REGULATION IMPACT STATEMENT – THE HARMONISATION AND MODERNISATION OF THE REGULATORY FRAMEWORK APPLYING TO INSOLVENCY PRACTITIONERS IN AUSTRALIA

EXECUTIVE SUMMARY

1. This Regulation Impact Statement (RIS) seeks to quantify the costs and benefits of possible regulatory amendments to the personal insolvency and corporate insolvency laws to address a wide range of issues that negatively impact on the efficiency and effectiveness of the insolvency system in providing for the fair allocation of resources where a company or individual is unable to service their debts.

2. The RIS synthesises information regarding current problems, and possible solutions, obtained through submissions to the Australian Government's *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework applying to Insolvency Practitioners in Australia* (the Options Paper), as well as to the 2009 Senate Economics References Committee Inquiry into 'the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission (ASIC), prior to and following the collapse of a business' (the Senate Inquiry), and industry dialogue.

3. There are currently inherent failures in the market for both personal and corporate insolvency services, driven by such features as the heterogeneity of services, asymmetries in information and skills, and the need to assess significant risk premiums; as well as a wide range of regulatory failures. The regulatory failures identified include: slow and inflexible practitioner disciplinary systems; unnecessary barriers to creditors removing insolvency practitioners; and unnecessary prescription of creditor's rights to information

4. In a broad range of areas, the current system for the registration, deregistration and discipline of both corporate and personal insolvency professionals, as well as the rules for the proper administration of external administrations and personal bankruptcies, are not providing for the fair and efficient operation of the insolvency system.

    4.1 The RIS does not seek to identify regulatory failures in relation to the broader corporate and personal insolvency laws outside of personal and corporate insolvency practitioner regulation and insolvency administration governance. These areas of corporate insolvency law and practice were identified as exhibiting particular failings in the Senate Inquiry. A staged approach to any possible alignment of the personal and corporate insolvency laws would minimise the potential for significant disruptions to the insolvency system resulting from 'big bang' reform.

5. The RIS sets out three options for possible reforms to the corporate and personal insolvency systems that may address the problems identified.

- The Government may retain the status quo.
- The Government may reform the current framework for the registration, deregistration and oversight of the insolvency profession by establishing a new co-regulatory system.

- The Government may reform the current regulatory framework through a process of alignment of the relevant corporate and personal insolvency divergences, with minor enhancements to reflect modern commercial practicalities.

6. The third option is preferred as it will best address the regulatory problems identified and meet the Government's objectives of aligning and improving personal and corporate insolvency practitioner regulation and insolvency administration governance; facilitate increased competition within the insolvency services market; and improve the efficiency of insolvency processes. This option will also assist in restoring confidence in the insolvency industry and its regulation following high profile cases of misconduct and adverse Senate Inquiry findings.

CONTEXT

7. The insolvency system has a significant effect on both the level and nature of business activity taking place within an economy. An efficient insolvency system facilitates structural adjustment; is a strong determinant of the accessibility and cost of credit in an economy; and minimises the impact of business failure of stakeholders, such as creditors and employees. It plays a key role in the efficient reallocation of resources and the minimisation of market distortions arising from business failure.

8. Australia has always had separate personal and corporate insolvency systems. This includes separate laws[1], regulators[2], agencies responsible for policy development[3], and ministerial responsibility[4]. This formal division mirrored the separation of corporate and personal insolvency laws in the United Kingdom prior to the Cork Report and subsequent reforms in the mid 1980s[5]. While corporate insolvency law, which developed in the 19th century with the growth of joint stock companies has its roots in 16th century personal insolvency law, these two areas of law have developed separately over time[6].

9. A liquidator may be appointed to administer a company where the company is unable to pay its debts as and when they fall due. The role of the liquidator is to ensure a fair, efficient and timely redistribution of the company's assets to the company's creditors or to facilitate the reorganisation and rehabilitation of the business in accordance with the legislative and regulatory framework outlined under the Corporations Act.

10. A registered trustee may be appointed to administer the estate of an individual where either: a sequestration order has been made by the Court against the estate of the individual; or the individual has voluntarily presented a debtor's petition to enter into bankruptcy. They may also act as a controlling trustee or as a trustee of a personal insolvency agreement.

