typically require an applicant for an unrestricted practising certificate to have worked for a number of years in legal practice under the supervision of a holder of such a certificate.

Supervision

6.45. It is notable that a person applying to be a registered liquidator is required to have undergone a period of work experience supervised by an **official**, rather than a **registered**, liquidator. At first glance it would appear odd that an applicant for a certain status or position is required to have been supervised by a person who has a status or position other than the one sought.

6.46. The rationale for this was that, in practice, registered liquidators had limited experience not only in court-ordered liquidations but also in other types of major administrations. In this regard, it seems that creditors tended to restrict their appointments for large receiverships and other major administrations to official liquidators, notwithstanding that a registered liquidator could legally perform those roles. Registered liquidators were, in practice, limited mainly to relatively small and less complex administrations.

6.47. With the advent of voluntary administrations, however, the market has changed significantly. Although official liquidators still tend to dominate the major administrations, the work of many registered liquidators now encompasses some fairly large and complex voluntary administrations and, in some cases, subsequent liquidations which would otherwise have been court-ordered.

6.48. Arguably, it is now more difficult to justify the requirement that an official liquidator supervise an applicant for registration, since working for a registered liquidator is likely to expose an applicant to an appropriate range of administrations.

6.49. The Working Party therefore considers that the existing requirement for an applicant to have work experience supervised by an official liquidator should be changed to allow supervision by a registered liquidator instead. The need for a change to this requirement would become essential if the classification of official liquidator was removed, as recommended by the Working Party.

Alternative Experience

6.50. One issue that the Working Party has considered in relation to the current experience requirements is whether they should be broadened to allow experience gained other than by way of working in corporate insolvency practice under direct supervision of an official liquidator to count towards the experience requirements. The types of experience most likely to be relevant in this regard is experience gained while working as a registered trustee in bankruptcy or experience providing legal advice in corporate insolvency matters. Arguably, however, broader commercial experience should also be considered relevant.

Trustees in Bankruptcy

6.51. In a previous chapter of this report,[272] the Working Party discussed the possibility of having only one type of insolvency practitioner who may practice in both corporate and personal insolvency. Reference was made in that discussion to the argument that personal insolvency practice is very similar to corporate insolvency practice. Although there are differences of opinion about how similar it actually is, it is beyond doubt that many of the principles and practices involved are comparable.

6.52. The Working Party considers that, due to the similarities involved, practice as a registered trustee in bankruptcy, or working directly under the supervision of a registered trustee on business-related personal insolvency matters should count toward the experience requirements for registration as a corporate insolvency practitioner, provided that this experience is accompanied by work under the supervision of a registered liquidator.

6.53. Precisely what weight experience in personal insolvency work should carry when applying for registration as a corporate insolvency practitioner should be a matter for the registering body to determine.

Legal Work

6.54 The proposition that some lawyers would be suitable persons to become registered liquidators has been mentioned above. Lawyers would not usually be in a position to meet the current experience requirements because they generally would not have been working under the supervision of an official liquidator.

6.55. Possession of a high level of skill in advising on the legal issues involved in an insolvency matter does not necessarily mean a person also possesses a high level of skill in, for example, making business decisions and forecasts about a company's prospects. Experience in the legal side of administrations is not a substitute for

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272 See Chapter 4.

experience in managing administrations under supervision of a corporate insolvency practitioner.

6.56. However, an understanding of the legal aspects of an insolvency matter is essential for a corporate insolvency practitioner. Accordingly, the Working Party considers that lawyers who have extensive experience in advising parties in relation to insolvency matters should be given credit for that experience in the context of the registration requirements for liquidators. There are, however, some practical difficulties in formulating the details of such a rule.

6.57. Insolvency practice is specialised. Active registered and official liquidators generally perform insolvency work as a substantial part of their practice. If a potential applicant has been working in the office of one of those persons for a number of years, they will have gained significant experience in various aspects of corporate insolvency administrations.

6.58. The practice of law, on the other hand, is usually not so specialised. The majority of legal practitioners who advise on corporate insolvency matters would also practise in other areas of law. Some of the experience gained in working on other legal matters regarding, for example, bankruptcy or general corporate law matters, would be useful in the corporate insolvency context, but experience in unrelated areas may not be as relevant.

6.59. Having regard to the above, it may be possible to formulate a criterion which requires years of legal experience exclusively in corporate insolvency matters in order to count towards experience for registration. However, that formulation is likely to disqualify all but a handful of lawyers from registration. Another approach is to draw up a list of matter types which qualify. However, this is likely to give rise to anomalous results.

6.60. Another option may be to introduce a requirement based on the number of administrations dealt with, which could be used in addition to, or instead of, the years of experience requirement. One difficulty with this option is that close involvement with a very large and complex administration, in terms of experience, could be worth far more than advising on a number of routine matters. Furthermore, even if applicants were required to list the administrations they have advised on, it would not be possible for an admission authority to verify the extent of the applicant's involvement in each administration.

6.61. It would be possible to use words like 'mainly' or 'predominantly' in the requirement and leave it to the admission body to determine whether that requirement is satisfied on a case by case basis. This option has drawbacks because it is less certain. While it could be made more certain by specifying a fixed percentage, it would not be desirable or practical for applicants and/or admission authorities to calculate the number of days or hours spent on corporate insolvency matters as opposed to other matters while working as a lawyer. Even if they did, verification

would be a problem and, at least at the margins, the result would have little or no bearing on the quality of the work performed.

6.62. On balance, the Working Party considers that the preferable course would be to specify a number of years working 'predominantly' on the legal aspects of insolvency matters and allow the admission authority a degree of discretion in interpreting and applying that requirement. Applicants would be entitled to submit whatever evidence they felt was necessary to convince the admission authority of the value of their experience and, where appropriate, the admission authority could 'discount' the number of years of experience claimed if a proportion of the experience was not considered relevant.

The Public Practice Requirement

6.63. ASC Policy Statement 40 includes a requirement that an applicant has spent five years working as an accountant in public practice. Although not expressly stated, unless there are exceptional circumstances, this effectively means an applicant must have worked for five years in the office of a person who holds a public practising certificate issued by one of the accounting bodies. The experience may also count towards the requirement to work under the supervision of an official liquidator.

6.64. Working for a significant period in an accounting firm under supervision of the holder of a public practising certificate is likely to provide the person with a fundamental working knowledge of one or more areas of accounting, which may or may not be related to insolvency practice. The person may also have gained an appreciation of the ethical issues which confront an accounting practitioner. The requirement to work under supervision as an accountant is comparable with requirements imposed by the professional bodies in relation to the granting of a public practice certificate.[273]

6.65. It would not, however, be possible for persons other than accountants to meet the public practice requirement. Given the discussion above concerning the relevance of accounting qualifications to corporate insolvency practice, it should be considered whether the five year public practice requirement (which may or may not include insolvency practice) could be modified, supplemented or removed.

6.66. If it is accepted that accounting and finance skills of a high order are not essential to successfully conduct a corporate insolvency practice on the basis that those skills could be provided externally when necessary, arguably the five year accounting public practice requirement should be removed.

6.67. However, a contrary argument is that the requirement is not directed at the acquisition of accounting and finance skills specifically, since the skills acquired may

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273 See, for example, ASCPA By-Law 704.1.

be in such areas as audit or taxation which may not be directly relevant to corporate insolvency practice. Rather, the requirement is aimed at ensuring applicants have had a reasonable level of exposure to professional practice generally. If this view is taken, it would not be appropriate to remove the requirement, even if it is accepted that accounting skills of a high order are not essential. Rather, it should be broadened to include equivalent types of experience in other relevant disciplines, such as legal practice. The Working Party supports this approach in respect of legal practitioners. Accordingly, the five year rule should be expanded so that five years' experience in legal practice should be made an alternative requirement to five years' experience in accounting practice.

Business Experience as an Alternative

6.68. The former Trade Practices Commission suggested in its report on the accounting profession that some persons with a broad commercial experience may have particular skills relevant to specific administrations and those persons may be able to enter and provide comparable services to persons who may currently become registered.[274]

6.69. Although the Working Party considers that argument has merit, there are significant practical difficulties in devising any meaningful and workable guidelines for the type of 'broad commercial experience' which should qualify. There is a wide range of commercial experience which people could be exposed to which could conceivably equip persons to conduct external administrations. Years of experience as a company director, chief executive or financial controller of some companies could, arguably, be sufficient. However, depending on the size and type of company involved, the extent of the person's responsibilities, and the success or otherwise of the enterprise, the experience gained may not be valuable in terms of conducting external administrations.

6.70. On balance, the Working Party considers that applicants with demonstrated commercial/business experience, including basic legal and accounting knowledge, should be eligible to apply for registration notwithstanding they do not possess tertiary qualifications in accounting or law. However, a further requirement should be to have five years experience working in insolvency practice, at least three of which were under the supervision of a registered liquidator or registered trustee. This formulation allows persons with broad commercial experience to have it recognised, but still ensures applicants have an appropriate level of directly relevant experience.

6.71. The Working Party further considers that significant directly relevant experience, such as seven years working in insolvency practice under supervision of a registered liquidator or registered trustee, should also be available as an alternative

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274 Trade Practices Commission, *Study of the Professions, Final Report—July 1992, Accountancy*, p. 69.

requirement to tertiary qualifications. This would allow persons who have worked for long periods in insolvency practice an avenue to become registered.

6.72. The Working Party notes that there is already a facility for persons with specific skills to apply to the ASC for permission to conduct a 'one-off' liquidation.[275] In particular, where an application is made for registration as a liquidator of a specified body corporate, the ASC may grant the application and register the applicant as a liquidator of the body concerned if it is satisfied that:

> 'the applicant has sufficient experience and ability, and is a fit and proper person, to act as the liquidator of the body, having regard to the nature of the property or business of the body and the interests of its creditors and contributories, but otherwise...shall refuse the application.'[276]

The provision gives the ASC a wide discretion which has not been elaborated upon in a policy statement.

6.73. The existing provision goes some way toward addressing the point made by the former Trade Practices Commission that persons who have specific skills relevant to specific administrations could utilise them in the context of an external administration. However, the facility of the ASC to register persons for the purpose of conducting 'one-off' administrations currently only applies to liquidations. Voluntary administrations and receiverships fall outside its ambit—persons conducting those administrations must be permanent registered liquidators.

6.74. The Working Party considers that there may be scope to extend the ASC's discretion to allow persons with specialised expertise relevant to one-off administrations to conduct those administrations, notwithstanding that they are not registered liquidators. The Working Party recommends that the Government consider making amendments to the Corporations Law to this effect.

Specialised Courses/Examinations

6.75. There is currently no specific entry examination in connection with the requirements to become a registered or official liquidator. The system relies on a combination of tertiary qualifications and experience.

6.76. If the entry requirements are to be broadened to provide opportunities to persons who do not have a background in both law and accounting, it may be desirable to establish a mechanism to test the fundamental knowledge of those persons in these

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275 Paragraph 1279(1)(c), Corporations Law.

276 Subsection 1282(3), Corporations Law.

areas. It has also been suggested in submissions to the Working Party that **all** applicants, regardless of their tertiary qualifications, should be required to pass a specialised admission examination which would be similar to the examinations currently held in conjunction with the IPAA's Insolvency Education Program. This program is an extension of the IPAA's Advanced Insolvency Course, which commenced in 1991 and continued until 1995. The current program commenced in the 1996 academic year and is run by the IPAA in conjunction with the University of Southern Queensland's Commerce Faculty. It consists of two modules covering 'terminal' and 'non-terminal' administrations and is designed to cater for graduates seeking IPAA membership. Successful completion of the modules, and active participation in the IPAA's Workshop Program, are requirements for full membership of the IPAA.

6.77. The ASCPA Centre of Excellence for Insolvency and Reconstruction has prepared a detailed paper in which it sets out options for entry examinations. The following table is based on the model proposed by the ASCPA:

Table 6.1: Options for Entry Examinations (ASCPA)

Applicant's Qualifications	Examinations Required
(a) Accounting	Specialised admission examination in insolvency practice based on IPAA Insolvency Education Program ('Insolvency')
(b) Law	Accounting + Insolvency
(c) Tertiary (other than accounting or law)	Bridging examinations in Business Law, Ethics, Accounting and an Aptitude Test *plus* Admission examinations in Accounting + Business Law + Ethics and Professional Responsibility + Insolvency
(d) None, but significant (ie 10 years) work experience in corporate insolvency	Admission examinations in Accounting + Business Law + Ethics and Professional Responsibility + Insolvency

6.78. The Working Party considers that the ASCPA proposal has merit in that, if it was implemented, there would be a high level of confidence that all applicants have a minimum required level of knowledge and skills in the various areas, particularly if the experience requirements were opened up to other professions.

6.79. The trade-off is that a significant administrative workload would be imposed on the admission authority and a large burden on applicants. For example, in order to gain entry through Category C, nine separate examinations would be required, each of which would probably comprise a number of parts. The admission examination in law would be likely to include areas such as insolvency, contract, trade practices and taxation laws.

6.80. It is questionable whether the expense involved in preparing and conducting all the examinations in the proposed framework can be justified on the basis that it should result in an increase in competition between insolvency practitioners. The number of persons who might use the alternative schemes is, arguably, too small to warrant the resources required to develop the regime and the ongoing expense of its administration. Accordingly, the Working Party does not support the establishment of a 'multi-stream' system of bridging and entry examinations at this stage.

6.81. However, the Working Party considers that there is scope for use of the IPAA's Insolvency Education Program examinations (or demonstrated equivalent knowledge, as approved by the registering authority) for **all** applicants. This would provide a 'safety net', since it would ensure that applicants are cognisant with fundamental insolvency principles, irrespective of their background. It should be possible to incorporate appropriate accounting content in the course to cater for persons from different backgrounds. The registering authority should have power to exempt persons from the requirement to complete the course in exceptional cases.

Membership of Professional Bodies

6.82 One of the alternative entry requirements set out in the Corporations Law is that an applicant be a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States.[277] However, other qualifications and experience will suffice if, in the opinion of the ASC, they are equivalent.[278] The ASC has not released guidelines regarding the types of experience and qualifications it would consider to be equivalent to membership of those bodies.

6.83 The membership requirements for the ICAA and the ASCPA are similar. The ASCPA requires applicants for membership as a Certified Practising Accountant ('CPA') to:

- be the holder of tertiary qualifications in accounting;
- produce evidence of good character;

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277 Subparagraph 1282(2)(a)(ii), Corporations Law and Regulation 9.2.01, Corporations Regulations.

278 Subparagraph 1282(a)(iii), Corporations Law.

- prove they have passed approved examinations in auditing, Australian business law and Australian taxation law;

- provide documentary evidence of work experience in accounting or finance supervised by a CPA member or another accountant with equivalent or higher status for at least three years, or five years non-supervised experience, or an approved mixture of supervised and non-supervised experience;

- make a commitment to undertake 20 hours per annum continuing professional development; and

- comply with any other conditions and possess such other qualifications as are prescribed—generally or in any particular case.[279]

6.84. The requirements for becoming a CPA, therefore, contain comparable requirements concerning accounting qualifications, character and work experience as the registration requirements for liquidators. However, there are no requirements concerning continuing professional education in the registration regime for liquidators. Furthermore, registered liquidators do not necessarily have to be subject to the disciplinary regimes and monitoring activities carried out by the professional bodies.

6.85. The ICAA and the ASCPA have jointly issued a number of documents relating to technical matters, quality control, professional conduct and ethics of their members. Those documents form part of a joint members' handbook and are in addition to the codes of professional conduct adopted by each organisation.

6.86. The joint documents include a Statement of Insolvency Standards (APS 7). Compliance with the standards set out in the statement is mandatory for members, and a breach may result in disciplinary proceedings. The standards are a set of basic principles governing professional responsibilities which a member must exercise in the course of insolvency practice. The statement is currently under review and an exposure draft of an amended standard was recently issued (copy at Schedule 2). The exposure draft includes standards relating to independence and objectivity, conflicts of interest, appointment, competition for appointment, inducements, property dealings, confidentiality, continuing education and availability of resources.

6.87. The standards imposed by the accounting professional bodies are, in the Working Party's view, an important part of the regulatory framework for insolvency practitioners. However, the Working Party doubts whether mandating membership of an accounting or other professional body for registration is the most appropriate means of achieving those regulatory goals. In particular, prescribing membership of a professional body as a mandatory requirement could be seen as anti-competitive and, possibly, contrary to the spirit, if not the letter, of the *Trade Practices Act 1974*. This

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279 ASCPA By Law 102.1.

is so despite that nearly all of the existing registered liquidators are members of a professional organisation.

6.88. In any case, requiring membership of a professional body in order to obtain registration does not ensure practitioners remain members. The prescribed form of the triennial statement does not require practitioners to indicate whether they remain members of a prescribed body and the ASC has no other means of monitoring whether registered insolvency practitioners remain members.[280] Also, ceasing membership of the ICAA or the ASCPA (or an equivalent body) is not a ground for deregistration.

6.89. The Working Party considers that there should be no mandatory entry requirement in the law relating to membership of a professional accounting or other professional body. The Working Party's views on the preferred means of dealing with the issues of ongoing supervision and discipline of practitioners are set out later in this report.[281]

Streamlining of Applications from Members of Professional Bodies

6.90. Although the Working Party considers that there should be no entry requirement in the law relating to mandatory membership of a professional organisation, the Working Party believes that, if a professional organisation can demonstrate that its own entry requirements ensure that its members are suitable to become registered insolvency practitioners in that they meet or exceed the prescribed entry requirements, then applications from members of that organisation should be capable of being streamlined so they do not need to go through the full processes in relation to their applications.

6.91. One organisation which may fit into this category is the IPAA. The IPAA was, until mid-1992, an organisation whose full members consisted only of persons who held a licence to practice as a registered trustee or a registered liquidator. More than 90 per cent of those license holders were full members of the IPAA. In mid-1992, the IPAA changed its constitution, primarily to raise the qualifying standards for its members. New members after that date are required to:

- be a member of a professional accounting body or law society within Australia;
- pass two semester examinations of the IPAA's Insolvency Education Program (covering both corporate and personal insolvency);
- possess or be deemed to possess prescribed accounting knowledge as detailed in the IPAA's regulations; and

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280 Form 904, Corporations Regulations.

281 Supervision is dealt with in Chapter 7. Discipline is dealt with in Chapter 8.

- have worked for a period of at least three years of the previous five years doing professional work under the supervision of a full member who has been carrying on business in Australia the practice of a registered trustee or a registered company liquidator.

6.92. It would be possible to formulate systems whereby membership of some organisations enables the application to be partially streamlined. For example, a member of a professional accounting body could have their application streamlined in so far as the educational requirements are concerned, so that the registering authority need only be concerned with assessing the experience and other general aspects of the application.[282] If the current requirements are broadened to allow lawyers to become registered, a similar system could operate in relation to members of professional legal bodies.

6.93. At the end of the day, the question of streamlining applications would be a matter for the registering body (that is, the ASC) to consider. However, the Working Party would strongly encourage the registering body to adopt a streamlining system to facilitate registration processes.

General Suitability and Fit and Proper Person Requirements

6.94. The current requirements include a provision which enables the ASC to reject an application if it is not satisfied that the applicant:

- is capable of performing the duties of a liquidator; or

- is not otherwise a fit and proper person to be a liquidator.[283]

6.95. This provision is really a 'catch-all' provision which, on its face, gives the ASC a wide discretion to reject applications. The ASC has not elaborated upon how it will apply the provision in a policy statement. However, it should be noted that a decision to reject an application on this ground would be subject to review by the AAT.

6.96. There has been no indication that the provision has been frequently used by the ASC to refuse applications from persons who might otherwise have qualified for registration. Nor has there been any suggestion that the provision has been used unfairly.

6.97. In the view of the Working Party, a general suitability provision should be retained regardless of the other qualifications and experience requirements. It should also remain subject to administrative review.

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282 This is effectively how the system works now in relation to members of the ICAA and the ASCPA—see subsection 1282(2), Corporations Law.

283 Subsection 1282(2), Corporations Law.

Conclusions

6.98. The Working Party recommends that the entry requirements for registered liquidators should be broadened so that persons with various combinations of qualifications and practical experience, as set out in the following table, would be eligible to apply for registration.

6.99. In addition, all applicants should be required to successfully complete the IPAA program in insolvency practice (or demonstrate equivalent knowledge as approved by the registering authority), and satisfy the 'fit and proper person' requirements.

6.100. Membership of a professional organisation should not be a mandatory requirement, but the registering authority should be allowed to streamline applications from members of relevant professional organisations (such as the IPAA, ASCPA, ICAA and the legal professional bodies) in order to facilitate the registration process.

6.100 The registering authority should have powers to waive part some or all of the entry requirements (except the 'fit and proper person' requirements) in exceptional cases. In particular, transitional arrangements should allow exemptions from the requirements for senior lawyers with significant insolvency experience.[284]

6.102. The following table illustrates how the proposed registration criteria would operate in connection with qualifications and experience:

284 Discussion of the proposed transitional arrangements for lawyers with significant insolvency experience commences at paragraph 6.103.