11. Insolvency practitioners in both personal and corporate insolvency also play a role in investigating the reasons for the insolvency of the individual or company, as well as in the

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1 The laws relating to corporate insolvency are contained in the *Corporations Act 2001* and the *Corporations Regulations 2001*, the *Australian Securities and Investments Commission Act 2001*, while the laws relating to personal insolvency are fully contained in the *Bankruptcy Act 1966* and the *Bankruptcy Regulations 1996*.

2 ASIC is the corporate insolvency regulator, while ITSA is the personal insolvency regulator.

3 The Treasury has responsibility for corporate insolvency policy. The Attorney-General's Department has responsibility for personal insolvency policy.

4 The Parliamentary Secretary to the Treasurer has responsibility for corporate insolvency. The Attorney-General has responsibility for personal insolvency.

5 *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558; *Insolvency Act 1986* (UK).

6 Michael Murray, *Keay's Insolvency: Personal and Corporate Law and Practice*, 6th Edition, 2008.

recovery of assets distributed through transactions completed before the commencement of the external administration or bankruptcy.

12. The regulation of insolvency practitioners, particularly corporate insolvency practitioners, has been the subject of a number of reviews in the past two decades by a range of bodies including the Australian Law Reform Commission in 1988 (the *General Insolvency Inquiry* (commonly known as the Harmer Report)); *the Working Party to review the regulation of corporate insolvency practitioners* in 1997; the Parliamentary Joint Committee on Corporations and Financial Service in 2004; and most recently the Senate Economics References Committee (Senate Committee) that release its report, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework* in September 2010 (the Senate Inquiry Report).

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

    13.1 The Government has decided not to accept the Senate Committee recommendation that the corporate insolvency arm of ASIC be transferred to ITSA to form a new personal and corporate insolvency regulator.

    13.2 The Senate Inquiry Report highlighted the current divergence between the regulatory systems for corporate and personal insolvency and expressed a desire for greater harmonisation of the two. The Government provided a comprehensive consideration of the areas for reform identified by the Senate Committee through the Options Paper.

14. In light of the concerns raised in the course of the Senate Committee Inquiry, and in response to the Options Paper, the Government is considering options for reform that will assist in restoring confidence in the insolvency industry and its regulation.

15. **Overview of insolvency services market**

	Corporate (2009/10)	Personal (2009/10)
Number of practitioners	662 (as at February 2010); 492 official liquidators.	208[7]
Complaints made to regulator about practitioners	467 (excluding duplicates)	299
Insolvency appointments	14,056	36,513 (approx. 17,000 are completed by registered trustees)
Number of firms	273 (as of December 2009)	106 (current)

[7] There are 55 debt agreement administrators – the proposed reforms are not intended to affect these practitioners.

PROBLEM

OVERVIEW OF PROBLEM

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

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

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

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

19. Furthermore, the nature of specialist insolvency administration services (whether they be personal insolvency or corporate insolvency services) inherently present difficulties in the market for these services operating in an efficient manner, largely because of asymmetries in technical knowledge, skill and information; the highly heterogeneous nature of the services provided; and the fractured nature of decision making by the 'client'[8]. These market failures adversely affect: efficient price-setting of insolvency services; the ability of stakeholders to conduct effective reviews of claims for remuneration; and the ability of stakeholders to monitor the progress of an administration in which they have a financial interest.

20. The following provides a discussion of the current failures in regulation, registration and remuneration of insolvency practitioners that are adversely affecting the efficiency and effectiveness of Australia's corporate and personal insolvency systems.

21. As a result of the low level of statistical data previously obtained in relation to the corporate insolvency industry, as critically commented on by the recent Senate Inquiry[9], the ability to quantify the problems listed below is limited.

[8] The 'client' in an insolvency administration is ordinarily the creditors as a whole (which is potentially a diffuse group of individuals or organisations).

[9] See chapter 9 of the Senate Committee Report.

CURRENT REGULATORY FAILURES

REGISTRATION

22. Currently, an applicant for registration as a liquidator must be registered by ASIC if the applicant: meets the prescribed tertiary qualifications and experience requirements; is able to satisfy ASIC that he or she is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered; is not disqualified from managing a corporation; and is an Australian resident. The application is considered 'on the papers' and applicants are not required to demonstrate their understanding of the legislation, or demonstrate that they are 'fit and proper' through practical scenarios.