Table 6.2: Proposed Registration Criteria for Insolvency Practitioners

Tertiary Qualifications	*Experience*
Stream A (Accountants)	
Accounting and Commercial Law	5 years accountancy practice *plus* 3 years under supervision of registered liquidator or registered trustee
Stream B (Insolvency lawyers)	
Law (including company and commercial law)	5 years in legal practice *plus* 3 years practising predominantly in insolvency law *plus* 3 years under supervision of registered liquidator or registered trustee
Stream C (Substantial experience)	
Qualification other than accounting or law	Demonstrated commercial/business experience, including basic accounting and legal knowledge *plus* ***5 years predominantly working in corporate insolvency practice, 3 of which was under supervision of a registered liquidator or registered trustee***
OR	
No qualification	*OR* 7 years in corporate insolvency under supervision of registered liquidator or registered trustee

Notes

Stream A: This category of applicant roughly corresponds to the persons who currently are eligible to apply for registration, but the experience requirements have been modified so that experience as **trustee in bankruptcy** and **working for registered liquidator** can be substituted for experience working under the direct supervision of an official liquidator. The Working Party envisages that this category would make up the bulk of applicants.

Stream B: This category of applicant is a significant addition to the current system. It would allow lawyers who have specialised in insolvency law to become registered liquidators. Note, however, that applicants in this category must have 3 years of supervised experience in corporate or personal insolvency practice acceptable to the registering authority.

Stream C: This category allows persons without tertiary qualifications in accounting or law to apply provided they have 7 years' experience working full time under the supervision of a registered liquidator, **OR** a tertiary qualification, 5 years' insolvency experience (including 3

years supervised experience), and a demonstrated knowledge of accounting, legal and business matters. The Working Party does not envisage that many persons would be eligible for this category.

Transitional Arrangements for Lawyers with Significant Experience

6.103. The Working Party considers that there are a very small number of senior lawyers with significant experience in corporate insolvency work who are already suitable to become registered liquidators, but who have been excluded from registration under the existing requirements. It would be neither necessary nor feasible to require those persons to undertake employment under supervision of a registered liquidator or registered trustee.

6.104. Accordingly, the Working Party proposes a transitional arrangement whereby those persons could become registered liquidators without having satisfied the requirements regarding supervised insolvency work. This facility would be available only for a limited time, such as one year from the commencement of the new regime. After that time, all lawyers seeking registration would have to satisfy the usual requirements, including supervised experience.

6.105. To be eligible for the transitional exemption regarding experience requirements, lawyers would be required to demonstrate to the registering authority that they have significant experience (at least seven years out of the last ten) advising predominantly in corporate insolvency matters, and that their experience covers a broad range of issues affecting corporate insolvency practice.

6.106. Lawyers who have expertise sufficient in insolvency to qualify for the transitional exemption from the experience requirements may also qualify for exemption from undertaking the IPAA program. However, whether this exemption is also available should be a matter for the discretion of the registering authority, as mentioned in paragraph 6.81. The Working Party envisages that members of the class of persons eligible for the concession from the IPAA education program would include those who have been conducting the IPAA program or those who could demonstrate similar knowledge and experience through, for example, preparation and delivery of papers, lectures, seminars and courses and contributions to submissions made by the Law Council's Insolvency and Reconstruction Committee or by the IPAA.

Official Liquidators

6.107. Earlier in this chapter, the desirability of retaining the class of official liquidator was discussed. Although the Working Party considers that a special class of official liquidator is no longer necessary, if its existence is to continue, at least in the short term, the question arises whether the current requirements for this class are appropriate.

6.108. The history of the official class of liquidators was summarised in Chapter 3. The ASC's current guidelines for admission as an official liquidator have four main elements:

- experience requirements;
- a willingness to conduct court ordered administrations and the resources to conduct them;
- membership of professional associations and participation in continuing education; and
- the amount of work generally available.[285]

6.109. The ASC has advised the Working Party that it is currently in the process of revising these guidelines. The changes being considered are:

- modifying the experience requirements to recognise the increasing incidence and importance of voluntary administrations; and
- removing the reference to restrictions on numbers of persons registered as official liquidators.

Experience and Resources

6.110. The major criticism levelled at the current experience requirements is that they require applicants to have work experience under direct supervision of another official liquidator. Accordingly, registered practitioners who do not have an opportunity to work under the direction of an official liquidator, such as those in regional areas, will not qualify for official liquidator status even though they may be involved in some complex administrations. The result of this policy is that there is potentially a closed shop of official liquidators who operate primarily out of the capital cities.

6.111. A response to this criticism is that it is important that all official liquidators have a sound knowledge of the conduct of court-ordered windings up and only persons who have worked under the direct supervision of an official liquidator will obtain that kind of experience. Further, there are no regulations preventing an official liquidator from setting up a regional practice. They generally choose not to do so for economic reasons. Adjusting the experience requirements may not necessarily change those factors. Accordingly, such a change may not result in more regional practitioners qualified as official liquidators, but rather a lowering of standards generally.

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285 ASC Policy Statement 24, *ASC Digest*, PS 9/17.

A Regional List

6.112. One approach which has been used in relation to practitioners in regional areas is the establishment of a separate list of official liquidators who practice only in a particular region. In New South Wales, a 'country list' of official liquidators was established in 1987 by the former New South Wales Corporate Affairs Commission in consultation with the NSW Supreme Court, the IPAA and the professional accounting bodies. This list was established primarily so that creditors of a company in liquidation in regional areas would have easy and low cost access to an official liquidator. Furthermore, the appointment of a local liquidator would generate cost savings to the administration.

6.113. The country list operates by allocating a defined area of the State to liquidators whose practice is in the country. The NSW Supreme Court and the Federal Court appoint only official liquidators on the country list to wind up companies whose principal place of business or major assets are in their defined area.

6.114. It was suggested in the report of the former Trade Practices Commission that practitioners on the New South Wales country list may not satisfy the normal experience requirements to be an official liquidator and they are only appointed to perform the less complex regional liquidations.[286]

6.115. The ASC Policy Statement on official liquidators recognises the practice in New South Wales in relation to rural areas and states that, pending the outcome of this review, the ASC will continue to support this practice.[287] The policy statement indicates that practitioners who restrict their practice to a particular geographic area will only need to show that they have the staff, resources and backup facilities necessary to conduct a practice in that particular area.[288] The ASC's policy statement does not expressly state that ASC support of the New South Wales practice translates into a lessening of the experience requirements for practitioners who wish to be granted official liquidator status on the country list. However, there is no statement to the effect that a lower standard will *not* be accepted for applicants wishing to restrict their practice to a particular geographic location. By contrast, such a statement was included in the policy statement relating to admission requirements for registered liquidators in December 1993.[289]

6.116. The practice in New South Wales effectively creates, at an administrative level, a sub-category of official liquidator who is entitled to work only in regional areas. Those persons are not required to meet the levels of staffing and backup facilities

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286 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 140.

287 ASC Policy Statement 24, *ASC Digest*, PS 9/17 at paragraphs 10A–10B.

288 ASC Policy Statement 24, *ASC Digest*, PS 9/17 at paragraph 8.

289 ASC Policy Statement 40, *ASC Digest*, PS 9/37 at paragraph 5.

required of city practitioners. Further, although it is not expressly recognised in current ASC Policy Statements, the Working Party accepts that the statement in the former Trade Practices Commission report that 'regional liquidators...may not have satisfied the normal experience requirements to be an official liquidator' is likely to be accurate.

Conclusion

6.117. While the Working Party is sympathetic to the desire to maintain the availability of local insolvency practices as a means of keeping costs down in country centres, it does not consider that such considerations should be the determining factor in setting the criteria for registration as an official liquidator. Rather, if the registration process ultimately adopted is fair, competitive and sets a reasonable standard, questions of access to practice by regional practitioners should not arise.

6.118. The Working Party considers that if its recommendations in this report relating to the abolition of official liquidator status and opening up insolvency practice to other professionals are adopted by the Government, many of the concerns of country practitioners should be addressed. Country practitioners would no longer need to meet the additional and stringent experience requirements to retain their official liquidator status and to be eligible for appointment to court-ordered liquidations.

6.119. The Working Party recommends that the current requirements concerning supervised experience and resources for applicants seeking official liquidator status should be retained, for the present, pending the abolition of the official liquidator class.

6.120. The Working Party considers that the practice in New South Wales of admitting regional practitioners to a separate 'country list' of official liquidators is anomalous and cannot be justified. The Working Party recommends that all future applicants in New South Wales should be required to satisfy the usual requirements for official liquidator status.

Amount of Work Generally Available

6.121. The rationale behind the factor relating to the amount of work generally available seems to be that if too many official liquidators are appointed, each practitioner would perform less work and, therefore, would not be able to maintain an adequate experience level. This assumes that all practitioners granted official status would have an equitable share of the work available.

6.122. As discussed later in this report,[290] the rotation system for appointment of official liquidators does not necessarily result in the work being shared equitably. In

290 See Chapter 9.

any event, the Working Party considers that it should not be the responsibility of the regulatory system to ensure practitioners obtain a certain level of work, particularly if the means of doing so involves excluding others who would otherwise be qualified to perform it.

6.123. Maintaining practitioners' work experience levels is an important consideration, but there are alternatives to addressing this issue which do not involve restricting entry to practice.[291]

6.124. The Working Party recommends that the amount of work generally available to official liquidators should not be a factor in determining whether a person should be granted official liquidator status.

291 See further discussion of this issue in Chapter 7.

GENERAL SUPERVISION

7.1. Apart from the registration function, the regulatory system must also deal effectively with the supervision of practitioners once they have been registered.

7.2. It is useful, for the purposes of this report, to categorise the supervision functions into those which are directed at maintaining general standards of practitioners ('general supervision') and those which are intended to address conduct in a particular matter, usually in response to a complaint, and possibly with a view to providing a suitable remedy to an affected person ('discipline and remedial supervision'). This chapter considers general supervision of practitioners, while discipline and remedial supervision is dealt with in Chapter 8.

INTRODUCTION

7.3. As noted by the former Trade Practices Commission in its 1992 report, it is important that effective mechanisms are in place to ensure that:

- appropriate standards are set for work undertaken by insolvency practitioners;
- there is widespread compliance with the required standards; and
- appropriate corrective action may be taken in the event there is non-compliance with recognised standards.

7.4. The main perceived shortcomings with the present institutional arrangements for supervision are:

- overlap in the responsibilities of the various bodies involved;
- unclear complaints mechanisms which do not always provide a prompt response; and
- the extent of ASC resources required to carry out the supervision function and possible lack of expertise on the part of ASC officers to properly assess complaints in relation to the conduct of practitioners.

7.5. There are six matters which are dealt with in this chapter:

- ethics and professional standards;
- continuing professional education;
- ongoing work levels;
- quality assurance and surveillance;
- performance bonds and professional indemnity insurance; and
- periodic reporting.

7.6. One key issue is relevant in relation to all of these matters. That is, the question of which body (or bodies) should be responsible for setting the appropriate requirements and monitoring practitioners for compliance? Should these matters be regulated by way of legislation, or should it be left to the professional bodies to self-regulate in relation to these matters?

ETHICS AND PROFESSIONAL STANDARDS

7.7. There is currently no requirement in the Corporations Law for registered liquidators to adhere to a professional code of ethics. This may have been considered unnecessary in light of the fact that membership of the ICAA or the ASCPA, which have their own professional codes of ethics and standards,[292] is one of the alternative conditions of registration and the vast majority of liquidators would be members of those organisations (or their equivalents).

7.8. In view of the recommendation of the Working Party that membership of an accounting or legal professional body should not be a mandatory requirement for registration,[293] the question arises whether there is a need for legislation to prescribe adherence to a code of ethics or whether this is considered unnecessary in light of the existing common law and statutory requirements regarding the duties of liquidators.

7.9. One view is that there is no need to legislate for matters such as professional conduct and ethics, as competition in the marketplace is the most appropriate mechanism to deal with such issues. Consumers of the services of insolvency practitioners will decide if they require the added protection that adherence to a code of conduct and ethics provides. If consumers feel it is desirable they may direct their

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292 Further discussion of the codes and standards of the professional bodies is in Chapter 6.

293 See paragraphs commencing at 6.82.

custom to those practitioners who do adhere to a code of conduct through, for example, membership of a professional organisation. An example of this type of arrangement can be seen in relation to the provision of general accounting services. While accounting bodies such as the ICAA and ASCPA promote the standards and conduct required by their organisations as a means of distinguishing the quality of services provided by their members from services provided by non-members, there are no mandatory standards governing ethics and conduct in relation to general accountancy.

7.10. If the law itself was to mandate adherence to a code of conduct and ethical standards it would be necessary for the requirements to be contained in the law or regulations, or be approved by the ASC. The ASC and/or the CALDB would need to be conferred with power to undertake disciplinary action in respect of breaches.

7.11. Legal practitioners are subject to a system of professional ethics, standards and discipline administered by the various law societies. However, this is not tailored to insolvency practice. If lawyers were allowed to become registered insolvency practitioners, it may be possible for the law societies, or the Law Council, to develop rules and procedures specifically aimed at insolvency practice, just as the accounting bodies have done.

7.12. Another option may be for the professional legal and accounting bodies to apply uniform standards set by the IPAA in consultation with each of them.

7.13. The Working Party's view is that, on balance, the preferable course is to leave these matters to the marketplace. Practitioners who are bound by a code of practice and ethics will be able to use that to their advantage in attracting clients.

7.14. The Working Party recommends that the legislation should not mandate adherence to a code of conduct and ethical standards.

PROFESSIONAL DEVELOPMENT

7.15. Currently, there are no legislative requirements concerning ongoing professional development. However, membership of a professional accounting body goes some way towards achieving a similar outcome.[294]

294 See the discussion of the professional bodies' ongoing professional education requirements in Chapter 6.

7.16. The ICAA, the ASCPA and the IPAA require members who hold public practising certificates to complete a minimum amount of continuing professional development. One of the key aims of the IPAA is to advance education in the study of insolvency and, to this end, the IPAA runs a structured Workshop Program.

7.17. The Working Party considers that professional accounting bodies are well placed to make decisions on the activities which should count towards the annual education requirements. Furthermore, they can monitor each member's compliance level as part of the process of annual renewal of membership.

7.18. In some jurisdictions, there are regimes in place for ensuring lawyers participate in continuing legal education (CLE). The requirements vary from jurisdiction to jurisdiction. In New South Wales, for example, the CLE requirements have been mandatory since July 1987 and failure to fulfil the requirements can result in suspension, cancellation or refusal to renew a solicitor's practising certificate.[295] By contrast, the Australian Capital Territory has no mandatory CLE requirements.

7.19. As the Working Party has already indicated,[296] making membership of a professional accounting body a prerequisite to registration as an insolvency practitioner is not an ideal means of ensuring all practitioners undergo continuing education. This position will be complicated if a wider class of participants from outside the accounting area become registered.

7.20. Accordingly, consideration needs to be given to an alternative mechanism for ensuring registered practitioners undergo appropriate levels of continuing education. Such a mechanism could involve the applicant agreeing to undertake a level of continuing professional education as approved by the ASC. In this regard, the Working Party envisages that the professional bodies would develop education programs which encompass a range of educational activities in various forms (such as lectures, videos, seminars, workshops and so on). Some or all of those activities may not necessarily be organised or provided by the professional bodies themselves. However, it is not contemplated by the Working Party that the ASC would approve the individual activities. Rather, it is envisaged that the professional bodies and the ASC would agree on a comprehensive program. The program would be reviewed every two years by a working group of the professional bodies and the ASC.

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295 Frank Riley LLM, *New South Wales Solicitors Manual* (loose leaf service), Law Society of New South Wales and Butterworths, paragraph [5050].

296 See discussion in Chapter 6.

7.21. The Working Party recommends that there should be an ongoing requirement for practitioners to undergo continuing professional education as agreed between the professional bodies and the ASC. The Working Party envisages that the professional bodies and the ASC would specify continuing education programs administered by the professional bodies and review these at least every two years.

ONGOING WORK EXPERIENCE

7.22. Related to the issue of continuing professional education is the issue of continuing practical experience.

7.23. At present, there is no express requirement in the legislation to maintain a certain level of work to retain classification as an official, or registered, liquidator. However, practitioners are required to submit to the ASC details of the number of administrations performed in a three year period in a triennial statement.

7.24. In some jurisdictions a rotation system for court appointments serves to ensure that each official liquidator receives a certain minimum amount of work. However, as discussed later in this report, the rotation system is not an ideal way of maintaining experience levels.[297] In the case of registered liquidators, there is no existing mechanism to deal with the experience issue.

7.25. The Working Party considers that maintaining a reasonable level of practical experience is important to ensure insolvency practitioners remain competent in their field. How this should be achieved is also being considered by the Working Party reviewing the requirements for registration and regulation and of auditors.[298] That Working Party has suggested in its draft report that mandating continuing professional education obviates the need for strict annual requirements in this regard. However, the Auditors Review Working Party recommended that, if a registered company auditor did not perform relevant work for a period of five years, the supervisory body should be able to request the auditor to show cause why his or her registration should not be cancelled.

7.26. The Working Party agrees that a strict annual requirement for ongoing practical experience should not be imposed. However, a review over a longer time frame is appropriate.

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297 See discussion in Chapter 9.

298 Review of the Requirements for the Registration and Regulation of Auditors, Draft Report prepared by a Working Party appointed by the Commonwealth Government, April 1996, pp. 77–78.

7.27. The Working Party recommends that the ASC should be permitted to require a registered liquidator who does not perform any substantive insolvency work over a period of five years [or an official liquidator who does not perform any substantive insolvency work over a period of two years], to show cause why his or her registration (or official status) should not be cancelled.

SURVEILLANCE AND QUALITY ASSURANCE

7.28. The Working Party considers that surveillance programs are an important mechanism for the maintenance of standards.

7.29. The ASC has engaged in a surveillance program aimed at creating a climate of compliance and cooperation amongst insolvency practitioners. The program sought to maintain good practice and focused on lodgement of prescribed forms, keeping proper books and records, carrying out impartial investigations and ensuring returns to creditors are maximised.[299]

7.30. The ASC selected practitioners for surveillance primarily on matters of which it became aware which indicated there may have been a problem in the insolvency practice concerned. Surveillance visits involved a detailed examination of the practice. Although the focus was on encouraging compliance, the program included an investigative element. In 1994–95, 87 liquidators were visited which resulted in three referrals to the CALDB[300] and 37 cases where other action was taken.[301] The ASC's surveillance program was recently terminated due to budgetary constraints and the ASC now only conducts a complaints-driven program.

7.31. The ICAA and ASCPA also conduct surveillance programs known as the Quality Assurance Program. This program was introduced in 1994. It involves a review of a sample of members' files to ensure that the work performed meets minimum professional standards.[302] The reviews are conducted by trained reviewers. Practitioners are selected for review by the accounting bodies on the basis that each member will be subject to review at least once every five years. Unlike the former ASC program, members are not 'targeted' for review primarily on the basis of possible concerns in their practice. The focus of the Quality Assurance Programs is on education, rather than investigation.

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299 1995 *ASC Digest*, SPCH 136.

300 ASC referrals to the CALDB are discussed further in Chapter 8.

301 1995 *ASC Digest*, INFO 353.

302 ASCPA Handbook, PP5.

7.32. Arguably, the professional bodies are better placed than the ASC to conduct surveillance programs, because practitioners would have intimate knowledge of industry standards and would be better placed to apply those standards in a practical context. Furthermore, practitioners may be more ready to accept judgements made by fellow practitioners.

7.33. However, there are some possible concerns with a self-regulatory body having sole responsibility for this function. Where there are relatively few practitioners operating in a market, such as outside the major cities, there may be difficulties in finding an adequate number of unbiased practitioners to conduct surveillance visits. For a self-regulatory system to work effectively, independence of the reviewers would be of critical importance.

7.34. If the Quality Assurance Program is to be the only surveillance program involving insolvency practitioners, ideally the focus would shift from a solely educational program to include an investigative element. Client confidentiality, right of access to records, potential liability of the reviewer for defamation, and possible courses of action available where deficiencies are identified may need to be addressed, most likely through legislation.

7.35. The Working Party does not accept, at this stage, that the program conducted by the professional bodies, with its focus on education, is an acceptable alternative to an ASC program. Further, some practitioners may choose not to be members of professional bodies, so there should be some kind of independent surveillance system to cover those persons.

7.36. The Working Party recommends that the ASC should retain its complaints-based surveillance program and examine the feasibility of reviving the surveillance program it previously operated. The Working Party further recommends that the ASC and the professional bodies examine whether there is scope for greater mutual education and cooperation in the surveillance area.