    22.1 This was commented on negatively by a number of submissions to the recent Senate Committee Inquiry, and by the Senate Committee itself[10]. In contrast, an applicant for registration as a registered trustee must meet lower prescribed experience requirements (two years senior experience compared to five years in corporate insolvency), but as part of the process for determining registration is required attend an interview conducted by a three person panel where the applicant is questioned.

<u>Standards for entry</u>

23. A number of submissions to the Senate Inquiry remarked on the high level of fees being charged by liquidators. The Senate Committee itself noted that while these charges may be justified in complex cases, overcharging and over servicing was clearly evident in the industry[11].

24. The Senate Committee noted that the market for liquidators is distorted due to the lack of adequate incentives for practitioners to offer fees that are genuinely commensurate with the efficient and effective performance of their duties[12].

25. Unlike in the legal profession, or general accountancy profession, the registered liquidator is the only person in their practice required to be registered or meet any minimum standards of competence. As a result, regardless of the experience or ability of a director or senior manager in an insolvency firm, without undergoing a registration process, the director is unable to compete for insolvency work with the liquidator.

26. The level of competition in the market for insolvency services has been considered by all major reviews of the industry in the past two decades with recommendations made to expand the categories of people who are eligible to apply for entry into the market.

    26.1 The Working Party established to review the regulation of corporate insolvency in 1997 considered that there was scope to broaden the entry requirements to allow persons in from outside the accounting profession without adversely effecting standards. In its 2004 report, *Corporate Insolvency Laws: A Stocktake,* the Parliamentary Joint Committee on Corporations and Financial Services recommended that the criteria for registration as a registered liquidator be broadened to recognise qualifications in other areas, and to abolish the dual classification of official and registered liquidators, on the basis that such changes have the potential to encourage greater competition in the provision of insolvency services and reduce the costs of external administrations.

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[10] Institute of Chartered Accountants, Submission to the Senate Committee Inquiry (*Submission 66*), page 3; Senate Committee Report, paragraph 11.35.

[11] Senate Committee Report, paragraph 11.47.

[12] Senate Committee Report, paragraph 11.51.

Unnecessary distinctions

27. The current distinction between official liquidators[13] and registered liquidators imposes an additional regulatory burden on liquidators given the need to comply with the administrative requirement to be appointed as an official liquidator. There is no corresponding tiered arrangement in the personal insolvency framework.

Period of registration

28. Currently, registered liquidators are able to remain registered provided they comply with lodgement of annual statements and insurance requirements under the Corporations Act[14]. The indefinite nature of liquidator registration limits the control of the regulator to determine the participants in the market by restricting the options for removing a registered liquidator from the market. This precludes a proactive continuing verification process that reviews the factors necessary for the proper performance of a registered liquidator's duties.

29. This contrasts with the requirement for periodic renewal of registered trustees' registration. However, the statutory requirements for renewal of registration under the Bankruptcy Act[15] do not provide for the consideration of a trustee's history and past conduct[16].

Conditions on registration

30. The Corporations Act and Bankruptcy Act provide ASIC and ITSA respectively with a discretion to register a practitioner who does not meet the prescribed qualifications and/or experience requirements. However, ASIC is not able to impose conditions on the registration of a liquidator. This diminishes the flexibility that ASIC has to deal with potential entrants to the profession, and as a consequence limits the potential for increased numbers of quality applicants to be allowed to compete in the market for insolvency services.

DISCIPLINARY SYSTEM FOR INSOLVENCY PRACTITIONERS (INCLUDING ABILITY TO DEREGISTER)

31. The current systems for the cancellation or suspension of registration and discipline of registered liquidators and registered trustees diverge significantly. The maintenance of two divergent regimes creates additional complexity for practitioners brought before the disciplinary process; and may therefore create additional costs.

32. The potential for the removal of poorly performing registered liquidators is important in maintaining the integrity and credibility of the system. A lack of confidence in the profession could result in a rise in the cost of obtaining credit as financiers impose increased protections for potential default.

33. The discipline of registered liquidators through the Companies Auditors and Liquidators Disciplinary Board (CALDB) is perceived by stakeholders to be a slow and expensive process. In particular, the level of procedural complexity in disciplinary processes is criticised for being

[13] If a liquidator wishes to accept appointments to a liquidation commenced in a Court, provisional liquidations or certain cross-border insolvency matters, the liquidator must apply to ASIC to be registered as an 'official liquidator'.

[14] Throughout, the term *Corporations Act* will be used to denote provisions in the *Corporations Act 2001*, Corporations Regulations 2001, the *Corporations (Fees) Act 2001*, the *Corporations (Review Fees) Act 2003*, the Corporations (Fees) Regulations 2001, and the Corporations (Review Fees) Regulations 2003.

[15] Throughout, the term Bankruptcy Act will be used to denote provisions in the *Bankruptcy Act 1996* and the Bankruptcy Regulations 1996.

[16] Under the Bankruptcy Act, the Inspector-General is required not to extend the registration only in cases where certain fees and charges have not been paid. The Inspector-General has no discretion to refuse the extension of registration on any other basis.

inconsistent with the obligation under the Corporations Act for CALDB to be fast and efficient.[17] Cost effectiveness is also affected where respondents choose to use Senior Counsel at hearings, and ASIC consequently considers there is a need for it to be likewise represented.

Standing to commence court proceedings

34. Most provisions in the Corporations Act empowering the Court to review a registered liquidator's conduct specify limited classes of persons who may seek a review.[18] There are only two which do not.[19] Likewise, while the equivalent Bankruptcy Act provisions[20] refer to specific categories of applicant, the statutory power to appeal to the Court against a decision of a registered trustee also refers to applications by 'other persons affected'.[21]

35. The 2008 Victorian Supreme Court decision of *Vink v Tuckwell*[22] expanded the intended scope of the provision from persons aggrieved by the conduct of the liquidator in connection with the performance of his or her duties to 'any person'. The decision provides a precedent for potentially vexatious litigation, the disruption of otherwise orderly liquidations, and unnecessary diminution of an insolvent company's assets.

Review of disciplinary decisions

36. The operation of the AAT Act with the Corporations Act or Bankruptcy Act allows an insolvency practitioner who is subject to a disciplinary sanction to continue to act in his or her capacity as a registered liquidator or registered trustee while those appeals are heard.

37. Where the creditor or regulator, on the basis of misconduct proven in other external administrations or bankruptcies, wishes to remove the insolvency practitioner from a current unrelated matter, the Court may be unwilling to interfere with the operation of the current matter due to the absence of connection between the matters.

PROCEDURAL RULES

38. The corporate and personal insolvency regulatory frameworks currently provide procedural rules regarding: the treatment of estate monies; the obligation on registered liquidators and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and ITSA respectively; the keeping of books and the period of time for which those books must be retained.

39. The current divergence in rules and requirements for personal and corporate insolvency create unnecessary complexity and costs for creditors and insolvency practitioners, making it difficult for creditors of individuals as well as companies to understand how the different regimes apply without an in-depth knowledge of both frameworks. This lack of knowledge and expertise is not something that creditors can easily address and it imposes both financial and time costs on creditors to obtain the information they need to protect their interests in a corporate or personal insolvency.

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

[17] See Senate Committee Report, page 76; Mr Geoff Slater, *Committee Hansard*, 13 April 2010, p. 47; Mr Vanda Gould, *Committee Hansard*, 13 April 2010, p. 20.
[18] See sections 447E, 472, 477, 598 and 1321 of the Corporations Act.
[19] See sections 536 and 423 of the Corporations Act.
[20] Sections 178, 179, 185ZBC and 210 of the Bankruptcy Act.
[21] Section 178 of the Bankruptcy Act.
[22] [2008] VSC 206

costs and the administrative burden on practitioners. Similar but different rules may contribute to error by practitioners through the application of the wrong set of rules in an administration[23].

INSURANCE REQUIREMENTS

41. A registered liquidator is required to maintain adequate and appropriate professional indemnity (PI) insurance and fidelity insurance to cover claims that may be made against him or her[24]. The Senate Committee's Report raised concerns regarding the current difficulties regulators face in gaining awareness of when the insurance policies of practitioners lapse, while industry has raised concerns that insurers will not offer run-off cover for insolvency practitioners[25].