7.37. Whichever body performs the surveillance role, there must be mechanisms in place so that appropriate disciplinary action can be taken to ensure compliance. This aspect is discussed further in Chapter 8.

PERFORMANCE BONDS AND PROFESSIONAL INDEMNITY INSURANCE

7.38. Currently, there are no statutory requirements for registered insolvency practitioners to obtain, or maintain, professional indemnity insurance.

7.39. There is a requirement to lodge and maintain a security deposit with the ASC in order to obtain registration. This deposit can be used by the ASC to pay compensation to any person who suffers loss or damage as a result of the failure of a registered practitioner to carry out their duties adequately and properly.[303] The ASC has determined that the security deposit must be in the form of a performance bond issued by certain financial institutions for a sum not exceeding $250,000.[304]

7.40. In July 1994, the ASC amended its policy statement dealing with the lodgement of security deposits.[305] As an alternative to lodging a performance bond, the ASC will now accept an undertaking from registered liquidators who hold practising certificates from the ICAA or the ASCPA to maintain professional indemnity insurance in accordance with the requirements of those professional bodies.

7.41. The policy statement indicates that the terms of the professional indemnity insurance must include:

(a) a minimum of $250,000 on each and every claim;

(b) cover for any civil or legal liability or any act, error or omission, subject to reasonably common exceptions; and

(c) provision for so called 'run-off' cover, whereby the liquidator maintains the policy for at least 7 years (or such period as the ASC deems appropriate) after registration ceases.

A practitioner seeking to use this option rather than a security deposit must also undertake to maintain a current practising certificate with the ICAA or the ASCPA.

7.42. Issues arising in relation to the regulation of professional indemnity insurance for insolvency practitioners are:

- whether it is necessary to regulate for a 'safety net' in the form of security deposits or professional indemnity insurance for corporate insolvency practitioners; and

- if so, the form that the regulation should take.

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303 Section 1284, Corporations Law and Regulations 9.2.05 and 9.2.06, Corporations Regulations.

304 The form of the performance bond is set out in ASC Pro Forma 14, *ASC Digest*, PF 199.

305 ASC Policy Statement 33, *ASC Digest*, PS 7/159.

Is Any Regulation Needed?

7.43. It is arguable that insolvency practitioners, like other professionals, have an incentive to maintain arrangements which would enable them to meet possible liabilities in order to protect their own assets. Accordingly, there is no need to regulate for these matters. However, a contrary view is that some professionals may choose to protect their interests not by taking out insurance, but by declining to hold any significant assets in their own names. As a consequence, the substance of any recovery for personal liability may be limited in the event that there is a successful action. There may, therefore, be a legitimate need to regulate for some kind of compensation mechanism. The Working Party favours this view.

Security Deposit v Insurance

7.44. The question arises whether professional indemnity insurance is a preferable mechanism to a security deposit as a means of protecting persons who suffer loss or damage as a result of a liquidator's default.

Procedure

7.45. Claims for compensation out of a security deposit lodged with the ASC may be made by lodging a claim in writing with the ASC.[306] After giving the liquidator an opportunity to be heard, the ASC makes a decision on the claim.[307] If the ASC decides that a person is entitled to a payment, the ASC will give the liquidator an opportunity to pay the amount directly to the successful claimant. If the liquidator will not or cannot make the payment:

- the payment will be made by application of the security deposit; and
- the ASC will consider whether to make application to the CALDB to have the liquidator's registration cancelled under paragraph 1292(2)(d) of the Corporations Law.[308]

7.46. By contrast, it would be necessary for a claimant to bring a successful action against a liquidator in court (or successfully settle such an action) in order to obtain the benefit of professional indemnity insurance cover. It could be assumed that insurers would have rights of subrogation which would allow them to defend or settle actions on behalf of the liquidator.

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306 Subregulation 9.2.05(3), Corporations Regualtions.

307 Subregulation 9.2.05(5), Corporations Regulations.

308 ASC Policy Statement 33, *ASC Digest* PS 7/159, paragraph 13.

7.47. In terms of procedural burdens and costs to claimants, the security deposit system is likely to be more advantageous than relying on professional indemnity insurance as it only requires claimants to lodge a claim with an independent administrative body at virtually no cost. In the event that the claim is settled expeditiously, there would be little difference relying on professional indemnity insurance. However, if this does not occur, claimants would have to go through the expensive, time consuming and uncertain process of bringing a court action which may be defended by insurers who have an advantage in terms of funding and tactical expertise. Bringing such an action involves risking significant adverse costs awards if the claim is unsuccessful.

Quantum

7.48. Issuers of performance bonds would, in most circumstances, require the person whose performance they are guaranteeing to provide them with some kind of protection in the event that the bond is called upon. For example, a bank or other institution issuing a bond to the ASC may require the liquidator concerned to provide security in the form of mortgages over property or third party guarantees which the institution may enforce in the event that the ASC calls upon the bond. Accordingly, there are limits to the amounts that may realistically be required in the form of performance bonds. As mentioned above, the maximum figure used by the ASC is presently $250,000. If part of the bond is used by the ASC to pay a claim, the liquidator must top-up the bond to that amount if they wish to remain registered.[309] If a liquidator choses not to 'top up' the bond, they would be in breach of the registration conditions and liable to have their registration cancelled. If that occurred, there would no longer be a source of funds from which claims could be paid.

7.49. The level of professional indemnity insurance cover is limited primarily by the amount of the premium a practitioner is required to pay. Currently, the ASC requires the insurance cover to be at a minimum level of $250,000 *on each and every claim.* This is liable to provide a greater level of protection in terms of quantum than the security deposit arrangement which does not exceed $250,000 at any one time. Further, the provision of 'run-off' cover for a period of seven years after registration ceases also provides further protection.[310]

7.50. Accordingly, in terms of quantum of available compensation, professional indemnity insurance provides a greater level of protection than the security deposit arrangements.

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309 ASC Policy Statement 33, *ASC Digest* PS 7/159, paragraph 11.

310 However, it is not clear what action would be available to enforce this requirement after registration has ceased.

Conclusion

7.51. The Working Party considers that the current system whereby the ASC allows practitioners to take out professional indemnity insurance instead of security deposits on condition that practitioners comply with requirements of a professional body is working satisfactorily. It does not require any immediate change except to expand it to encompass the legal professional bodies. However, in the long term, professional indemnity insurance could be expressly recognised as an ongoing requirement of registration in legislation and facilities used to monitor compliance, for example, by requiring practitioners to submit details of insurance on the annual statement or having a professional body certify maintenance of cover to the ASC.

PERIODIC REPORTING

7.52. The existing requirements for the lodgement of triennial statements are a means of keeping track of the activities of practitioners, including checking whether a practitioner is eligible to remain registered.[311]

7.53 The ASC is currently responsible for administering the lodgement of triennial statements and is given certain powers in relation to extensions and requiring lodgement in respect of specific periods.

7.54. The Working Party considers that periodic reporting requirements could operate as a key mechanism to ensure that practitioners comply with their ongoing obligations in a number of areas. However, the current system does not utilise the periodic reporting requirements to their full potential, since minimal information is required to be provided on the current statement and many of the ongoing requirements, such as professional education, are not mentioned. Rather, the current regulatory system relies heavily on criteria assessed at the point of registration. It is assumed that if practitioners meet the requirements at the time of registration they will, in the main, continue to meet those requirements for life (or at least while they continue to pay the charges for lodging the triennial statement).

7.55. The Working Party considers that this is not necessarily a valid assumption. Ongoing obligations such as continuing professional education, continuing practical experience and maintenance of appropriate professional indemnity insurance cannot be regulated by way of a registration criterion alone. Consequently there needs to be a system of monitoring practitioners after registration.

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311 For a description of the requirements and the form of the statement, see paragraph 3.37.

7.56. In the view of the Working Party, the utility of the statement for monitoring practitioners would be enhanced if it:

- was made into an annual statement, rather than triennial;
- required practitioners to provide, in addition to personal particulars:
  - certification of professional development courses undertaken;
  - a summary of insolvency work undertaken; and
  - details of professional indemnity insurance.

For ongoing requirements which overlap with requirements imposed by the professional bodies, there could be a streamlined system whereby practitioners could comply merely by providing evidence of continuing membership of a professional body.

Failure to comply with the ongoing requirements in respect of such matters would allow the ASC to issue a notice requiring the practitioner to show cause why he or she should not be deregistered and the ASC should have powers to deregister a practitioner if not satisfied with the response.

DISCIPLINE AND REMEDIAL SUPERVISION

8.1. In this chapter, the various mechanisms for dealing with the conduct of registered liquidators in relation to particular matters are considered. In particular, the two types of disciplinary procedures (statutory and self-regulatory) are considered as well as the various powers of the ASC and the courts to investigate conduct, make remedial orders and related matters.

DISCIPLINARY PROCEDURES

8.2. There are essentially two separate procedures which may be used in relation to disciplining corporate insolvency practitioners. The first is a 'registered liquidator specific' statutory procedure involving the ASC, the CALDB and the AAT. The second comprises the self-regulatory procedures set down in the internal rules of the professional bodies which are not designed specifically for corporate insolvency practitioners.

The Statutory System: ASC/CALDB/AAT

8.3. The CALDB is established under the ASC Law.[312] Its membership consists of a Chairperson (who is a legal practitioner) and two other members selected by the Minister from panels of five persons nominated by each of the ICAA and the ASCPA.[313]

8.4. Upon an application by the ASC, the CALDB is empowered under the Corporations Law to suspend or cancel a registered liquidator's registration if it is satisfied that the liquidator:

- has failed to comply with the requirements to lodge triennial statements;
- has ceased to live in Australia;

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312 Section 202 ASC Law.

313 Section 203 ASC Law.

- has failed to carry out or perform adequately and properly the duties of a registered liquidator; or

- is otherwise not a fit and proper person to remain a registered liquidator.[314]

Similar powers exist in relation to liquidators of specified bodies corporate.[315]

8.5. Where the ASC's application relates to a liquidator's failure to adequately or properly carry out or perform his or her duties, or the unfitness of the person to remain a registered liquidator, the CALDB is given additional powers to deal with the person by:

- admonishing or reprimanding the person;

- requiring the person to give an undertaking to refrain from engaging in certain conduct; or

- requiring the person to give an undertaking to refrain from engaging in certain conduct, except on specified conditions.[316]

If a person fails to give an undertaking as required, the CALDB may cancel or suspend the person's registration.

8.6. The CALDB's powers may be exercised whether or not the conduct in question constituted, or may have constituted, an offence, and whether or not any proceedings are brought in relation to the conduct.[317]

8.7. Proceedings of the CALDB are intended to be conducted with as much expedition and as little formality and technicality as possible.[318] However, the CALDB is still required to observe the principles of natural justice.[319] In particular, the CALDB must not make any orders or otherwise deal with a person unless it has given the person concerned an opportunity to be heard in relation to the matter.[320] It must also give the ASC an opportunity to appear.[321]

8.8. The CALDB is required to provide the liquidator and the ASC with written reasons for its decisions and to publish notices of its decisions in the *Commonwealth*

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314 Subsection 1292(2), Corporations Law.
315 Subsection 1292(3), Corporations Law.
316 Subsection 1292(9), Corporations Law.
317 Subsection 1292(11), Corporations Law.
318 Subsection 218(1) ASC Law.
319 Subsection 218(2) ASC Law.
320 Subsection 1294(1), Corporations Law.
321 Subsection 1294(2), Corporations Law.

of Australia Gazette.[322] Decisions of the CALDB are subject to review by the AAT at the instigation of the ASC, the liquidator concerned, or any other affected person.[323]

8.9. There have been few instances where conduct of liquidators has been referred by the ASC to the CALDB. According to the CALDB's latest annual report, from its establishment in 1991 to June 1996 there had been only nine referrals involving registered liquidators, and four of the persons involved were also registered auditors.[324] In 1995–96, only two liquidators were referred to the CALDB.[325]

8.10. As mentioned above, at present, only the ASC may refer matters to the CALDB. The figures indicate an apparent reluctance on the part of the ASC to do so. In this regard, it is understood the ASC has some concerns that proceedings before the CALDB are conducted in a manner which is too legalistic and consequently too expensive to prepare for.

8.11. In its 1994–95 annual report, the CALDB highlighted its own concerns about the lack of referrals.[326] In particular, the CALDB expressed concern about the manner in which matters were presented to it by the ASC. The CALDB also noted that it had introduced a pre-hearing conference procedure and a mediation facility in an effort to streamline the process. In this regard, the CALDB has asked for amendments to its enabling legislation to clarify its powers in this area.

8.12. Practitioners who are members of the ASCPA, the ICAA or the IPAA are bound by the codes of conduct and ethical standards of their respective bodies. These codes require members to apply relevant professional pronouncements when undertaking insolvency work. The Articles and By-laws of the organisations regulate the conduct of members. These provisions are comprehensive and establish and regulate the operations of investigative and disciplinary committees, appeals committees and provide for such matters as hearings, penalties, costs awards and so on.[327] The Investigative, Disciplinary and Appeals Committees may include lay members.

8.13. For example, the ASCPA Articles provide that a member may be penalised where (among other things) he/she has breached the Society's Articles, By-Laws and Pronouncements, engaged in conduct that is dishonourable, derogatory or not in the best interests of the Society or its members or has failed to observe proper professional

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322 Subsection 1296, Corporations Law.

323 Sections 1317A–1317D, Corporations Law.

324 Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 1996*, AGPS, Canberra, p. 3.

325 See citation at note 324.

326 Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 1995*, AGPS, pp. 8–10.

327 For example, ASCPA Articles 26–32 and By-laws 301.1–310.6 deal with regulation of conduct and disciplinary procedures.

standards, obtained admission by improper means, or has become an insolvent under administration.[328] Penalties that may be imposed include forfeiture of membership, suspension from membership, a fine not exceeding $50,000, censure and admonishment.[329] In addition, or as an alternative, the member may be required to undertake a course of professional development.[330] The affected practitioner may also be required to pay the costs of investigating and hearing the matter.[331] Appeals are allowed to the National Council where a member would be required to forfeit or suspend membership or pay a fine exceeding $5,000. However, if the appeal fails, the member is required to pay the costs of the appeal.[332]

8.14. The professional legal bodies in the States and Territories also have disciplinary regimes for their members which are supported by legislation, regulations and rules.

8.15. The IPAA does not have a formal disciplinary procedure. However, if a complaint is made against one of its members, it will investigate the complaint to determine if there is a case for action. If there is such a case, the matter is referred to the appropriate disciplinary committee of the member's foundation organisation, being the accounting bodies or a law society.

Commentary

8.16. Under the current statutory disciplinary system, responsibility for the processes of investigation, hearing and appeal are divided between the ASC, the CALDB and the AAT respectively. Under the system conducted by the professional bodies, various committees of those bodies perform all three roles.

8.17. The main advantage of the current statutory system is independence. The separation of the investigation/hearing/appeal roles between various bodies serves to ensure impartiality and fairness. However, there are considerable disadvantages in terms of costs and delay, particularly in relation to matters which are relatively straight forward, such as the failure to lodge triennial statements.

8.18. There may be considerable savings in costs if the professional bodies could take over the disciplinary role completely. However, a disciplinary system run by the professional bodies could give rise to a perception that the system is not truly independent. In addition, the merging of the investigation/hearing/appeal processes gives rise to obvious concerns about impartiality. Further, it is questionable whether

328 Paragraph 27(1) ASCPA Articles.
329 Paragraph 27(2) ASCPA Articles.
330 Paragraph 27(3) ASCPA Articles.
331 Paragraph 27(4) ASCPA Articles.
332 Paragraphs 30(2), 30(4) ASCPA Articles and By-law 309.

the committees of the professional bodies would be sufficiently funded and equipped to deal effectively with potentially long and complex proceedings.

8.19. Maintaining two parallel disciplinary systems may appear to be unnecessary duplication. However, in relation to matters involving allegations of serious misconduct which could result in substantial penalties, the Working Party considers that there are legitimate concerns in giving the professional bodies responsibility for the disciplinary role. In this regard, consideration should be given to the necessities of having a fair and impartial system and having a system which is seen to be so. The only way of ensuring this would be to have these matters dealt with by an independent body (or bodies).

8.20. It would be possible for the ASC to perform the disciplinary function itself, as it currently does in relation to securities dealers and investment advisers. However, the Working Party considers that, from a fairness perspective, there are advantages in retaining separate responsibility for the investigation and hearing roles, at least in relation to matters involving alleged misconduct.

8.21. The disciplinary procedures in relation to registered liquidators are similar to the procedures in relation to registered company auditors. The Working Party notes that the role of the CALDB and the difficulties mentioned above have been considered in the context of the Review of the Requirements for the Registration and Regulation of Company Auditors.[333] In its draft report, the Working Party conducting that review stated that:

- administrative matters, being the failure to lodge reporting statements or cancellation of registration due to a disqualification or prohibition order, should be dealt with not by a CALDB but by the body charged with registration and general supervision of practitioners (which would, in the case of auditors, be a professional body under authorisation from the ASC);[334]

'conduct' matters should continue to be dealt with by the CALDB at a formal hearing and natural justice principles should be observed, unless the ASC agrees to a particular conduct matter being conducted by the registering and supervisory body.[335]

8.22. The Working Party conducting the auditors' review considered that there is little justification for using the resources of a disciplinary body on matters such as a failure to lodge statements. However, a disciplinary board conducting a formal hearing and observing the principles of natural justice should be used where matters of

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333 Review of the Requirements for the Registration and Regulation of Auditors, Draft Report prepared by a Working Party appointed by the Commonwealth Government, April 1996, Chapter 9.

334 See note 333, draft recommendation 9.3.

335 See note 22, draft recommendations 9.6., 9.7.

judgement and professional knowledge are required, for example, in cases alleging failure to adequately and properly carry out duties and functions.

8.23. A further issue considered by the review dealing with auditors was the penalties that the CALDB was able to impose. Currently, they are permitted to suspend or cancel registration, admonish or reprimand a person. In its draft report, the Working Party dealing with auditors concluded that greater flexibility, particularly in relation to the imposition of fines, would be a desirable reform. In addition, the Working Party recommended that consideration should be given to allowing the CALDB to enforce orders made during the pre-hearing period and use mediation and arbitration.[336]

8.24. The Working Party agrees with the views expressed by the Working Party conducting the auditors review regarding the matters mentioned above. The Working Party considers that there is no reason to distinguish the powers that the CALDB has in relation to those issues in relation to auditors from the powers it has in relation to liquidators.

8.25. The Working Party recommends that the statutory disciplinary procedure involving the ASC, the CALDB and the appeal mechanism to the AAT should be retained for **conduct matters.** However, the professional accounting and legal bodies should also have a right to bring a matter before the CALDB. **Administrative matters** should be dealt with by the registering authority, which is currently the ASC.

8.26. Further, the Working Party recommends that the CALDB should be given greater flexibility in the penalties it may impose and should be given powers to enforce orders made during the pre-hearing period and to use mediation and arbitration.

REMEDIAL SUPERVISION

8.27. Responsibility for remedial supervision, that is, activities directed at providing a remedy for an inappropriate act or omission by a practitioner in a particular matter, is currently shared by the ASC and the court.

336 See note 333, draft recommendation 9.9.

The ASC

8.28. As discussed earlier in this report,[337] the role of the ASC in relation to remedial supervision encompasses a number of areas.

Inquiries

8.29. The ASC has power to inquire into the conduct of liquidators, scheme administrators and controllers where complaints are received by the ASC from any person regarding the performance of duties.[338] The ASC may also initiate an inquiry where it appears to the ASC that a practitioner is not faithfully performing his or her duties/functions, or has breached or is not observing a requirement of the Law, the rules or regulations, the court or, in the case of controllers, the order or instrument of appointment.[339]

8.30. Unlike the court, the ASC has not been given specific powers in the Corporations Law to require practitioners to answer questions on oath, or to undertake an investigation into the books of the practitioner.

8.31. The ASC has some compulsive powers which are set out in the ASC Law. The powers of the ASC to inspect books may be exercised for the purpose of the performance of its responsibilities under national scheme laws such as the Corporations Law.[340] Accordingly, in some circumstances, the ASC could use those powers for the purpose of carrying out an inquiry into the conduct of a practitioner. However, generally the powers in the ASC Law regarding compulsory examinations may only be used where the ASC is investigating a possible contravention of the Corporations Law or other statute which concerns the management of a body corporate or involves fraud or dishonesty relating to a body corporate, securities or futures contracts.[341] The powers could not be used in relation to an inquiry into a possible breach of duties or other requirements where there is no ongoing investigation of a contravention of the law.

8.32. Therefore, where a possible breach of duty or other requirements has occurred but there is no formal investigation on foot in relation to a possible contravention of the law, the ASC would need to seek the assistance of the court in order to conduct a compulsory examination.

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337 See Chapter 3.