COMMUNICATION BETWEEN INSOLVENCY PRACTITIONERS AND STAKEHOLDERS

42. Personal and corporate insolvency laws contain a number of mechanisms designed to ensure that stakeholders are appropriately informed of debtors' affairs and the process of insolvency administrations. These mechanisms impose obligations upon practitioners to provide specified types of information and rights for stakeholders to make ad hoc requests for information.

Limited creditor access to information

43. Generally, liquidators are obliged to act in the best interests of all creditors; however, there are limited opportunities for creditors in an external administration to access the information necessary to determine whether this is actually occurring. The potential inability of creditors to access information about the conduct of the external administration negatively impacts on the ability of creditors to monitor the external administration.

44. The difficulty for creditors to monitor their own interests in an external administration may result in the regulator being drawn into disputes that are fundamentally commercial in nature — about whether a service provider is providing value for money, rather than concerning alleged misconduct.

Cost arising from meetings

45. The Senate Committee found that while creditors in corporate insolvency may have a right to call a meeting where creditors representing 10 per cent in value agree, the cost of calling and holding the meeting acts as an effective deterrent to creditors doing so. The free-rider problem in this instance may also encourage creditors to refrain from undertaking acts of administrator oversight because it is in their interest for someone else to undertake these acts and bear the costs.

Periodic meetings and reporting

46. Industry concerns have been raised regarding the need for liquidators to report to creditors annually, or hold meetings, about the state of an ongoing liquidation, and the requirement for a final meeting of creditors under an external administration. These concerns relate to the low level of interest by creditors in these reporting mechanisms that lead to a compliance based

[23] Annual Review of Regulatory Burdens: Business and Consumer Services – Research Report, 2010, Productivity Commission, page 172.

[24] Section 1284 of the Corporations Act.

[25] Ms Denise North, Senate Economics References Committee Hansard, Reference: Liquidators and administrators, Canberra, 12 March 2010, page 51.

approach to the completion of these processes. The costs of these regulatory requirements are borne by the estate as a whole.

Limitations of committees of inspection (COI)

47. The provisions setting out the rights and rules for COIs are drafted in varying language and spread throughout Chapter 5 of the Corporations Act which does not facilitate their easy use and understanding by creditors. The Bankruptcy Act also sets out rules governing COIs in personal insolvency. The divergence, notwithstanding any clear policy rationale for doing so, imposes time and potential legal costs on creditors and insolvency practitioners required to meet the varying requirements.

Obtaining reports as to affairs (RATAs) and books of the company

48. RATAs and statements of affairs are documents that must be completed and provided by debtors or directors at the commencement of an insolvency administration. They are a means of ensuring that practitioners are provided with information necessary to facilitate efficient administration. The provision of this information is also essential in ensuring that practitioners can provide an appropriate level of information to stakeholders regarding: the affairs of the debtor; the likely outcomes of the administration; and the tasks that may need to be performed by the practitioner.

49. The non-lodgement with an insolvency practitioner of the RATA and the company's books and records does not merely impact on the practitioner's ability to properly conduct the administration.

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

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

REMOVAL AND REPLACEMENT OF INSOLVENCY PRACTITIONERS FROM AN EXTERNAL ADMINISTRATION

52. Creditors and members in a corporate insolvency currently possess limited opportunities to remove a liquidator or administrator once they are appointed, regardless of poor performance or misconduct. Currently:

- creditors in a Court-ordered winding-up possess no opportunity to remove an appointed official liquidator without recourse to a Court;
- creditors in a voluntary winding-up are able to remove an appointed liquidator at the first meeting of creditors (held within 11 days after the winding up commences); and
- creditors in a voluntary administration are able to remove an appointed administrator at the first meeting of creditors (held within 8 days after the administration commences). At the

second creditors meeting (held within 25 or 30 days), creditors may pass a resolution to appoint someone else to be the administrator of a deed of company arrangement (DOCA) or to be the liquidator in a winding-up.

53. At the first meeting of creditors, it may be unlikely that there will be sufficient knowledge of the registered liquidator or other reason to justify removing them from office.

54. Other than at the times noted above, only the Court may remove a liquidator or administrator. Applications to, and hearings before, a Court represent a significant cost barrier to the possible removal of liquidators from an administration. Again there is a free-rider problem, with the petitioning creditors bearing the risk of adverse cost orders but being unable to obtain any greater share of the possible efficiency gains from any removal.