338 Paragraphs 536(1)(b), 411(9)(b), 423(1)(b), Corporations Law.

339 Paragraphs 536(1)(a), 411(9)(b), 423(1)(a), Corporations Law.

340 Paragraph 28(a) ASC Law.

341 Section 13 ASC Law.

8.33. The Working Party is aware that any proposal to expand the ASC's compulsory examination powers is likely to be contentious, particularly in the light of recent criticisms by the Senate Legal and Constitutional References Committee in its report on the investigatory powers of the ASC.[342] However, the Working Party considers that such a proposal should be given consideration because:

- the existence of compulsive powers in relation to inquiries into the conduct of insolvency practitioners can be justified on similar grounds as compulsive powers the ASC already has; and

- the court already has these powers and, arguably, the ASC is a more appropriate body than the court to conduct inquiries into these matters.

8.34. Issues concerning whether, and to what extent, privileges and immunities would apply to an examination, and what rights of review should be available in relation to a decision to exercise the powers, would need to be considered in detail to ensure that an appropriate balance is struck between making the procedure as effective as possible and avoiding practitioners being exposed to an excess of power. However, the Working Party considers that these matters could be resolved by imposing 8.35.

8.35. The purpose of the proposal is not to attempt to maintain appropriate standards of conduct by disciplining practitioners, although disciplinary proceedings might arise out of matters connected with the subject matter of an inquiry. Rather, the proposal would provide an important remedial measure aimed at protecting 'third parties', such as creditors, in particular matters. The outcome of an inquiry could, for example, determine whether the estate of a company should be compensated due to the default of a liquidator.[343] The inquiry may lead to a wider investigation which is not restricted to the conduct of a liquidator, but involves the conduct of directors or other persons and breaches of laws unrelated to liquidator's duties. It is, therefore, important that the inquiries are conducted in a timely manner by a well-resourced body which is completely impartial, and is seen to be so by all concerned.

8.36. The Working Party recommends that the ASC's powers to carry out **inquiries into conduct** should remain. However, consideration should be given to whether the ASC should be permitted to exercise compulsive powers for this purpose, or at least be given an express power to request the court to exercise its own compulsive powers for this purpose. The ASC should also retain its existing powers to submit reports to the court and apply for remedial orders.

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342 Australia. Parliament, Report by the Senate Legal and Constitutional References Committee, *The Investigatory Powers of the Australian Securities Commission*, June 1995, Canberra, in particular pp. 65—94.

343 Subsection 536(2), Corporations Law.

Reports and Applications

8.37. The ASC has power to report any matter to the court which, in its opinion, is a misfeasance, neglect or omission on the part of a practitioner. In response, the court may order the practitioner to make good any loss that the estate of the company has sustained, and any other orders it thinks fit.[344] Like the power to conduct inquiries, this power may be exercised in relation to liquidators, scheme administrators and controllers, but not in relation to voluntary administrators or deed administrators.

8.38. In relation to companies under voluntary administration or a deed of company arrangement, the ASC has the power to apply to the court for orders where the administrator concerned has managed, or is managing, the company's business, property or affairs in a way which is prejudicial to the interests of some or all creditors or members, or where the practitioner has done, or proposes to do, something that would be prejudicial.[345] Creditors and members of the company concerned may also apply to the court in those circumstances,[346] and the court, in response, may make such order as it thinks just.[347]

8.39. There is also a specific power for the ASC or a creditor to apply to the court to seek removal of a voluntary administrator or a deed administrator.[348]

8.40. The ASC has a general power to apply to the court for an order against any person in cases involving fraud, negligence or breach of trust where a corporation has suffered, or may suffer, damage as a result.[349] This application could be made in respect of any practitioner.

8.41. The Working Party considers that these general powers are appropriate and should be retained as they provide a significant degree of flexibility to enable the ASC under the scrutiny of the court to ensure that any person adversely affected by the default of an administrator may be compensated.

344 Subsection 536(2), paragraphs 411(9)(b), 423(1)(b), Corporations Law.
345 Subsection 447E(1), Corporations Law.
346 Subsection 447E(3), Corporations Law.
347 Subsection 447E(1), Corporations Law.
348 Section 449B, Corporations Law.
349 Subsection 598(2), Corporations Law.

The Courts

8.42. The role of the courts in relation to the supervision of corporate insolvency practitioners has a long history which is described in Chapter 3. In summary, it encompasses: inquiries into conduct (at the instigation of the ASC or on receipt of complaints); mandatory examinations and inquiries of practitioners; orders for removal; enforcement of duties and supervisory directions; review of remuneration; and making orders for compensation.

8.43. There are essentially two main issues concerning the court's involvement in the process. The first issue is whether it would be more effective for another body to carry out those roles. The second, somewhat related issue, is whether it would be possible for a non-judicial authority to be given responsibility for such matters.

Inquiries and Examinations

8.44 The court has a general power to conduct inquiries where it appears to the court that a liquidator (including a provisional liquidator) has not faithfully performed his or her duties, or has not observed (or is not observing) a requirement of the court, or the Corporations Law and associated regulations and rules.[350] The court may also conduct an inquiry where a complaint is made to the court by *any person* in respect of the performance by a liquidator of his or her duties.[351] The powers to inquire into the conduct of liquidators also apply to scheme administrators,[352] and there are similar powers relating to controllers.[353] The ASC has identical powers in relation to the conduct of these inquiries. Where the ASC or the court carries out such an inquiry, the court may take 'such action as it thinks fit'.[354] No guidelines as to the conduct of the inquiries are set out in the Law or in the associated regulations, although the rules of the courts contain some provisions which address some procedural aspects.[355] For the most part, the procedure to be followed is determined by the court in each particular case, having regard to the interests of fairness.[356] Inquiries by the court are not automatic on receipt of a complaint—the court must be satisfied that it is in the public interest to conduct an inquiry.[357] The ambit of the inquiry is for the court to determine and may include other administrations in which the practitioner has been involved.

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350 Paragraph 536(a), Corporations Law.

351 Paragraph 536(b), Corporations Law.

352 Paragraph 411(9)(b), Corporations Law.

353 Subsection 423(1), Corporations Law.

354 Subsection 536(1), Corporations Law.

355 See for example Order 71 Rule 73 of the Federal Court Rules, Part 80A Rule 29 of the NSW Supreme Court Rules.

356 *CCA v Harvey* [1979] ACLC 32,296 at 32, 317.

357 *Burns Philp Investments Pty Ltd v Dickens (No 2)* 10 ACSR 626.

8.45. It is arguable that courts are not generally geared to conducting these inquiries. This issue was discussed in detail by Marks J in *CCA v Harvey*.[358] However, it has also been noted by courts on some occasions that, despite the use of the word 'inquiry' in the legislation, inquiries by the court into conduct of practitioners are essentially adversarial proceedings between the practitioner and the party making the complaint.[359] In practice, the complainant will set out, by way of affidavit, the grounds on which the inquiry is sought and possibly also the nature of the relief sought. Commonly, this will include substantive orders such as the removal of the practitioner from the administration, requiring a practitioner to pay compensation, or ruling on entitlements to remuneration and expenses. In addition to substantive orders, the court may make 'findings' about the conduct which may be of considerable significance to the practitioner concerned.[360]

8.46. The Working Party considers that, except in the case of administrators appointed by the court, who are the court's own officers, there are no readily apparent reasons for the courts to retain powers to undertake inquiries of their own motion. Except in the case of official liquidators, the court's role in supervision should be limited to determining matters brought before it by the parties and, where appropriate, making orders in that regard. Although, in practice, this is essentially how the provisions have operated, it may be desirable to clarify the position on the face of the legislation.

8.47. In some cases, the ASC will not be in a position to fund an investigation or court proceedings within the time frame sought by the complainant or at all. The Working Party, therefore, considers that it should be possible for a person to seek the direct intervention of the court in particular cases of alleged breach of duty, legislation or court requirements. However, the court should not be responsible for 'inquiring' into complaints in the sense of gathering evidence, examining books and so on.

8.48. The Working Party notes that certain aspects of the role of the court in supervising practitioners are currently subject to challenge in the High Court.[361] Regardless of the outcome of that litigation, the Working Party considers that there would be advantages in reviewing the role of the courts in supervising insolvency practitioners in order to ensure that the system works effectively. For this purpose, consideration should be given to the matters mentioned above.

8.49. The Working Party recommends that the provisions of the Corporations Law

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358 [1979] ACLC 32,296 at 32, 317; (1979) 4 ACLR 259 at 275.

359 See, for example, *Re Day & Dent Constructions Pty Ltd (in liq)* ((1985) 3 ACLC 98 at 113.

360 *Re Ah Toy* (1986) 4 ACLC 480 at 483.

361 *Gould v Brown (In his capacity of Amann Aviation Pty Ltd)*—Matter No 125 of 1996. Appeal to the High Court from the judgement and orders of the Federal Court given and made on 24 June 1996 in the matter of *BP Australia v Amann Aviation Pty Ltd* (1996) 21 ACSR 108.

concerning the role of the court in supervising practitioners should be reviewed.

APPOINTMENT

9.1. In the majority of corporate external administrations, including voluntary administrations, receiverships, and voluntary members' and creditors' liquidations, the insolvency practitioner is selected by the creditors, members or directors making the appointment in accordance with rules set down in the Corporations Law and the Corporations Regulations in relation to the administration concerned.

9.2. In the case of a winding up ordered by the court, the Corporations Law provides that the court may appoint an official liquidator. The Corporations Law does not regulate the procedure for selecting the practitioner and the courts of each relevant jurisdiction have developed their own rules and conventions to deal with the selection process.

9.3. The rules differ between jurisdictions, but there are essentially two types of systems: the nomination system and the rotation system. In a nomination system, the applicant, who is usually a creditor petitioning the court for a winding up order, nominates a preferred practitioner and the court will, in the ordinary course, appoint the nominated practitioner. In a rotation system, the petitioning creditor has no say in the appointment and the court selects a practitioner from a list of official liquidators by rotation. The rotation system has been criticised because of possible anti-competitive effects.[362]

9.4. This chapter focuses on the system for selecting official liquidators for court appointments. Some issues concerning the appointment of receivers and voluntary administrators are also discussed at the conclusion of the chapter.

APPOINTMENT OF OFFICIAL LIQUIDATORS BY THE COURT

9.5. The role and duties of official liquidators and their status as officers of the court is discussed in Chapter 2.

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362 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 83–87.

Features of the Current System

9.6. Under the current system:

- where an order is made for the winding up of a company by the court, the court may appoint an official liquidator to be the liquidator of the company;[363]

- the procedures by which courts select official liquidators for appointment are set out in the rules of court and by convention and vary between jurisdictions; and

- some jurisdictions employ a rotation method, others a nomination method, and some use a combination of the two.

9.7. The following table summarises the position in each of the relevant jurisdictions.

Table 9.1: Appointment Systems for Official Liquidators

Court	System of appointment	Mechanics of rotation system (if any)	Rules
Federal	Nomination system and default rotation system	List of official liquidators	Order 71, Rule 39 of the Federal Court Rules
NSW Supreme	Rotation (nomination system for provisional liquidators)	Firm is on the register, rather than individual practitioners There is a regional list[364]	Part 80, Div 4 of the Supreme Court Rules 1970 (NSW)
TAS Supreme	Nomination system and default rotation system	Court appoints liquidator nominated by creditors in same area company trades	Part X, Div 8 of the Supreme Court Rules 1965 (TAS)
SA Supreme	Nomination system	Not applicable	Part XI of the Supreme Court (Corporations) Rules 1993
QLD Supreme	Nomination system	Not applicable	Rule 63 of the Corporations (Queensland) Rules 1993

363 Subsection 472(1), Corporations Law.

364 The regional list in New South Wales was discussed in detail in Chapter 6.

Table 9.1: Appoiontment Systems for Official Liquidators continued

Court	System of appointment	Mechanics of rotation system (if any)	Rules
WA Supreme	Nomination system and default rotation system	List of official liquidators	Order 81G, Rule 75 of the Rules of the Supreme Court 1971
VIC Supreme	Rotation system	Rigidly applied selection from list of official liquidators	Rule 8.09 of the Supreme Court (Companies and Securities) Rules 1985
NT Supreme	Nomination system	Not applicable	Rule 30 and Part XI of the Supreme Court (Companies) Rules 19896 (NT)
ACT Supreme	Nomination system	Not applicable	Part 5.4, Div 8 of the Rules of the Supreme Court ACT

9.8. The two main areas of concern regarding the current system for selection of official liquidators by the court are the:

- use of a rotation system in some jurisdictions which could have anti-competitive effects;[365] and
- lack of uniformity between jurisdictions which may result in 'forum shopping'.

Why Have Court Appointments?

9.9. A threshold issue regarding appointment of liquidators by the court is whether there is a need for the court to be involved in the selection of practitioners at all. As mentioned above, the court is not involved in the appointment of practitioners in other types of administrations, although in some circumstances it can hear challenges to appointments. It would be possible to amend the Corporations Law so that, when the court orders a winding up, the practitioner to conduct the administration is appointed by, for example, the person(s) making the application, a resolution of a meeting of creditors, or by the ASC. The court would not become involved in the appointment

365 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 83–87.

unless there was a challenge to the appointment. Alternatively, the court could confirm an appointment made by the applicant.

A Matter of Principle

9.10. If the legislature were to include rules for selecting and appointing practitioners as part of the Corporations Law by persons other than the courts, there would, from one perspective, be a significant change in the fundamental principles on which court-ordered liquidations are based. A winding up which is ordered by the court has traditionally been viewed as a winding up **by the court** and the official liquidator acts as a representative of the court in conducting the administration. The Corporations Law provides for some powers of the court to be delegated to the practitioner, subject to the control of the court.[366] The official liquidator is entrusted with the reputation of the court for impartial and proper dispatch of duties.[367] Viewed in that light, it may be considered appropriate that the law provides for the court to make the appointment and it is also proper that the court should have a discretion to appoint a practitioner of its own choosing.[368] Amending the law so the appointment is made by another party would blur the distinction between court-ordered liquidations and other administrations and would require significant consequential changes to the insolvency framework set out in the Corporations Law.

9.11. On the other hand, it is arguable that having someone other than the court make the appointments would not be a significant change, either in principle or practice. Even though a court-ordered winding up is viewed as being conducted by the court, it is, like the company itself, a creature of statute. In this regard, it is arguable that the legislature has already placed a significant fetter on the court's discretion by providing that the court must select the practitioner from a list of official liquidators kept by the ASC.[369] Furthermore, the courts do not, in practice, take a pro-active role in selecting a practitioner. Neither the nomination nor the rotation systems require the court to become involved in the selection process unless a party asks it to depart from the usual practice, in which case it makes a ruling based on the evidence put before it. In

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366 Section 488, Corporations Law.

367 per Street J in *Duffy v Super Centre Development Corporation Ltd* (1967) 1 NSWR 382 at 383.

368 In the case of in *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) & Anor v Attalex Pty Ltd (No 2)* (1984) 2 ACLC 752, McHugh JA (at 773), when commenting on the discretion of the court to appoint a liquidator under the former Companies Code, stated that: 'It is hardly to be supposed, however, that the Legislature intended that the Court's choice was simply to approve or disapprove that official liquidator, willing to act, who is nominated by the applicant for winding up of a company. Virtually the whole history of the appointment of liquidators is against such a notion. Whatever the form of the legislation, the Court has always asserted a right to reject one nominee and appoint another.'

369 The provision concerned, section 472, Corporations Law, actually provides that 'the Court *may* appoint an official liquidator...' However, it is generally accepted that the Court must not select a person other than an official liquidator—see, for example, *Pipkin v Corporate Affairs Commission (SA)* (1987) 11 ACLR 433.

particular, under the nomination system, which seems to be the most common, the court appointment is effectively a 'rubber stamp' for a selection made by the petitioning party. Accordingly, enacting the 'usual practice' as law would not make a practical difference to this framework.

9.12. The Working Party tends to favour the latter view. However, it acknowledges that any proposal to replace the court's discretionary power of appointment with a power to be exercised by another party should be considered in consultation with the courts and with due regard to constitutional issues which may arise regarding the separation between judicial, executive and legislative powers. The issue of how to deal with assetless administrations also comes to the fore if there is no system of court appointment.[370] The issue also interacts substantially with the question of whether to retain the category of official liquidator.[371]

Uniformity

9.13. A key concern with the current system for appointment of insolvency practitioners is the lack of uniformity between jurisdictions. Since the courts in each jurisdiction differ in the way they select practitioners, persons making an application to have a company wound up may be influenced to make the application in one jurisdiction rather than another in order to be assured of a particular selection process. For example, a petitioning party (or their legal adviser) with an asset-rich administration who wants to have a particular practitioner appointed may choose to make the application in a jurisdiction which uses a nomination system. On the other hand, a person seeking to wind up an assetless company may be attracted to a jurisdiction which uses a rotation system if they have difficulty finding a practitioner to consent to conducting an administration without an indemnity for costs.

9.14. One of the major objectives in establishing a national corporate regulation scheme and the Corporations Law was to provide a seamless legal and administrative regime for corporate regulation across Australia. In this regard, it is generally agreed that the establishment of the national scheme, compared to the former cooperative scheme, has been successful in reducing the complexities and costs involved in doing business in Australia, particularly in relation to companies which trade across state borders, and increasing confidence in the marketplace.

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370 For further discussion on dealing with assetless administrations, see Chapter 10.

371 The abolition of the official liquidator class was recommended in Chapter 6.

9.15. In the light of those considerations, the Working Party considers that the potential for forum shopping between jurisdictions is not a desirable outcome of the lack of uniformity in the selection processes for official liquidators. On the other hand, it has not been identified as a problem which has created significant difficulties in practice.

Conclusion

9.16. Having regard to the above matters, the Working Party recommends that, in the long term, consideration be given to substantive changes to the Corporations Law framework which minimise the distinction between court-ordered and voluntary liquidations in terms of the qualifications and appointment of liquidators. The Working Party envisages that these changes would see the abolition of the category of official liquidator altogether.[372]

9.17. The Working Party also recommends that the rules relating to the selection of liquidators by the court be made part of the Corporations Law in order to establish uniformity across jurisdictions.

Selection System

9.18. In the event that the Working Party's recommendation that the category of official liquidator should be abolished is not proceeded with in the near future, consideration should be given to the question of whether official liquidators should be appointed through a nomination system or a rotation system.

9.19. The main arguments advanced in favour of using a nomination system for selection of official liquidators are that:

- selection of official liquidators by the market encourages competition for insolvency services;
- the most skilled and efficient official liquidators will be rewarded;
- the number of official liquidators required by the courts will be set by market forces; and

372 See note 371 above.

- creditors are encouraged to seek appointment of the most able and competitive liquidators based on skill, experience, efficiency and/or costs.

9.20 The main arguments in favour of a rotation system for selecting practitioners are that it:

- prevents inappropriate relationships developing between insolvency practitioners and creditors;
- avoids entrenching liquidation work in a small number of large firms;
- ensures all official liquidators receive a reasonable amount of work thereby maintaining their experience levels;
- enables less experienced practitioners to gain more experience than they may otherwise obtain; and
- spreads the burden of assetless administrations.

Anti-Competitive Effects

9.21. The Working Party received submissions to the effect that the rotation system impedes competition and may not be in the best interests of creditors, particularly where an administration requires particular skills.

9.22. It is difficult to argue that a rotation system does not produce anti-competitive effects in relation to those administrations to which it applies, since practitioners or firms appearing on the rotation list will be appointed when their turn comes around, rather than being appointed on the basis of their own expertise, efficiency or suitability for the particular administration involved. The rotation system operates on the assumption that all practitioners who attain official liquidator status are equally capable of performing every court-ordered liquidation. However, notwithstanding the rigid entry requirements for that class, it is likely that some official liquidators are more suitable than others for particular administrations, either in terms of experience or available resources.

9.23. While the existence of anti-competitive elements connected with a rotation system may be accepted, the nature and impact of those elements is a matter of debate. One submission to the Working Party argued that the business environment for insolvency practitioners has changed markedly since the time of the Harmer and former Trade Practices Commission reports. Court-ordered liquidations are now such a small part of the work done by insolvency practitioners that the rotation system can have only a negligible impact, if any, on competition between them.

Inappropriate Relationships

9.24. One of the virtues of a rotation system for the selection of official liquidators is that it assists to ensure the independence of the practitioner. There are two concerns about inappropriate relations which may arise if a nomination system is used rather than a rotation system:

- the formation of 'clubs' comprising lawyers and liquidators who refer work to each other; and

- the independence of the insolvency practitioner from any particular party involved in the liquidation, such as a creditor.

Clubs

9.25. If a nomination system is used rather than a rotation system, relationships may develop between groups of legal practitioners, who act for creditors or other persons applying to the court, and official liquidators, whereby the legal practitioners and insolvency practitioners refer each other work. A result of these informal arrangements could be that solicitors would tend to recommend the appointment of their favoured liquidators, with little regard to the merits of the appointment. Unless an official liquidator can become a member of one of these 'clubs', they are unlikely to be nominated for appointment by those persons irrespective of their suitability. In practice, the nomination system may not necessarily result in the market rewarding those practitioners who are the most competent and efficient, but rather those who are most successful in 'cultivating' relationships with solicitors acting for petitioning parties using the prospect of cross-referrals as an incentive.

9.26. In its submission to the Working Party, the ASC noted the argument that an inappropriate relationship may develop between liquidators and solicitors who refer work to one another. However, the ASC considered that creditors seek efficient conduct of administrations and this disciplines the market for insolvency practitioners and induces persons such as solicitors, to seek competent practitioners.

9.27. The Working Party notes that the nomination system which currently operates in relation to other forms of external administration also has the potential to give rise to 'clubs' between legal practitioners and insolvency practitioners. While there may be instances of this occurring, it has not been suggested that a rotation system should be introduced for those administrations in order to prevent its occurrence. There are, in the Working Party's view, no factors peculiar to a court-ordered liquidation which justify use of a rotation system in order to prevent the formation of 'clubs'. Furthermore, this possibility has not been identified as a significant problem in those jurisdictions which use a nomination system for selection of official liquidators for court ordered liquidations.

9.28. Accordingly, the Working Party agrees with the view expressed in the report of the former Trade Practices Commission[373] that the possibility of the establishment of 'clubs' of legal practitioners and insolvency practitioners is not a sufficient reason for rejecting the nomination system for selecting official liquidators.

Independence

9.29. The second element to the issue of inappropriate relationships is a concern that, if official liquidators are nominated for appointment by a particular party, there may be a tendency for the liquidator to give undue weight to the interests and wishes of that party. Pre-appointment discussions could take place regarding the possible conduct of the administration and appointments could be made on the understanding that the liquidator will take, or refrain from taking, a particular course of action. Liquidators may tend to have a bias against acting contrary to the wishes of the appointing party, particularly if that person could be a direct or indirect source of further work.

9.30. This would be a most undesirable consequence of a nomination system because it is very important that officers of the court exercise independent judgement and do not act in the interests of any particular party but rather in the interests of creditors and shareholders as a whole. They must also have regard to their status as officers of the court.

9.31 The importance of the independence of practitioners appointed by the court has been considered by the courts on a number of occasions. Some relevant passages from judgements are as follows:

> 'The principle to be applied is clear and was indeed quoted by the learned judge from McPherson, *The Law of Company Liquidation*, 3rd ed, p 209 where it is said "The guiding principle in the appointment by the court of a liquidator is that he must be independent and must be seen to be independent". The authorities to which we were referred amply support that statement of principle and it is unnecessary to refer to them.'—Full Court of Victoria in *Re National Safety Council of Australia Victorian Division* (1989) 15 ACLR 355 at 360.
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> ...The winding up is by the Court which for the purposes the liquidator is. As such he is entrusted with the reputation of the Court for impartial and proper dispatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge.

373 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 86.

> When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the Court.'—Marks J of the Victorian Supreme Court in *Commissioner of Corporate Affairs v Harvey* (1979) 4 ACLR 259 at 286.'

9.32. Concerns about the lack of independence of practitioners cannot be dismissed lightly. Complaints regarding improper relationships between external administrators and advisers, creditors, directors or debtors are commonly received by the ASC and the Minister responsible for Corporations Law.

9.33. However, there are mechanisms currently available for concerned parties to apply to a court to remove a nominated practitioner after appointment. In the case of official liquidators, the removal must be 'on cause shown'.[374] The courts have indicated that it will not necessarily be enough to demonstrate to the court that the majority of creditors are in favour of removal, although this would be a relevant consideration.[375] The court must be satisfied, on the evidence presented to it, that it is desirable in the interests of all those interested in the corporation's assets that a particular person should not manage them, although there is no need to show any personal misconduct on the part of the liquidator concerned.[376]

9.34. Although there are instances where liquidators have been removed by the court due to a lack of independence or perceived conflict of interest,[377] this remedy is not often practicable. Aside from the obvious difficulties involved for an interested party in preparing a case to satisfy the court that the removal is justified as well as the legal and other expenses involved in bringing an action of this nature, there are other costs which will be incurred. The incumbent practitioner has usually done a certain amount of work which would need to be reviewed by any replacement. The replacement practitioner should be remunerated for reviewing the work previously done, which adds to the overall costs to the creditors.

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374 Subsection 473(1), Corporations Law.

375 per Ryan J in *Re Giant Resources Ltd* (1991) 9 ACLC 1,418 at 1,424–1,425.

376 *Re Adam Eyton Ltd & Co* (1887) 57 LJ Ch 127; 36 Ch D 299, quoted with approval by Marks J. in *Commissioner for Corporate Affairs v Harvey* 4 ACLR 259 at 287.

377 See for example, *Re Queensland Stations Pty Ltd (in liq); Re Coutts Finance Pty Ltd; Re Coutts Townsville Pty Ltd* (1991) 9 ACLC 1,341; *In the matter of Keith Morris Pty Ltd, K.D. Morris & Sons (NSW) Pty Ltd, Kirr Investments Pty Ltd* (1975–1976), Corporations Law ¶40-206.

9.35. The rotation system goes a long way towards preventing improper relationships arising between insolvency practitioners and particular parties in relation to court-ordered liquidations. The question is whether there are any factors peculiar to these liquidations which make the independence of the practitioner more important than it is in other external administrations, so that a rotation system is justified in that context but not in the others.

9.36. Arguably there are such factors. Court-ordered liquidations occur, by definition, in a litigious environment. There will almost always be parties involved who have interests which clash with the interests of other parties and it is important that the liquidator is not aligned, or seen to be aligned, with a particular individual or interest group. There is also the status of the official liquidator as a representative of the court to consider—see the passages quoted from judgements above.[378]

9.37. On the other hand, it is arguable that there are sufficient safeguards to ensure independence apart from the rotation system. The rigorous entry standards require that persons who attain the status of official liquidator to meet the highest professional and ethical standards. If practitioners fall short of these standards in the course of any particular administration, there are mechanisms by which their conduct can be supervised including the possibility of removal by the court. There is also the prospect of disciplinary proceedings and, ultimately, the loss of official liquidator status. In those circumstances, it is arguable that there is no need for a rotation system as a further preventative measure.

Spreading of Work

9.38. A further reason advanced in support of a rotation system is that it equitably distributes the available work among practitioners. It is argued that this is in the public interest because:

- it ensures that the work does not become entrenched in a small number of large firms;
- all official liquidators will maintain their experience levels; and
- it gives less experienced practitioners an opportunity to gain experience they may not otherwise get.

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378 This argument might be considered 'begging the question'—the status of official liquidators as officers of the court also needs to be justified—see above discussion in paragraphs commencing at 9.9.

9.39. The Working Party agrees that the entrenchment of work in a small number of firms would not be a desirable outcome. However, there is no evidence that the work has actually been entrenched in a small number of firms in the jurisdictions which do not use the rotation system.

9.40. The Working Party considers that it is important that official liquidators maintain a minimum level of experience in court-ordered liquidations. However, it queries whether a rotation system is an appropriate means of achieving this. The Working Party has sympathy with the view of the former Trade Practices Commission that, in light of the already stringent experience requirements for entry, it is difficult to justify use of a rotation system to obtain additional experience.[379]

Assetless Administrations

9.41 Where an assetless company is ordered into liquidation by a court, the liquidator conducting the administration has no source of remuneration unless creditors are prepared to indemnify the practitioner for expenses incurred. It was noted in the Harmer Report[380] that creditors are unlikely to do this where there is little prospect of any recovery. Consequently, in many instances of court-ordered liquidations, the conduct of the administration actually imposes a cost, rather than a benefit, on the liquidator concerned.[381]

9.42. The final major argument in support of a rotation system is that it has the effect of spreading the burden of administrations where little or no remuneration will be received. When commenting on the rotation system operating in New South Wales, one judge noted the following:

> 'Unless a system exists for inducing official liquidators to take the unremunerative liquidations, it seems likely that, in many cases, either liquidators will not be found at all or the work will be done less thoroughly than it should...
>
> Ever since the *Companies Act, 1936*, the Court, when appointing liquidators, has had available at least two liquidators, each of whom was required to take any case allocated to him. The general public interest in the winding up of companies and the Court's duty always to appoint a liquidator point to the importance of a pool of liquidators being available

379 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 84.

380 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 337.

381 Evidence given to the former Trade Practices Commission suggested that the figure was in the order of 70 per cent—see Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 68.

> to the Court beyond the nominee of the applicant for a winding up. The Report of Mr Justice Helsham's Committee demonstrates that, without such a group or the provision of external funds, there may be difficulties in obtaining liquidators for many windings up.'[382]

9.43. This argument was considered at some length in the report of the former Trade Practices Commission.[383] The Commission took the view that minimal resources needed to be dedicated to assetless administrations, so the burden on practitioners is not great in any event. Provisions in the Corporations Law limit the extent to which a liquidator is required to incur expenses in the case of assetless companies.[384] However, experienced insolvency practitioners have stressed that the cost component associated with compliance with the Corporations Law is significant in the case of an assetless company. In particular, the accounting and reporting obligations imposed on liquidators are quite extensive and must be complied with regardless of the size of the corporation's assets.

9.44. The former Trade Practices Commission also considered that there is no evidence to suggest that there are difficulties in finding a practitioner to take on assetless administrations in those jurisdictions which do not have a rotation system. The Commission thought this was because liquidators in those jurisdictions are driven by market forces to accept appointments notwithstanding that there is no prospect of remuneration. Unless they are willing to take the 'bad with the good' from persons referring work, they are unlikely to get a good flow of referrals.[385]

9.45. A further argument raised by the Commission against the use of a rotation system in order to spread the burden of assetless administrations is that it operates so that all creditors effectively pay for the administration of assetless companies in the sense that the remuneration rates of liquidators will be generally adjusted upwards to compensate for the administrations they perform without remuneration. The Commission noted that, by contrast, in Queensland, where a nomination system operates, the Australian Taxation Office directly subsidises those practitioners who undertake all of the assetless work for that office.[386] The Commission stated in its report that direct subsidies of that nature are preferable to a cross-subsidy system

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382 per McHugh J.A. in *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) & Anor v Attalex Pty Ltd (No 2)* (1984) 2 ACLC 752 at 774.

383 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 84–86.

384 Section 545, Corporations Law.

385 The Working Party does not necessarily agree with the Commission's explanation. Creditors may tend to use the Federal Court system for assetless companies to get the benefit of the rotation system. See the discussion earlier in this chapter on 'Uniformity' at paragraphs commencing at 9.13.

386 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 84.

which effectively requires all creditors to share the burden, even those who never become involved with assetless companies.

9.46. Finally, the Commission stated that the rotation system does not, in practice, result in the burden of assetless administrations being shared equitably because:

- some jurisdictions allow exceptions to the rotation system on the application of the petitioning party which removes some of the better remunerated administrations from those available to practitioners on the rotation list;

- where major administrations are on offer, there is a tendency for the larger firms to attempt to persuade solicitors or creditors to appoint them as provisional liquidators pending a formal liquidation, since if they are already in place as a provisional liquidator the court may be reluctant to replace them with a liquidator from the rotation list;

- if individuals, rather than firms, are included on the list, a single firm may be appointed to a number of liquidations for which it will receive no remuneration; and

- the system takes no account of the complexity and size of the administrations involved, so equity will not necessarily be achieved.[387]

9.47. Notwithstanding differing views regarding some of the arguments advanced in the report of the former Trade Practices Commission, the Working Party agrees with the general conclusion reached that the benefits of spreading the burden of assetless administrations do not provide a great deal of support for the imposition of a rotation system. Although the burden of assetless administrations is undoubtedly a problem, the rotation system is an imperfect method of addressing it.[388]

Preferred Option

9.48. The Working Party received a number of submissions which commented on the issue of the preferred system for selecting official liquidators for court-ordered liquidations. With one exception in support of the rotation system, submissions favoured a system which included elements of the nomination system and the rotation system. Under the option which received most support, practitioners would be selected in the first instance by nomination of the petitioning party with the consent of the practitioner concerned. However, if, in any particular case:

- no nomination is received due to lack of assets or otherwise; or

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387 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 84–87.

388 See further discussion regarding the treatment of assetless administrations in Chapter 10.

- the independence of the liquidator is questioned,

a practitioner would be selected from a rotation list which operates as a 'default' system.

9.49. The Working Party supports this suggestion in principle because it eliminates the anti-competitive elements in a strict rotation system but still allows the rotation system to operate in the situations where it is most needed. There are, however, some issues in relation to the mechanics of such a combination system which deserve some attention.

Consent

9.50. In one submission to the Working Party, the view was put that a consent should always be obtained from a liquidator before a nomination is made. It was reported that, in some jurisdictions, nominations are being made in reliance on the general consent which official liquidators give to the ASC as part of their application without the knowledge of the liquidator concerned.[389]

9.51. The Working Party agrees that when a petitioning creditor wishes to nominate a particular practitioner to perform an administration, they should be required to approach and obtain the consent of the practitioner in advance of making the nomination.

9.52. However, in relation to selecting practitioners off the rotation list, the system would be undermined if practitioners were entitled to reject administrations they did not wish to accept. The Working Party considers that the general consent should be adequate to select practitioners from the backup rotation list—no further consent should be required for that purpose.

Challenges to Independence

9.53. The system envisaged would operate to protect the independence of practitioners because where the independence of a nominated practitioner was in doubt, a practitioner would be appointed from the rotation list instead.

9.54. Although this idea sounds straight-forward in theory, in practice there could be some questions in relation to its application. As mentioned above, the mechanisms currently in place for replacement of practitioners in relation to other types of administrations have been criticised. They are not always feasible due to the costs involved in making an application to the court and the difficulties in obtaining

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389 In 1938 in New South Wales a practice note was released by Long Innes CJ (in Equity) to the effect that it was unnecessary to obtain the consent of an official liquidator prior to appointment—(1938) 55 WN 112.

evidence that would be sufficient to persuade a court to make the relevant orders. Ideally, the system for safeguarding the independence of official liquidators under a combination of the nomination/rotation method would not suffer from those drawbacks.

9.55 The Working Party considers that, as a starting point, the mechanism for challenging the independence of a practitioner and securing a replacement from the rotation list should be framed around the following ideals:

- it should take place as early as possible in the proceedings so that the duplication of practitioners' work is minimised, however, a later replacement should not be precluded altogether;

- the need for safeguards to prevent parties making unjustified allegations of bias or improper relationships, which can cause delay and increase the costs of the administration, must be balanced against the need to ensure that the procedure for challenging independence does not place demands on persons making a challenge, in terms of costs and procedural burden, so great as to make the procedure impractical; and

- it should recognise the court's position in relation to official liquidators.

The Power of the Court

9.56. A further issue is the power of the court if a nomination system is introduced, particularly if such a system is enshrined in legislation. Although, in practice, the court rarely takes any active involvement in the selection process, on at least one occasion, the court has expressed the view that it has, and always had, a right to do so, and that this is appropriate given the status of an official liquidator as an officer of the court.[390]

9.57. Whether it is necessary for the court to retain the discretion to select its own nominee was previously discussed in this chapter.[391] However, a secondary issue is whether the court should have a power of veto which it could use to 'strike out' a nominee of which it did not approve and ask the relevant party to make a substitute nomination.

9.58. The Working Party considers that a veto power is appropriate, but the right to select a substitute practitioner of its own motion is not necessary and selection should be the responsibility of the nominating party. As indicated above, the power of the court is in the nature of a motion of confirmation of a nomination. In circumstances

390 See further note 368.

391 See paragraph 9.10.

where a further nomination is not forthcoming for some reason, the court could select a practitioner using the backup rotation list.

Should Entry on the Rotation List be Compulsory?

9.59. At present, the ASC requires all applicants for official liquidator status to give an undertaking that that they will accept any appointment made by a specified court and/or district of a Federal Court. The status of official liquidator, therefore, comes with a price. The practitioner must agree to take on any court appointment, even if it is unremunerative.

9.60. In the past, practitioners have been willing to take on the role of an official liquidator and have their names placed on a rotation list, notwithstanding the burden it places on them in terms of conducting assetless administrations. The status of the office gave them access not only to court-ordered liquidations, but also administrations that, although they could legally be conducted by a registered liquidator, tended to be given to official liquidators because creditors perceived official liquidators as providing a higher quality service than registered liquidators.

9.61. If official liquidators could choose not to be entered on the backup rotation list, they would not share in the burden of conducting assetless administrations, but would still get most of the benefits of being an official liquidator. A likely outcome of such an arrangement would be that many official liquidators would choose not to be on the backup rotation list, leaving only a handful of practitioners to share the burden of assetless administrations. This would, in turn, make being on the rotation list even less attractive, since the assetless administrations accessed through the list are likely to outnumber the remunerative ones by a considerable margin.

9.62. The Working Party considers that if a backup rotation list system is to be workable, all official liquidators should be required to participate in the system. In the event that a system of funding assetless administrations is developed, such as by way of a centralised fund, this issue could be reconsidered since there would then be a positive incentive to be on the list.[392]

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392 The Working Party discusses this proposal in detail in Chapter 10.

Conclusion

9.63. The Working Party recommends that:

I. the system of appointment of corporate insolvency practitioners by the court should be based on nomination by the petitioning creditor with a 'back up' rotation system if the nomination is not, or cannot, be made successfully;

II. the court should be given power to reject a nomination on its own motion or on the application of an interested party; and

III. entry on the backup rotation system should be compulsory for all official liquidators pending abolition of that class and/or establishment of a funding mechanism for assetless administrations.

OTHER APPOINTMENT ISSUES

9.64. Complaints that insolvency practitioners are not suitably independent from other parties such as directors and creditors are not limited to liquidations. Concerns of this nature also arise in relation to voluntary administrations and sometimes in connection with receiverships. Challenges to appointments in those circumstances are currently possible, but rarely used because of the expense involved with taking the matter to court.

9.65. The issue of appointment of administrators in voluntary administrations is currently being considered by the Legal Committee of the Companies and Securities Advisory Committee in its review of the voluntary administration scheme.[393] The Working Party notes that it would be desirable to make procedures for replacement of practitioners who are not seen to have the required level of independence as accessible as possible.

393 See further Legal Committee, Companies and Securities Advisory Committee, *Voluntary Insolvency Administration—Discussion Paper*, January 1997.

REMUNERATION

10.1. Ministers responsible for Corporations Law and the ASC have received representations from time to time expressing concern in relation to the remuneration of insolvency practitioners. Most commonly, the complaints are of a general nature about the proportion of assets of an insolvent company which are taken out of the pool as a priority payment for an administrator's remuneration and expenses connected with the administration. In many cases, most of the unsecured assets of a company are utilised for this purpose, leaving unsecured creditors with little or no dividend and disillusioned with the system.

10.2. Concerns of this nature were a major impetus for the establishment of this review. The cost of administrations has been a consideration at the forefront of much of the previous discussion in this report, which has examined aspects of the regulatory regime that may tend to discourage practitioners adopting competitive price structures. In this regard, the Working Party considers that its earlier recommendations to open up the profession to non-accountants and to abolish the category of official liquidator should go a substantial way towards promoting competition and reducing the general costs of administrations. This chapter, however, focuses on the actual fee setting mechanisms and the means for reviewing fees.

10.3. Another major issue considered in this chapter is how to remunerate practitioners who conduct administrations of corporations which have little or no assets available to fund the administration.

FEE-SETTING

10.4. As mentioned above, complaints are frequently made that insolvency administrators use up what was left of an insolvent company's assets to cover remuneration and costs, leaving trade creditors with nothing. In one sense, it is unfair to draw the conclusion that remuneration levels of practitioners are unjustified solely on the ground that in many cases the costs of an administration approach or exceed the value of the unsecured assets available to pay them. The fact that a product or service is not affordable to all does not necessarily mean that the price, from an objective viewpoint, is excessive. Nevertheless, the common occurrence of unsecured creditors seeing most, or all, of the available assets used to cover the expenses and remuneration of practitioners has led to a perception in some quarters that the insolvency industry generates more benefits for itself than for the creditors it serves.

10.5. More specific complaints include liquidators charging for work that creditors consider unnecessary and the charging of fees without regard to the relative complexity or difficulty of a particular liquidation.

Features of the Current System

10.6. Currently:

- the Corporations Law does not prescribe remuneration levels, but encourages remuneration to be agreed between the liquidator or administrator and the creditors or members;
- the predominant method for remuneration is based on practitioners charging an hourly rate for time spent working on the administration;
- the courts have a general supervisory role in settling disputes over remuneration, or setting remuneration when it is not practicable for agreement to be reached;
- remuneration is recoverable from assets of the company in priority to other unsecured debts and obligations;
- the IPAA issues a guide to hourly rates which has become a standard which is accepted as reasonable by courts and many creditors; and
- the IPAA guide effectively has a built-in allowance to cover administering assetless companies.

10.7. In the report of the former Trade Practices Commission, concern was expressed about features of the current system of remuneration for insolvency practitioners which have the potential to affect the impartiality and efficiency of insolvency administrations.[394]

IPAA Guide

10.8. The Guide to Hourly Rates issued by the IPAA for remuneration of insolvency practitioners ('the Guide') lists a series of hourly rates in relation to various categories of person who are likely to work on an insolvency administration, from office juniors through to the principal appointee.

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394 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 74–82.

10.9. The Guide was recently given legislative recognition in the context of personal insolvency. Where the creditors of a bankrupt estate fail to fix the trustee's remuneration, the remuneration is calculated in accordance with the Guide.[395] There is no legislative basis for use of the Guide in the context of corporate insolvency but, as mentioned above, it is widely accepted by the courts and creditors as being a reasonable standard to use.

10.10. The rates set out in the Guide are 'cost-based'. That is, they are calculated by reference to the costs of conducting administrations in the relevant location, with an allowance for a reasonable profit margin. The rates are calculated by consultants employed by the IPAA. They are reviewed by the ASC on an annual basis and a major review, funded by the IPAA, is conducted triennially.

Consideration by Other Review Bodies

10.11. The use of the Guide was considered by the former Trade Practices Commission and the Australian Law Reform Commission in separate reports.

Trade Practices Commission

10.12. Arrangements or understandings between suppliers regarding prices to be charged for services may fall within the ambit of the general prohibitions on restrictive trade practices set out in Part IV of the *Trade Practices Act 1974*.[396] However, there are provisions in that legislation which allow the regulatory authority (formerly the Trade Practices Commission, now the Australian Competition & Consumer Commission) to authorise any activity which otherwise is, or might be, a restrictive trade practice under the Act.[397] The regulatory authority is required to assess any application for an authorisation in accordance with public benefit criteria. The former Trade Practices Commission considered a number of applications from trade associations who sought an authorisation for issuing price recommendations. In 1978, a statement of general principles was issued by the Commission providing guidance as to the exercise of this power in those circumstances. The principles stated, in part, that:

> '(b)...the members may include all or most of the firms in the relevant market, which makes anti-competitive consequences of price recommendations more probable; the members may have a common interest in keeping at or about the recommended prices, not so much because this is a level which reflects their costs, but because it is likely to

395 Section 162(4), *Bankruptcy Act 1966* and Regulation 8.08, Bankruptcy Regulations.

396 See, in particular, sections 45–45A, *Trade Practices Act 1974*.

397 See Part VII, *Trade Practices Act 1974*.

> become market level or higher than the market level would be in more competitive conditions.
>
> (c) An extreme case of (b) may be where market entry is limited to operation of law, for example by licensing provisions...'[398]

10.13. In light of the above, it is not surprising that, in its 1992 report on the accounting profession, the former Trade Practices Commission gave detailed consideration to the use of the Guide.[399] The Commission expressed serious concerns about the Guide and stated that, in the context of the restricted access to the insolvency market, it had become a powerful restriction on competitive behaviour. The information available to the Commission at the time of the report suggested that the scale of fees then in place had operated as the norm and was applied in the large majority of cases, thereby all but excluding the element of price competition.

10.14. The Commission considered the following public benefit arguments in favour of issuing a guide for hourly rates:

- in the absence of some guide, creditors and, more particularly, the courts, would find it extremely difficult to make any kind of judgement about the appropriateness of the fees charged or proposed to be charged (the 'market information' argument); and

- the rates in the Guide are actually lower than the rates generally charged for other accounting services, which suggests that the Guide operates as a check on fee levels and, in its absence, prices would rise (the 'price check' argument).

10.15. The Commission dismissed the market information argument in relation to creditors because it considered that larger creditors would be well aware of the market rates and smaller creditors would usually use a solicitor as an intermediary who should also be well-informed. As to the position of the courts, the Commission suggested that in a more competitive market there would probably not be a call for external review of remuneration rates. To the extent that there was, the Commission suggested it should be done by the ASC based on surveys of actual fees charged, rather than by the court using a cost-based estimate. Since the calculations in the Guide are based on 'average' costs (with an allowance for assetless administrations), plus a margin for reasonable profit, they cannot properly reflect the cost structures of individual firms. Further, the published rates do not attempt to address the amount of time which would be reasonable to spend on any particular job and therefore are likely to encourage

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398 Price Recommendations to Members by Trade Associations of Small Businesses (1978) TPRS 403.147.

399 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 74–83.

inefficient work practices. Accordingly, in the Commission's view, the published rates are of dubious value as a guide to users.

10.16. The Commission rejected the 'price check' argument on the basis that the Guide was customarily used even for administrations not ordered by the court. The Commission's view was that the widespread use of the Guide suggested that it provided 'a convenient mechanism to ensure relatively high returns for the work involved'.[400]

10.17. The Commission concluded that the scale is anti-competitive and should either be discontinued altogether or replaced with a survey of actual rates charged. If it is felt that public interest arguments continued to justify the use of the Guide, the IPAA should apply for an appropriate authorisation under the *Trade Practices Act* for consideration through the procedures provided for under that Act. Furthermore, serious consideration should also be given to whether the courts should continue to have a role in determining remuneration levels.[401]

Australian Law Reform Commission

10.18. In the Harmer Report of 1988, the ALRC gave some consideration to the need for remuneration scales.[402] The ALRC considered that, given the largely public nature of insolvency practice, it is desirable that there is a facility to set scales of remuneration. Although the rates set by the IPAA were generally accepted as providing an objective standard which was widely acknowledged by creditors and the courts, they did not have universal application and were not binding.

10.19. The ALRC recommended that the regulatory authority in the form of the proposed new statutory board should have the power to determine and set maximum remuneration scales for practitioners and review those maximum levels at appropriate times. The maximum rates set by the statutory board should be given legislative recognition.[403]

Method of Calculation

10.20. Another aspect of the Guide which received comment in submissions to the Working Party was the general lack of understanding as to the basis on which the fees

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400 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 81.

401 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 82.

402 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 946-947.

403 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 947.

are calculated, particularly in relation to overheads. Although it is well known by practitioners that overheads are included in the calculation, together with an allowance for unremunerative work and a margin for profit, precisely which overheads are included are not expressly identified. This could lead to some practitioners effectively charging twice for the same costs by including them in the account as disbursements when they have already been taken into account in the hourly rates. Others may not be recovering all they are entitled to because they have assumed some overheads are covered in the hourly rates when in fact they are not.

10.21. Possibly of more concern is the allowance in the Guide's hourly rates for the costs of administering assetless administrations. Arguably this is not an appropriate means of dealing with the costs of these administrations because not all practitioners engage in the unremunerative work. The issue of remuneration for assetless administrations is a major issue which is discussed further below.

Comment

10.22. Issues relating to the IPAA Guide were raised in the Working Party's discussion paper. Many comments were received by the Working Party on this issue and the general feeling was that the Guide was of value. Comments were made that:

- the Guide provides an established benchmark which assists in orderly fee negotiation and provides an industry guide for creditors and courts to use when considering fees;

- in the absence of a benchmark, there would be arguments over remuneration in nearly every case, which could result in increased costs and delays;

- criticisms of the Guide are misguided because:

  - it is not compulsory and fee levels are sometimes set below the published rates;

  - the fees in the Guide are set independently and reviewed by the ASC;

  - competition is strong, particularly in relation to receiverships, despite the existence of the Guide;

  - the Guide does not prevent other types of fee setting mechanisms like percentage or contingency fees being used occasionally, but creditors generally are not in favour of them.

10.23 The Working Party considers that, although the rates in the Guide have been the subject of much attention and controversy, the significance of the level of the hourly rates in the overall costs of administrations is debatable. Complaints of excessive remuneration levels are rarely based solely on the high hourly charge-out

rate. Rather, the total cost of the administration compared to the assets recovered is the real issue. The role of the Guide should be addressed in the context of a wider debate regarding fee setting mechanisms. Those issues are considered below.

Time-Costing, Fixed Fees and Commissions

10.24. There are three main mechanisms commonly used for pricing services: time-costing, fixed fees and commissions. In this part, the relative merits of each in the insolvency context are discussed.

Which System is the Fairest?

10.25. In Australia, the fee-setting mechanisms for insolvency practitioners have traditionally been time-based, although there is no legal requirement in that regard. Charging by reference to the amount of time spent on matters is also the traditional method of fee-setting for legal and accounting work in Australia.

10.26. The main reason time-costing has become the norm is basically the same in all three cases. Unlike many other service industries, there is a high level of uncertainty at the outset of jobs as to how complex and resource-intensive a piece of work may be until at least some preliminary work has been carried out and, even then, there is the ever–present prospect of new problems arising during the course of the administration. Quoting a fixed price for an uncertain level of work is risky for the service provider and, as a result, fees are likely to be higher, in the majority of cases, than they would be if a time-costing method was used. This is because service providers offering fixed fees must make a larger profit on the majority of their jobs than competitors who charge on a time basis in order to compensate for the occasional job when, inevitably, they make a large loss because it costs more to perform than expected.

10.27. By contrast, where there is a relatively high degree of certainty involved regarding the amount of work to be performed and the risks of making a loss are low, fixed fees become the norm, even in fields otherwise dominated by time costing. For example, this can be seen in relation to accountants' fees for preparing salary and wage earners' taxation returns and lawyers' fees for residential conveyancing.[404]

10.28. There are also some examples in the legal and accounting areas where, despite relatively high levels of uncertainty about the work required, fixed fees are sometimes used. For some jobs at the upper end of the spectrum, it has become common practice for consumers to put the jobs out for competitive tender. This can be seen in, for example, legal work for large contracts or privatisations and, in the accounting field, audit work for large companies. The process of making estimates and preparing tender

404 Fixed fees tend to be used for such work irrespective of whether there is competition from service providers outside of the relevant professions.

documentation for such work is costly, but practitioners are prepared to participate in the process and, in some instances, risk quoting a fixed fee (sometimes subject to qualifications), because of the profit they stand to make if the work required does not exceed their estimates. To date, however, the tender process has usually only been used in relation to very large projects (or large bundles of smaller projects) because the high costs associated with this process are not warranted for small or medium sized jobs.

10.29. Tenders are virtually unknown in insolvency practice and it is unlikely that they would be well-suited to insolvency work in the vast majority of cases for two reasons. First, in order for bidders to make meaningful estimates of costs, a reasonably detailed description of the work to be performed would be required in advance. Secondly, it would involve long lead times which are rarely, if ever, practicable in the insolvency context.

10.30. The final method of charging which could be used for insolvency services is a commission system. This involves the practitioner being remunerated on the basis of a percentage of the assets recovered for the benefit of creditors.

10.31. From the creditors' perspective, commissions offer the advantage that at least a proportion (and probably most) of the assets recovered will be distributed to them. However, from the practitioner's viewpoint, commissions are an uncertain method of calculating remuneration because the amount of work involved in an administration is not necessarily proportional to the value of the assets available for distribution. In many cases, practitioners may require a fairly high percentage rate to compensate for those administrations in which the percentage-based remuneration does not cover their costs. Nevertheless, the commission-based system is widely used in the United Kingdom and the United States.[405] In the United States there is a maximum percentage limit, while in the United Kingdom there are facilities to increase or decrease the remuneration payable pursuant to the commission-based system. For obvious reasons it is not practicable to use the commission system in cases of assetless administrations, so a flat fee is used in those circumstances in the United States and time-based charging in the United Kingdom.

10.32. It is difficult to make any general remarks about whether a commission-based fee calculation would be less costly than a time-based or fixed-fee based one. Clearly it depends on the percentage figure arrived at, the value of the assets available for distribution and the work conducted in each particular case.

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405 See Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 143–149.

Influence of the Fee-setting Mechanism

10.33. The above discussion considered different remuneration systems on the underlying assumption that the work performed by practitioners is the same, irrespective of the fee setting system used. In practice, however, this would probably not be so. It is possible that the fee setting mechanisms used could influence practitioners in the way they conduct administrations.

Time Costing

10.34. Practitioners working on a time-based remuneration system have an incentive to maximise the time that they spend working on an administration, subject to their obligations to account for all time spent. In cases where assets are available, practitioners are likely to conduct a very thorough administration. Although this has some benefits, many complaints have been received along the lines that practitioners working on a time-costing basis have increased the remuneration they receive by engaging in practices such as:

- spending time on speculative investigations and recovery possibilities which would not be contemplated if funds were more limited;
- assigning either too many or too highly qualified staff to tasks; and
- taking too long to perform tasks.

10.35. Even relatively large reductions in the hourly charge-out rates can be easily negated by the practices mentioned if they are left unchecked. Competition which results in lower hourly charge-out rates is therefore not a complete solution to unreasonably high fee levels.

10.36. One means of addressing the difficulties that arise with time-based charges is by establishing an efficient and effective procedure for reviewing fees. This is discussed further below.[406] Using a method of fee-setting other than time-based is another option and that is discussed immediately below.

Fixed Fees and Capping

10.37. A fixed fee regime may encourage practitioners to spend a minimal amount of time on an administration. Arguably, this is a considerable advantage over the time-cost based system because it is likely to eliminate inefficient work practices and creditors would not pay for any unnecessary work. However, in some cases fixed fees could work to the detriment of creditors and the wider public interest. This is because

406 See paragraphs commencing at 10.65.

practitioners working on this basis would be reluctant to spend any time following up all but the most obvious possibilities for recovery of assets. Furthermore, practitioners may be tempted not to explore evidence suggesting there may have been wrongdoing because they would have no pecuniary interest in spending time reporting on it.[407]

10.38. Another approach would be to use a time-based system but also quote a maximum level or 'cap' so that the creditors have advance notice of the maximum amount of fees that will be deducted. Although this practice would not be suitable for all administrations, it could be utilised in cases where there is a reasonable level of certainty about the work involved. The Working Party envisages that there would be a facility to revise the cap in appropriate cases, for example, where unexpected work arises, by seeking approval of the creditors. Even though this does not provide creditors with a guaranteed maximum fee level at the beginning of the administration, requiring the practitioner to justify a revision of the capping level to creditors provides a mechanism of accountability that is not present with an 'open-ended' time based method.

10.39. The Working Party notes that the explanatory material to the latest version of the IPAA Guide (a copy if which is at Schedule 3) contains the following paragraph:

> 'The resolution for remuneration should include a specified amount and where remuneration is approved prospectively an upper limit must be included in the resolution of creditors or Committee of Inspection. If an amount is not specified or the amount specified is exceeded, it will be necessary for practitioners to convene a further meeting in order to seek approval for a specified amount or for the additional amount, as applicable.'

Commissions

10.40. A commission-based system is a method of fee setting which closely aligns the practitioner's pecuniary interest with that of the creditors because the practitioner has an incentive to maximise the return to creditors. However, commission-based fees have been criticised because they encourage practitioners to focus on a quick and easy realisation of assets and the maximum return that can be obtained for a minimum cost in terms of work performed. Practitioners may be discouraged from looking at alternatives which require more work but, in the longer term, could be more beneficial to creditors, employees and the wider economy. Other concerns are that, like fixed fees, there is little incentive to do any sort of work which does not directly increase the return to creditors, such as reporting on possible misfeasance by company officers.

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407 The extent to which administrators should be required to engage in activities which do not directly benefit creditors, but rather the wider public interest, is discussed further below (see paragraphs commencing at 10.45).

Role of Creditors in Fee Setting

10.41. A consistent theme in many of the submissions to the Working Party concerning the remuneration mechanisms was that the solution to many of the difficulties does not lie in wholesale changes to the existing framework. Rather, educating creditors about, and encouraging them to participate in, the procedures that are already in place was seen as the preferable approach. Often difficulties arise because creditors who appear unlikely to receive a dividend are unwilling to take an interest in any other aspect of the administration, even where they are aware of their rights.

10.42 The ASC suggested that one approach to this problem could be to amend the Corporations Regulations dealing with meetings for approval of liquidators' remuneration. If creditors took a greater interest in, and responsibility for, the negotiation of remuneration, it may encourage liquidators to charge by some means other than on the basis of the IPAA Guide.

10.43 The Law Council of Australia favours a requirement for practitioners to provide advance notice to creditors of the proposed level of their remuneration and, when approval of fees is being sought, greater detail as to what work has been carried out in arriving at those fees.

10.44. A further suggestion was that legislation should require that a practitioner obtain creditors' approval for the fee-setting mechanism, as well as obtaining approval from the creditors for each lump sum drawing. This proposal may present problems in cases where creditors do not take an interest in the administrations and so are not present at meetings. To combat this difficulty, it was proposed that if a meeting of creditors was called to approve fees and a quorum was not available at that meeting or there was an adjournment of that meeting, the practitioner should be able to draw fees without having to approach the court.

Reporting Obligations of Liquidators

10.45. One aspect of the role of insolvency practitioners which must be taken into account when considering remuneration and fee-setting mechanisms is the responsibilities they have in relation to matters which are not directed at maximising returns to creditors. There are two elements to this wider responsibility:

- the obligations imposed on liquidators to furnish reports to the regulatory authority, particularly in relation to possible misfeasance by company officers, (dealt with immediately below); and

- the winding up of assetless corporations, which is dealt with later in this chapter.

10.46. A liquidator is required to lodge certain accounts, reports and statements with the ASC.[408] In particular, a liquidator must lodge a preliminary report (usually within two months of appointment) which states whether, in his or her opinion:

> 'further inquiry is desirable with respect to a matter relating to the promotion, formation or insolvency of the company or the conduct of the business of the company.'[409]

10.47. Possibly of more significance, in terms of the resources required, is the liquidator's continuing obligation to report to the ASC suspected breaches of the Corporations Law, misapplication of funds, negligence, breach of duty or breach of trust by past or present company officers or members.[410] Further reports may also be lodged specifying any matter which the liquidator thinks is desirable to bring to the attention of the ASC.[411] The court may direct a liquidator to lodge such a report if, during the course of a winding up, it suspects that some misfeasance on the part of present or past officers or members may have occurred.[412] Following the provision of such a report, the liquidator must:

> 'furnish the [ASC] with such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as the [ASC] requires.'[413]

10.48. Preparing reports and otherwise assisting the regulatory authority in relation to possible misfeasance by company officers and others does not usually result in a greater return to creditors. In fact, depending on the extent of the work required and the method of fee-setting being used, it can result in either a reduction in return to creditors in that particular administration, or a significant loss to the practitioner concerned which eventually will be reflected in higher costs of other services performed. It has been suggested that this is not a satisfactory situation. One submission to the Working Party suggested that, for the sake of reducing costs, the 'public duty' aspects of the liquidator's role should be eliminated so the liquidator's only concern is the speedy realisation of assets and maximising returns to creditors.

10.49. When the issue of the extent of the liquidator's investigatory and reporting functions was canvassed in the 1988 Harmer Report,[414] the ALRC concluded that there should be no change to the existing duties. Those duties have not substantially

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408 Sections 476, 509, 533, 539, Corporations Law.

409 Paragraph 476(d), Corporations Law.

410 Section 533, Corporations Law.

411 Subsection 533(2), Corporations Law.

412 Subsection 533(3), Corporations Law.

413 Paragraph 533(1)(e), Corporations Law.

414 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 952-954.

changed since then. The ALRC considered that the public duties of liquidators regarding reporting on possible misfeasance are inextricably bound up with their duty to creditors to make due inquiries into possible claims against directors and other officers which may result in the recovery of assets for the benefit of creditors. It was considered more efficient for the liquidator to conduct preliminary investigations and report to the regulatory authority in the course of their other duties, rather than to split the functions and, for example, have a public official conduct inquiries.

10.50. The Working Party agrees that having preliminary investigative and reporting functions performed by public officials would be less efficient than having it done by the liquidator in the course of the administration. However, there is a threshold issue which was not canvassed by the ALRC regarding whether the function is really necessary. This question arises particularly because some reports made by liquidators may not always be followed up by the ASC due to resource constraints or other reasons.

10.51. In this regard, the Working Party considers that, despite the fact that some reports may not always be acted upon by the regulatory authority, information uncovered in the course of a liquidation is an important means of identifying corporate misconduct by company officers and others. A liquidation is one of the key occasions in the life of many companies when a party other than the directors has an opportunity to examine the operations of the company as a whole and identify possible misfeasance. Even if every report is not acted upon immediately, the fact that it has been lodged could be of value if subsequent reports are made regarding dubious conduct by the same persons.[415] This is particularly important in relation to companies which have become insolvent and caused creditors to lose substantial sums.

10.52. Recent proposals aimed at reducing the incidence of the so-called 'phoenix company' phenomenon[416] rely, to some extent, on information provided to the ASC during the course of a liquidation as a basis for disqualification of persons from directing other companies. There is no obvious alternative to liquidators' reports for obtaining such information.

10.53. If reports of corporate misconduct were not made during the liquidation phase, there would be a gap in the regulatory framework that could potentially result in a significant increase in the frequency of misfeasance by company officers which go undetected and unhindered. Although it might be argued that this conduct is only harmful to the creditors of the company concerned, there is a wider public interest in

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415 For example, involvement in the management of two or more failed companies may give rise to grounds for disqualification of the persons concerned. Sections 599 and 600 of the Corporations Law give the court and the ASC certain powers to disqualify persons who take part in the management of two or more companies which have failed within a seven year period.

416 This is the situation where a company which goes out of business owing creditors large sums of money 'rises from the ashes' in the form of a new company to conduct a similar business under the same or similar management, sometimes using a substantially similar company name.

maintaining high standards of corporate conduct for the benefit of creditors, investors and the economy as a whole.

10.54. For these reasons, the Working Party considers that removing the 'public duty' obligations of liquidators is not a desirable option.

10.55. In light of the wider interest in a liquidator's work, a case could be made that the burden of that work does not, at present, fall equitably. Arguably, that the cost of work performed in the public interest should be at the public's expense. One way of achieving this would be to require the ASC to pay liquidators for their reports or, at least, for any further inquiries that the ASC requests the liquidator to make. The funds for such a scheme could either be allocated out of consolidated revenue or be raised by the ASC by, for example, increasing fees for company annual returns.

10.56 As mentioned above, where time-based fees are used, the cost of the practitioner performing his or her duties is currently borne by the unsecured creditors, since the practitioner will be remunerated at the usual hourly rate for the time spent carrying out reporting functions following the discovery of a possible breach. In fact, the practitioner may profit from performing the work. If fixed fees or commission-based methods are used, the practitioner would bear the cost directly to the extent it has not been allowed for in the agreed remuneration, but indirectly the cost would be passed on to creditors in other administrations because the practitioner would need to compensate for any losses suffered by charging higher rates.

10.57. Consequently, the persons who bear the cost of the 'public duties' of liquidators are essentially the persons who bear the loss caused by possible misfeasance in that they are often creditors of insolvent corporations. On an individual level, this appears unfair, because the parties concerned suffer one loss on top of another. No doubt in many instances unsecured creditors are innocent victims of the mismanagement, misfortune or otherwise of an insolvent corporation and they have little, if anything, to gain personally out of actions taken against possible wrongdoers except those resulting in recovery of assets. However, from another perspective, when viewed as a whole, creditors of failed corporations comprise, for the most part, persons who unsuccessfully risked advancing credit to an entity with limited liability in order to profit from the transaction themselves. Often those persons would have had the opportunity to deal with the corporation on a different basis or refuse to deal with it at all. Arguably, that class of persons has the most to gain from maintaining high standards of corporate conduct and it is therefore appropriate that they, as a class, contribute more than other creditors or taxpayers generally towards the costs of the regulatory system. This rationale does not apply to the Australian Taxation Office and other authorities who become creditors by operation of law. However, in the case of those bodies, the burden is ultimately shifted to the wider community.

10.58. The Working Party acknowledges that the current situation is not perfect and the above justification would be cold comfort to creditors who, directly or indirectly, must fund reports and investigations which provide them with no direct benefit.

However, the options of having a public official perform the role, having liquidators perform it but funded by the government, or eliminating the reporting and investigatory requirements altogether, are not, in the view of the Working Party, desirable alternatives at present.

10.59. However, it may be possible to clarify and streamline the reporting requirements with a view to lowering costs and reducing unnecessary work. It should be noted that, although the Corporations Law requires a very wide range of possible misfeasance to be reported, it is only required if the matter comes to the practitioner's attention in the course of a winding up. Practitioners are not required to take a pro-active approach to the investigative and reporting function, although some submissions to the Working Party indicate that there may be a perception in some quarters that this is the case. Furthermore, practitioners may spend too much time gathering material in relation to matters which the ASC considers do not warrant further investigation. Alternatively, some practitioners may provide too cursory a description of the conduct in question, which requires subsequent reporting to clarify matters.

10.60. To address these issues, the Working Party recommends that the ASC should work together with the professional bodies to develop guidelines that assist practitioners identify the types of possible misfeasance on which the ASC is focusing from time to time and provide some indication of the level of detail that the ASC expects in reports.

10.61. Apart from playing a role in reducing costs, clarifying practitioners' responsibilities may also be beneficial from another perspective. At present, there is a financial incentive for practitioners to perform the 'public duty' aspect of their duties because of time-based fees. However, if commissions and fixed-fees become more common, there will be a disincentive to do this work. It would therefore be to the advantage of the ASC and the public to ensure that practitioners have a sound understanding of the extent of their responsibilities in this regard.

Conclusion

10.62. The Working Party does not consider that criticisms of commissions and fixed fees based on fears that their introduction would increase costs are well founded. The market should be allowed to determine the most cost-effective fee systems. However, the Working Party sympathises with the view that the public interest is not necessarily best served by minimising the cost of administrations at the expense of quality.

10.63. There is currently no legal impediment to using a fee setting mechanism other than the time-based system. In fact, the Corporations Law clearly contemplates that remuneration may be calculated on a percentage basis.[417] The Working Party considers that the IPAA Guide may tend to discourage relevant parties from exploring different and more flexible means of calculating remuneration. However, the preferable solution is not necessarily abolishing the Guide, which provides a benchmark against which the reasonableness of fees may be assessed. Although the Guide could be modified so that its utility as a benchmark is enhanced, the Working Party considers that the key measure should be educating creditors on their rights, powers and possible options with regard to fee setting.

10.64. The Working Party recommends that:

- the ASC, in consultation with the relevant professional bodies, should consider appropriate means to educate creditors and practitioners about the different methods of fee setting available and the rights which creditors have with regard to establishing fees so as to encourage greater involvement by creditors in fee setting;
- the notices to creditors of a meeting to determine fees of insolvency practitioners should set out a proposal for remuneration as well as a summary of the creditors' rights to vary the proposal;
- where time-based methods are used, the practice of 'capping' fees should continue to be encouraged; and
- the method of calculating the IPAA Guide, particularly in connection with overheads and disbursements, should be better explained.

REVIEW OF FEES

10.65. No matter which system of remuneration is used it would be desirable to have some kind of review process in relation to the remuneration payable. However, this will probably be more relevant where time-based systems are used.

Current Position

10.66. There are two existing means by which liquidator's fees may be challenged; review by the court, and review by the professional bodies.

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417 Subsection 473(1).

Review by the Court

10.67. Remuneration of provisional liquidators is set by the court and there are no provisions in the Corporations Law dealing with review.[418]

10.68. In court ordered liquidations, remuneration is set initially by the committee of inspection and, failing that, by a resolution of creditors, or finally by the court itself.[419] Where remuneration is set by a committee of inspection, it is open to:

- a member or members representing at least 10 per cent of the issued share capital;
- a creditor or creditors with at least 10% of the total debts; or
- the ASC,

to apply to the court to have the remuneration varied.[420] If the remuneration is set by a meeting of creditors, the liquidator or member(s) representing at least 10 per cent of the issued share capital may apply to the court for review.[421] The court may, upon hearing the application, increase, decrease or confirm the remuneration set by the creditors or the committee of inspection.

10.69. In a voluntary winding up, the liquidator's remuneration is set at first instance by the committee of inspection or, failing that, by resolution of creditors.[422] The liquidator and any creditor or member may apply to the court for review of the remuneration, and the court's decision is expressly stated to be final and conclusive.[423]

10.70. Remuneration of administrators and deed administrators is set by resolution of the creditors or, failing that, by the court.[424] If remuneration is fixed by resolution of creditors, the court has power to review the remuneration on the application of the administrator or an officer, member or creditor of the company.[425]

10.71. Remuneration of privately appointed receivers is determined by negotiation between the receiver and the appointing party. However, the court retains wide powers to fix and vary remuneration of receivers, sometimes even retrospectively, especially where the corporation concerned enters into another kind of external administration.[426]

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418 Subsection 473(2), Corporations Law.
419 Subsection 473(3), Corporations Law.
420 Subsection 473(5), Corporations Law.
421 Subsection 473(6), Corporations Law.
422 Subsection 499(3), Corporations Law.
423 Section 504, Corporations Law.
424 Subsection 449E(1), Corporations Law.
425 Subsection 439E(2), Corporations Law.
426 Section 425, Corporations Law.

Applications for orders to fix remuneration or vary an existing order may be made by a liquidator, administrator, deed administrator, or the ASC.[427] The receiver may apply to the court to vary an existing remuneration order.[428] There are no similar powers in relation to non-receiver controllers.

Review by the Professional Bodies

10.72. The joint statement of insolvency standards issued by the ASCPA and the ICAA[429] provides that members of those organisations must be remunerated in accordance with rules of conduct laid down by each organisation.[430] The first of those rules states that fees must be:

> 'a fair reflection of the value of the work performed for the client, taking into account:
>
> (a) the skill and knowledge required for the type of work involved;
>
> (b) the level of training and experience of the persons necessarily engaged on the work;
>
> (c) the time necessarily occupied by each person engaged on the work; and
>
> (d) the degree of responsibility that the work entails.'

10.73. Persons who feel that the remuneration charged by members of those organisations is unfair can complain directly to them or through the IPAA if the person is also a member of that body. The professional bodies can arrange for an informal mediation to take place with a view to reaching a settlement. In extreme cases of overcharging, the complaint can lead to disciplinary proceedings, on the basis that the member has breached the rules of conduct.[431] However, whether a breach has occurred is often a matter of opinion and ruling on such matters can be very difficult. Although the sanctions available through the disciplinary process do not extend to ordering practitioners to refund or forfeit fees, the threat of such proceedings and the prospect of disciplinary sanctions may encourage practitioners to settle the matter through mediation if they think an adverse finding is likely to be made.

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427 Subsection 425(5), Corporations Law.

428 Subsection 425(6), Corporations Law.

429 APS 7 clause 24.

430 ICAA Rules of ethical conduct REC1/ASCPA Code of professional conduct, statement F5.

431 Disciplinary proceedings by the professional bodies are discussed further in Chapter 8.

Commentary on the Review Mechanisms

10.74. The Working Party considers that the existing arrangements for challenging a liquidator's fees, namely review by the court, and the ability to lodge a complaint with the practitioner's professional body or with the ASC, are adequate. Lack of creditor awareness about the available review mechanisms is likely to be a major contributor to the infrequent use of the existing procedures. This could be addressed in the course of educating creditors generally about their role in the fee setting process.

10.75. The Working Party also considers that there would be advantages in shifting the formal court-based system to one involving review by experts. This type of approach is used in connection with the review of fees charged by bankruptcy trustees.[432] One way of introducing this system would be to allow the ASC to refer matters involving allegations of overcharging to the CALDB. The CALDB could be given powers to tax bills of costs and order refunds of fees where overcharging has been proved. It would be desirable for the CALDB to consult with representatives of the professional bodies and, in particular, the IPAA, in relation to these matters. The IPAA, as a peer review body, would be able to provide expert evidence regarding the amount of work that would reasonably be required to perform any given administration.

10.76. Whether or not changes are made to the structure of the formal review system, the Working Party considers that it should be extended so it is available in respect of any type of corporate insolvency administration.

10.77. The Working Party envisages that the formal fee review procedures would only be applied in extreme cases due to the expenses involved. The informal mediation system currently operated by the professional bodies is a useful means of dealing with disputes of a lesser scale, and should be encouraged.

10.78. The Working party recommends that:

- creditors should be given greater education about existing fee review mechanisms;
- the formal review mechanisms should be extended to encompass all types of corporate insolvency administrations;
- consideration should be given to empowering the CALDB to hear and make appropriate orders in relation to fee disputes in consultation with the professional

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[432] See the discussion of the taxation of bills of costs submitted by bankruptcy trustees at paragraph 2.64.

bodies (particularly the IPAA); and

- the informal mediation system currently administered by the professional bodies should be encouraged to continue.

ASSETLESS ADMINISTRATIONS

10.79. Since the remuneration and expenses of liquidators are ordinarily funded from the assets of the company in liquidation, a difficulty is created when the corporation does not have sufficient assets to cover those expenses. Without the financial incentive of remuneration, there would appear little reason for practitioners to conduct such administrations.

10.80. A threshold issue in relation to assetless companies is whether there is any point in liquidating them as creditors do not stand to recover anything in any event. This issue was considered by the ALRC in the Harmer Report. The ALRC was of the opinion that there were strong reasons for encouraging administrations of assetless companies.[433] Allowing an assetless company simply to lie dormant, eventually to be deregistered, means that there would never be a review of the company's activities by someone other than the company officers. Unscrupulous directors could improperly move assets out of companies into related companies or appropriate the corporate property themselves. As long as they do not leave enough assets behind to pay for an administration, their activities would probably not be subject to scrutiny and they would not be subject to clawback provisions and other remedies available to a liquidator. Furthermore, the regulator would not find out about the conduct so the directors would not be subject to action by the regulator. This would leave little in the way of deterrence for illegal conduct and entering voidable transactions—rather it would be likely to encourage abuse.

10.81. If it is considered desirable to wind up assetless companies, it must also be considered who should pay for the winding up. The current system for dealing with these companies is described in detail in Chapter 9. Rarely is an assetless company wound up voluntarily, but if it is, creditors and/or members would need to indemnify the practitioner or provide funds 'up front' to cover costs. In court-ordered liquidations of assetless companies, the cost of obtaining the winding up order is borne by the petitioning creditor. In jurisdictions which use rotation systems, the cost of conducting the administration is paid directly by official liquidators on the rotation list and cross-subsidised by their clients generally, since their remuneration rates are adjusted to take into account unremunerative work. In jurisdictions where a nomination system is used, a 'professional' creditor sometimes subsidises particular practitioners to

433 See Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 337, 340 and 343.

conduct all the assetless administrations in which they are a petitioning creditor on the basis that the practitioner will also be nominated for remunerative work. Sometimes one or more creditors will provide a practitioner with funds (or an indemnity) for the costs of conducting the administration. However, in many cases, creditors are reluctant to spend money on an administration when there is no prospect of a return. Consequently, no administration is conducted.

A Centralised Fund

10.82. In the Harmer Report, the ALRC canvassed various options for funding the administration of assetless companies with the aim of increasing the number of assetless companies which would be subject to a liquidation. The Commission favoured the creation of a centralised fund to which a wide class of persons would contribute.[434] Options considered for generating revenue for the fund included:

- payments by the directors of companies being wound up;
- increased filing fees for winding up applications;
- requiring all monies realised in administrations to be deposited by liquidators in a common account, with interest going toward the fund;
- diverting a proportion of the interest from trust accounts of practitioners into the fund;
- depositing assets from small insolvent estates (less than $1,000) into the fund rather than distributing the amounts to creditors; and
- directing monies and dividends unclaimed by creditors in liquidations into the fund.[435]

10.83. Although the ALRC considered that the above sources of revenue could be considered further in the longer term, in order to quickly generate an initial source of revenue, the ALRC favoured the imposition of a levy on all companies to be paid at the time of lodging the annual return.[436]

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434 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 347.

435 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 348.

436 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 349.

10.84. The ALRC also made recommendations regarding the administrative aspects of the fund and how the fund would be recompensed if it eventuated that assets were in fact recovered in the course of conducting the administration.[437]

10.85. The establishment of a fund to finance administration of assetless companies was also supported by the former Trade Practices Commission in its report on the accounting profession, primarily on the basis that it would obviate the need for a rotation system for appointment of official liquidators.[438]

10.86. In response to its discussion paper, the Working Party received a number of submissions supporting the establishment of a fund along the lines proposed in the Harmer Report.

10.87. Options for financing an assetless administration fund raised in the submissions included:

- consolidated revenue;
- a levy imposed upon all companies at the time of incorporation; and
- a small levy on annual returns.

10.88. A further suggestion was that the directors of the companies concerned should be liable to reimburse the fund for monies spent on the initial investigations of their companies. This suggestion was opposed in another submission on the basis that directors should not be personally liable for expenses connected with their companies unless they are shown to have breached relevant legislation or their duties.

10.89. There was a range of views on the uses to which the fund should be put. One suggestion was that it should only be used to fund investigations and prosecutions of directors and officers on the basis that, if the creditors do not wish to fund the investigations into possible asset recoveries, then neither should the public purse. Another suggestion was that the fund should be available to cover out-of-pocket expenses and the first stage of enquires. Any additional investigation or recovery work would continue to be funded by the creditors or the liquidator on a 'contingency basis'.

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437 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry,* (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraphs 355-358.

438 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 86–87.

Alternatives

10.90. Although the creation of a centralised statutory fund to provide resources for private practitioners to conduct assetless administrations has received much support, there are some alternative suggestions aimed at addressing the difficulties associated with administrations of assetless companies.

10.91. One suggestion considered by the ALRC in the Harmer Report was the creation of a public office (similar to the Official Receiver in Bankruptcy). The holder of this office would have responsibility for conducting assetless administrations. This option was rejected by the ALRC in favour of maintaining the use of private sector practitioners to perform this work.[439]

10.92. The ALRC also considered a proposal whereby individual companies deposit a lump sum or bond with the regulator on incorporation to pay for costs of the administration which would become available when the company was wound up. Security for the bonded amount could be taken over assets of the directors. This proposal was rejected because it was likely to be difficult to administer and would impede the borrowing capacity of directors.[440]

10.93. A variation on the deposit of a bond would be a system of insurance whereby companies would be required to take out the insurance and liquidators would be permitted to make a claim on the policy in the event the company's assets did not reach a certain level. This has the advantage that the premiums would, in all likelihood, be less in dollar value than a bond. Unlike the bond, the premium would not be returned to companies which do not make an insurance claim. However, since the bond would only be returned on a solvent liquidation, it is questionable whether there is, in practice, a significant difference between this and a non-returnable premium.

10.94. A submission to the Working Party contained a suggestion that a bond could be lodged with the court by the petitioning creditor for an amount (for example, $5,000) to cover some costs of the administration. The bond would not be called upon if assets were realised to cover the costs. Although this proposal would provide resources to the practitioner to fund preliminary investigations, it may result in creditors becoming less keen than they already are to proceed with winding up applications in cases of apparently assetless companies. On the other hand, the establishment of a formal mechanism could be preferable to the current situation where creditors are requested to provide indemnities or 'up front' payments by

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439 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 345.

440 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 347.

practitioners on an ad-hoc basis. A formal mechanism may provide both parties with additional confidence that the other will fulfil their obligations.

10.95 A variation on this option would be to prescribe a fixed fee or indemnity which must be advanced by the nominating creditors in the event that the company is assetless. If a nominating creditor were willing to advance the prescribed fee, the nominated liquidator would not be allowed to refuse the appointment without the leave of the court or the ASC.

Conclusion

10.96. Each of the mechanisms suggested to deal with the assetless company situation have disadvantages. The central fund, insurance and bond systems would all impose significant costs in terms of the impositions on all companies and the administration of the schemes. Requiring a bond or indemnity to be lodged by a petitioning creditor focuses the burden on that creditor which may result in even less assetless companies being administered.

10.97. On balance, the Working Party favours a levy being placed on all companies, either at the time of incorporation or as part of the annual return fee, as a means of funding assetless administrations. The fund would be administered by the ASC and would apply to compulsory liquidations where there are no assets. It would provide liquidators with enough funds to prepare a report to creditors and a report to the ASC.[441]

10.98. However, it is important to ensure that any levy that companies would be required to pay was not so high as to adversely affect the ability of companies to compete, or constitute a barrier to entry. This is particularly important with respect to smaller companies. Accordingly, the Working Party considers that consideration should be given to structuring the fund so that the levy payable is proportionate to the capacity of companies to contribute.

10.99. However, such a system has its drawbacks. The companies which are less financially sound are, by definition, the ones more likely to end up being involved in an assetless administration and causing diminution of the fund. Arguably, it is unfair to have financially sound companies, which are less likely to give rise to claims on the fund, contributing proportionately more to the fund than those companies which are likely to diminish the fund. Whether a proportional scheme is desirable will depend on the amounts involved. If the average levy required is small, the costs involved in

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441 The report would be made pursuant to section 533 of the Corporations Law. That provision requires a report to be made to the ASC where the return to unsecured creditors is less than 50c in the dollar or where it appears to the liquidator that officers and others involved in management may be guilty of an offence, negligence, breach of duty etc.

administering a proportionate system are likely to outweigh the benefits. However, if the levy would have a significant impact on smaller companies, a scheme requiring proportionate contributions could be desirable for the reasons outlined above.

10.100. The Working Party recommends that:

I. the Government consider the establishment of an assetless administration fund along the lines recommended by the ALRC to fund preliminary investigations of breach of directors' duties and fraudulent conduct; and

II. the ASC should liaise with practitioners with a view to developing guidelines about the content of reports, particularly in the case of assetless companies, which should serve to avoid needless work on the part of practitioners.

DUTIES AND RESPONSIBILITIES OF CONTROLLERS

11.1. One of the issues raised in the Working Party's Discussion Paper was whether the provisions in the Corporations Law dealing with duties and responsibilities of controllers who are not receivers, which commenced in 1993, are necessary and appropriate.[442]

BACKGROUND

11.2. Rather than allowing for appointment of a receiver or receiver and manager over corporate property to enforce a security, it is possible for security documents to provide for a secured creditor to become a mortgagee in possession (or appoint an agent to carry out the function of such a mortgagee) on default by the debtor corporation. The popularity of this form of administration increased markedly after a decision in 1975 in which the High Court found that a receiver and manager appointed over the whole of a corporation's property under a fixed and floating charge was a 'trustee' for the purposes of section 221P of the *Income Tax Assessment Act 1936* and, therefore, was required to grant priority to the liability of the debtor corporation for unremitted group tax debts.[443] The preferred status from a taxation perspective of mortgagees in possession was confirmed in the late 1980s following court decisions to the effect that an agent for a mortgagee in possession was not a 'trustee' for the purposes of section 221P.[444]

11.3. A further possible advantage, from a secured creditor's perspective, of appointing an agent of a mortgagee in possession, rather than a receiver, was that the reporting requirements and other regulatory provisions in the companies legislation did not apply, provided the agent did not take control of the company concerned. There was no need for agents to be registered or have any formal qualification notwithstanding that their role, in many respects, was very similar to the role of a receiver.

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442 See the Discussion Paper released by the Working Party at paragraphs 234–239 and Attachment J.

443 *FCT v Barnes* (1975) 133 CLR 483.

444 *General Credits Ltd v Chemineer Nominees Pty Ltd* (1986) 4 ACLC 570; *Deputy Commissioner of Taxation v General Credits Ltd* (1987) 5 ACLC 1103.

11.4. This somewhat anomalous situation was addressed by the ALRC in the Harmer Report, which recommended that certain provisions in the companies legislation concerning powers, duties and reporting obligations of receivers should also be extended to mortgagees in possession and their agents.[445]

11.5. The Government responded to the recommendations by introducing into Part 5.2 of the Corporations Law the concept of 'controller' and 'managing controller'.[446] Under these provisions, a controller is a receiver, or receiver and manager, or *any other person in possession or control of a corporation's property for the purpose of enforcing a charge*.[447] A managing controller is a receiver and manager, or *any other controller who has functions or powers of management of the corporation*.[448]

11.6. The abolition in 1993 of the priority in favour of the Commissioner of Taxation, together with the introduction of the controller provisions into the Corporations Law, means that the appointment of a mortgagee's agent instead of a receiver is now less attractive than it was. However, there are still many instances where a non-receiver controller is appointed, particularly where the secured property concerned makes up only a minor part of the debtor corporation's assets.

CURRENT PROVISIONS

11.7. The Corporations Law requires controllers to:

- open and maintain a bank account in respect of money of the debtor company coming into the hands of the controller;[449]

- lodge a notice with the ASC and a corresponding notice in the *Gazette* when the controller enters into possession of, or assumes control over, relevant property, or when the controller ceases to be a controller;[450]

- lodge a notice of address with the ASC within 14 days of becoming a controller and notify the ASC of subsequent changes of address;[451]

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445 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 188.

446 The amendments were part of the package of insolvency reforms in the *Corporate Law Reform Act 1992* (Cth).

447 Section 9, Corporations Law.

448 Section 9, Corporations Law.

449 Section 421, Corporations Law.

450 Section 427, Corporations Law.

451 Section 427, Corporations Law.

- serve notice on the corporation when the controller enters into possession or assumes control;[452]

- comment upon and lodge with the ASC a copy of the report as to affairs required to be provided to the controller by the reporting officers of the debtor company;[453] and

- lodge with the ASC six monthly accounts in respect of the controller's receipts and payments.[454]

11.8. In addition to the above, managing controllers with functions or powers in respect of the management of the company must lodge a report as to the affairs of the company with the ASC within two months of taking possession or control of the corporate property.[455]

Perceived Difficulties

11.9. The concerns raised by the Working Party in its Discussion Paper in relation to the provisions mentioned above were essentially that:

- the notification and reporting obligations on controllers may impose undue compliance costs where only a minor item of corporate property is involved; and

- the reporting obligations on managing controllers apply whether or not the controllers actually exercise their powers of management, which means those controllers are subject to the requirement to lodge with the ASC a report as to the affairs of the company when they are not necessarily in a position to prepare such a report.

452 Section 429, Corporations Law.
453 Section 429, Corporations Law.
454 Section 432, Corporations Law.
455 Section 421A, Corporations Law.

OPTIONS FOR CHANGE

11.10. In the responses to the Working Party's Discussion Paper, there was a general consensus that the current provisions require amendment to address one or more of the difficulties mentioned above. There are essentially two types of options for reform of the provisions. The first type focuses on reducing the situations in which the obligations apply. The second type focuses on reducing the content of the obligations themselves.

Scope

11.11. There were a number of suggestions for reducing the scope of the reporting and notification requirements.

Obligations Confined to Receivers, Receiver and Managers and Managing Controllers Only

11.12. One suggestion was that Part 5.2 of the Corporations Law should not apply to controllers who are not receivers and do not have management powers in relation to the corporation concerned. This would generally exclude mortgagees acting under bills of mortgage, bills of sale or mortgages of goods.

11.13. It was argued that there is no justification for imposing notification and reporting obligations on persons who are not carrying on the business of the corporation or incurring debts in the company's name. The fact that a secured creditor happens to enforce a charge over the secured property does not make any difference to the position of an unsecured creditor since the secured property would not have been available for general distribution in any event.

Obligations Confined to Persons Controlling the Whole, or Substantially the Whole, of the Corporation's Property

11.14. Another option considered was to confine the obligations to persons who control the whole, or substantially the whole, of the corporation's property. This view draws support from a passage in the Harmer Report which suggests that only persons taking control of the whole, or substantially the whole, of the property of a corporation should be regulated by companies legislation.[456]

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456 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 186.

Obligations Confined to Assets Whose Value Exceeds Prescribed Limits

11.15. Under this option, an arbitrary limit could be set so that the requirements in the Law would not apply to controllers of assets worth less than the threshold amount. This would address a significant criticism of the current provisions because the requirements would no longer apply to minor items of property.

Obligations Confined to Certain Types of Financing Arrangements

11.16. It would also be possible to exempt certain types of financing arrangements from the scope of the provisions. One difficulty with this option is that it may require the enactment of provisions to prevent parties structuring transactions so that they have the appearance of an exempt transaction when they are not, in substance, of that character. However, transactions such as mortgages over real property would not appear susceptible to that sort of practice.

Obligations of Managing Controllers Confined to those Controllers Who Actually Exercise Management Powers

11.17. The Corporations Law currently applies to controllers who have powers of management, whether or not they actually exercise those powers. This means that a controller who has powers of management will be subject to the full range of obligations in the Law, even where they merely take possession of property for the purposes of sale and do not take any part in the management of the corporation.

11.18. It was suggested that the definition of 'managing controller' should be amended so that only those controllers who actually exercise management functions would be required to comply with the relevant obligations.

Content

11.19. Some submissions proposed a different approach which involves changing the content of the obligations, rather than the circumstances in which the obligations apply.

Restrict Controllers' Obligations to Notification and/or Settlement Statement

11.20. It was argued in one submission to the Working Party that the current obligations on controllers who do not exercise management powers should be restricted to lodging a notice at the ASC that a person is in control of an asset.

11.21. In support of this view, it was argued that the chargor itself does not benefit from any of the requirements as there are already obligations on the chargee at general law to account for receipts, payments and expenses. Third parties dealing with the company or the chargee in relation to the charged property would benefit from a notification to the ASC which sets out details of the property involved and details of the chargee. However, there does not appear to be any reason to extend the requirements beyond this notification.

11.22. As to unsecured creditors, one view is that they do not benefit at all from the requirements on controllers since they do not have any interest in the charged property. However, another view is that unsecured creditors have a legitimate interest in finding out what prices were obtained for sold assets and the expenses involved with the sale, so that they may assess whether the controller has complied with its obligation to obtain the best possible price. The extent of any shortfall or surplus on the sale directly impacts on unsecured creditors. In addition, the reporting requirements provide other creditors, whether secured or not, with notice that the company may be in financial difficulty.

Restrict Obligations Regarding Bank Accounts

11.23. The current obligations in the Corporations Law require a bank account to be opened, arguably, whenever a controller is appointed. This means that an account must be opened even where there is no likelihood of the chargor's money passing into the hands of the controller.

11.24. It has been suggested that the obligation to open a bank account should be restricted to circumstances where the controller comes into possession of money of the chargor corporation.

11.25. The ASC has issued a policy statement dealing with this issue.[457] The ASC concluded that no policy objectives are served by requiring a bank account to be opened where there is no money of the debtor corporation to be deposited. Accordingly, the ASC will not take any action against a controller who fails to open and maintain a bank account in those circumstances.

11.26. Although the view expressed in the ASC's policy statement appears appropriate, there is a possible problem determining what constitutes 'money of the corporation' for this purpose. The ASC's policy statement indicates that it does not necessarily agree with the view that money is only 'money of the corporation' concerned if it exceeds the value of the amount secured by the charge. The ASC considers that whether this is correct in any given case 'depends on the relevant

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457 ASC Policy Statement 106, *ASC Digest* PS 5/61.

security documentation evidencing the charge and the transactions entered into under such documentation.'[458]

11.27. Accordingly, restricting the requirement to open a bank account to those instances where a controller comes into possession of 'money of the corporation' will not necessarily mean the requirement will only apply if there is a surplus. It is possible that some loan transactions are structured so that the entire proceeds realised from sale of the property concerned are legally the property of the chargor, at least for an instant, before they are remitted to the chargee. In these cases it would still be necessary for a controller to open an account and deposit the proceeds, even if the provisions were to be amended in the manner suggested. However, in many cases it is likely that the chargor would not have an interest in the proceeds except to the extent of any surplus.

Conclusion

11.28. In light of the above discussion, the Working Party considers that there is scope for reducing the burden of the administrative requirements on controllers and managing controllers while still maintaining an adequate level of protection for third parties by addressing both the scope, and the content, of the obligations.

Notification

11.29. The Working Party considers that the current requirements for notification of appointments and cessation of each and every controllerships by publication in the *Gazette*[459] is of little benefit. The requirements are intended to provide the public and, in particular, creditors and potential creditors, with notice of controllerships. However, gazettal is a very expensive requirement to fulfil and the beneficiaries usually would only include those persons who regularly scan the *Gazette* for such notices. It is likely that only major credit providers would have cause to regularly scan the *Gazette* and the Working Party has not received any evidence suggesting that even those organisations actually do so.

11.30. Most creditors would be interested only in controllerships affecting companies with which they are currently dealing and such information can be obtained by conducting periodic searches of the files of relevant companies as they appear on the ASC database.

11.31. The ASC has recently introduced a new mechanism called the 'ASC Alert' system. Using that system, a client may set up an 'alert profile' on the ASC's database, whereby documents lodged in relation to one or more specified companies may be

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458 ASC Policy Statement 106, *ASC Digest* PS 5/61 at PS 5/63.

459 Section 427, Corporations Law.

monitored automatically. The client may specify which sort of lodgements in relation to specified companies it wishes to be informed about. If a document of the type specified is lodged in relation to a company on the client's alert profile, the client will be advised automatically by facsimile of the lodgement. Clients may also set up the alert profile so that they automatically receive (by facsimile) an updated company extract from the database when the document is lodged and/or a copy of the lodged document. The alert system has the potential to be a more effective and efficient way for interested persons to monitor the appointment of controllers to specified companies rather than scanning the *Gazettes* for this information. To ensure that credit controllers are aware of the existence and potential benefits of the Alert database, the ASC may wish to consider conducting suitable advertising.

11.32. The Working Party considers that the content of the notifications to the ASC should contain sufficient detail so that the public can obtain at least a description of the property of corporations which are currently subject to controllerships. This will allow persons to conduct dealings with the corporation and/or the controller accordingly. For this purpose, a notice should be lodged at the commencement of the controllership and at six-monthly intervals noting any changes to the property covered by the controllership.

Reporting

11.33. The Working Party has noted the arguments regarding the utility (or lack thereof) to parties other than the corporation itself of a statutory requirement to account for the proceeds of sale by way of lodging accounts with the ASC. However, on balance, the Working Party favours an obligation to provide an account containing details of the proceeds of sale and how they were applied at the end of a controllership. This requirement serves two purposes. First, knowing the information will be publicly available imposes an extra layer of accountability. Controllers will be encouraged to obtain the best price for property and contain costs. Secondly, the Working Party considers that details of matters such as the residual amount which is remitted to the chargor corporation is of relevance to unsecured creditors. This is particularly so in cases where the charged property is substantial, since this information could have implications for the corporation's general financial situation.

11.34. The Corporations Law recognises that creditors and members have an interest in the conduct of the controllership as these parties are permitted (unless the court orders otherwise) to view detailed accounting records of the controller.[460] Allowing free access to fundamental information concerning the controllership, such as total proceeds of sale and expenses, enables creditors and members to assess whether to view the detailed records. It would be preferable to make this information available at

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460 Subsection 421(2), Corporations Law.

the earliest possible date, rather than relying on the annual reporting obligations of the corporation itself.

Managing Controllers

11.35. The Working Party notes the view expressed in a number of submissions that the current definition of 'managing controller' is too wide in that controllers who do not actually exercise powers of management are required to comply with the reporting obligations. Arguably this could be addressed if chargees were to draft their security documents so that powers of management were only conferred if there is a real likelihood that they will be needed, rather than including these powers in charge documents as a standard practice. This would mean that the number of controllers having powers of management which are not exercised would be substantially reduced. Furthermore, introducing a test based on whether powers are actually exercised may be open to abuse and difficult for the ASC to enforce, since it will not be apparent on the face of the relevant documents whether a controller is or is not a managing controller.

11.36. On balance, however, the Working Party considers that the current position in the Law should be changed because it imposes inappropriate obligations on controllers who possess powers of management but do not actually exercise them. Accordingly, the definition of managing controller should be amended so that those controllers who actually exercise powers of management will be subject to the reporting obligations.

11.37. The Working Party further considers that if a controller is in control of the whole, or substantially the whole, of the assets of a corporation, they are effectively in control of the activities of the corporation. In these circumstances, the powers of the directors to control the corporation in the ordinary way would be severely curtailed. Accordingly, controllers in such a position should be considered managing controllers and should be required to comply with the additional obligations on such controllers, without the need to address the issue of whether they are actually exercising the powers of management.

11.38. The Working Party considers that the current obligations for controllers in relation to the report as to affairs, which is required to be prepared by the reporting officers of a corporation, should be modified.

11.39. The Corporations Law currently requires a controller to serve on the corporation a notice that the person is a controller of the corporation's property.[461] The reporting officers[462] of the corporation must, within 14 days of receiving the

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461 Paragraph 429(2)(a).

462 The 'reporting officers' of a corporation are usually persons who were a director or a secretary of the corporation—see subsection 429(1), Corporations Law.

controller's notice, provide the controller with a report as to affairs.[463] The controller is then under an obligation to lodge this report with the ASC within one month of its receipt.[464] A notice must also be lodged setting out any comments which the controller has on the report as to affairs.[465] If the controller does not consider it necessary to make any comment, the notice must state this.[466]

11.40. The Corporations Law also allows the reporting officers to apply to either the controller or the court for an extension of time in which to submit the report as to affairs to the controller.[467] A copy of the notice or court order granting an extension of time must be lodged with the ASC within a reasonable time of granting the extension.[468]

11.41 Although the controller is responsible for the lodgement of the report, its preparation is the responsibility of the reporting officers. In the view of the Working Party, it would be preferable not to split responsibility in this fashion as it may give rise to uncertainties about which party is in default in cases where the report is lodged late or not at all.

11.42. It is proposed that the obligation to prepare and lodge the report as to affairs be placed on the reporting officers of the company alone. In the event that the reporting officers are unable to finalise the report within the specified time-frame, they will be required to apply to the ASC for an extension of time. Once the report has been lodged with the ASC, it is proposed that the reporting officers will be required to provide controllers with a copy of the report. The controller will then be required to lodge with the ASC a notice setting out any comment which they have on the report as to affairs within one month. In accordance with the current requirements of the Corporations Law, this notice may simply state that the controller has no comment to make. If a controller requires an extension of time for preparing this notice, the controller will be required to apply to the ASC.

11.43. It is proposed that the requirements regarding the report as to affairs by company officers will only apply to controllers, as opposed to managing controllers. The managing controller will still be required to prepare and lodge their own report as to affairs within two months of appointment and comments on the report as to affairs prepared by the reporting officers may be made in that context.

11.44. The Working Party has also considered whether the current obligations of receivers to report to the ASC possible offences on the part of directors and other

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463 Paragraph 429(2)(b), Corporations Law.

464 Paragraph 429(2)(c), Corporations Law.

465 See note 464.

466 See note 464.

467 Subsection 429(3), Corporations Law.

468 Subsection 429(4), Corporations Law.

officers[469] should be extended to managing controllers. In this regard, the fact that managing controllers do not necessarily have to be registered liquidators and, accordingly, may not have as great a knowledge of the Corporations Law, may be a factor which weighs in favour of restricting the obligations to report possible misconduct.

11.45. On the other hand, managing controllers are arguably in as good, if not a better, position than receivers to discover such matters in the course of their administrations and, if they do, they should be obliged to report the possible misconduct. It is properly a matter for the ASC to determine whether there is any substance to the allegations. On balance, the Working Party considers that the obligations of receivers to report possible misconduct of company officers should be extended to managing controllers. The ASC may wish to consider whether it would be of assistance to formulate guidelines or develop some other mechanism to educate managing controllers about the type of actions by directors which should be reported to the ASC.

Bank Accounts

11.46 The current requirement on the part of all controllers to open and maintain a separate bank account for each controllership is designed to prevent the mingling of funds and make accounting for, and tracing of, the proceeds of the sale or profits from controllerships straight-forward and transparent.

11.47. The objective of the requirements is clearly a worthy one. However, debate concerning what constitutes 'money of the corporation' for the purposes of the provisions,[470] together with the reality that, in many instances, even if the entire proceeds of sale were paid into the account, they could legitimately be paid straight out again in full to the controller, has meant that the requirement to open a separate bank account is seen as burdensome and unnecessary.

11.48. In the view of the Working Party, the requirement to record and explain all transactions that the controller enters into as controller is the main mechanism of accountability. Even if 'money of the corporation' is given a broad interpretation, the requirement to open a separate account where there are very few transactions during the course of the controllership does not appear to add significantly to the level of accountability.

11.49. The situation is different, however, where there are potentially numerous transactions involved. In the more complex controllerships where there are multiple incoming and outgoing transactions, it is important from the controller's perspective as

469 Section 422, Corporations Law.

470 Section 421, Corporations Law.

well as the perspective of the chargor corporation, that the funds in relation to each controllership are accounted for and kept separate from the controller's own funds and funds relating to other controllerships.

11.50 The more complex controllerships in terms of financial transactions are likely to occur where the controller is a managing controller. The Working Party acknowledges that this may not be true in all cases. Some managing controllerships may involve only a handful of transactions and some ordinary controllerships may involve numerous incoming and outgoing payments. However, unless a line is drawn somewhere it would be necessary to either retain the separate bank account requirement in all cases, or do away with it entirely. The Working Party considers that neither of those options is desirable and recommends that the requirements be retained for managing controllers only in cases where money for which they are obliged to account comes into their hands.

11.51 The Working Party recommends that the preferred approach regarding reform of the duties and responsibilities of controllers is as follows:

I. the ASC should become the source of public information concerning controllerships and the Gazettal requirements should be abolished;

II. all controllers should be required to notify the ASC and the chargor company that they have been appointed over corporate property and the nature of the property concerned;

III. all controllers should be required to provide a status update every six months after appointment which details the property still subject to the controllership and any property which has been disposed of or returned;

IV. all controllers should be required to provide a final report to the ASC when an appointment has lapsed due to disposal or return of the assets concerned and, where applicable, provide a report on sale proceeds and dispersal of proceeds;

V. 'managing controllers' should be redefined to include only those controllers who have taken control or possession of the whole or substantially the whole of a company's assets or those controllers who actually exercise powers of management (with the question of what is substantial left to the common law);

VI. the company officers should be responsible for preparing and lodging a report as to affairs themselves and, if an extension of time is needed, they should be required to apply to the ASC rather than to the controller;

VII. controllers other than managing controllers should be required to lodge a notice with the ASC commenting on the report as to affairs provided by the company officers within one month of receipt;

VIII. managing controllers should be required to prepare and lodge a separate report as to affairs within two months of appointment and that report should include comments on the report as to affairs prepared by the company officers;

IX. only managing controllers should be subject to a requirement to open a separate bank account where they have received money which is required to be accounted for;

X. managing controllers should be required to report possible misconduct on the part of company officers to the ASC; and

XI. the suitability of the forms required to be lodged by controllers should be reviewed.