55. The Court is unlikely to remove a liquidator or administrator unless serious misconduct occurs. Liquidators and administrators may therefore be insulated from the consequences of failing to fulfil their role as they are likely to remain as the liquidator/administrator so long as their actions can be broadly justified in terms of being reasonable commercial decisions.

56. Aside from the costs involved for members or creditors for seeking to remove a registered liquidator, there is a high potential for the liquidator's costs of defending an action (even unsuccessfully) to be borne by the liquidation or administration. Court based remedies are also associated with significant delay, during which the incumbent will likely continue to act.

57. Similar difficulties do not exist in relation to personal insolvency administrations due to the statutory power for creditors to vote to remove a registered trustee[26].

Transfer of liquidation or administration documents

58. Upon removal of a practitioner (whether it be a liquidator, administrator or registered trustee) from a matter, the administration documents (as opposed to the books of the company itself) may remain the property of the outgoing practitioner, subject to an express order of the Court. This creates a disincentive for creditors considering the removal of the practitioner, as the incoming practitioner may not be able to build on the work already undertaken by the outgoing practitioner. It also provides an uncertain position for creditors and practitioners attempting to determine whether the books of the administration are the property of the company, individual or the practitioner.

REMUNERATION

59. The market failures referred to at paragraphs 78 to 96 impact on the efficiency of fee setting, monitoring and review. In particular, the operation of fee setting mechanisms are impacted by asymmetries in technical knowledge and skills.

Lack of price competition

60. Anecdotally, there appears to be little indication of active price based competition occurring between insolvency practitioners. This may not be unexpected for an industry where 'purchases' by many clients are rare, there is a highly heterogeneous service provided and assigning responsibility for outcomes is difficult.

[26] Section 181 of the Bankruptcy Act.

Disbursements

61. The Senate Committee echoed creditor dissatisfaction with the current disbursements system in corporate insolvency[27]. Whilst a practitioner must account to creditors for disbursements, they are not subject to the requirement that they receive approval from a specified party, and are instead paid out of company assets.

62. The disbursement system can be abused by obtaining payment as a disbursement for actions which should properly have been charged as remuneration. For example, a liquidator may pay disbursements to specialist firms, related to the liquidator, which have been structured to ensure that work done by the practitioner's employees are charged to that separate corporate identity.

Casting vote and practitioner remuneration

63. Concerns have been raised at the inherent conflict of interest in a practitioner being authorised to exercise a casting vote on resolutions approving their own remuneration. While liquidators fall within the definition of a de facto director under section 9 of the Corporations Act and therefore are subject to general director's duties, the duty for a director to refrain from obtaining an advantage from their position requires actual dishonesty.

Communication of practitioner remuneration

64. The regulatory frameworks for both corporate and personal insolvency provide an opportunity for the approval of remuneration by the creditors of the estate. However, concerns have been raised that the disclosures made by registered liquidators to creditors may contain too much information to be meaningful and easily understood.[28] Vague, unnecessarily complex, or unnecessarily dense remuneration disclosure impedes the ability of creditors to determine the reasonableness of fees proposed.

65. Complaints regarding remuneration issues, including excessive fees and poor disclosure of remuneration, constituted eight per cent of all insolvency related complaints to ASIC from 2006–2010. A further 12 per cent of complaints were in relation to criticism of insolvency practitioners failing to act in a timely manner[29].

High cost of fee approvals in assetless administrations

66. While a liquidator is currently able to draw down up to $5,000 where he or she has called a meeting of creditors but failed to obtain approval for remuneration because of a lack of quorum, the liquidator (and ultimately the estate) is required to incur the expense of convening a creditors meeting, regardless of the potential for achieving a quorum. In contrast, registered trustees are able to draw down up to $5,000 without approval. This figure reasonably reflects the essential tasks which every trustee must undertake[30].

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27 See paragraphs 8.33-8.38 of the Senate Committee Report.

28 Hughes B, Pitcher Partners, Submission 47 to the Senate Committee Inquiry, page 2.

29 ASIC submission to the Senate Committee Inquiry (*Submission 69)*, page 58.

30 Explanatory Memorandum, Bankruptcy Legislation Amendment Act 2010.

REGULATOR POWERS AND OBLIGATIONS

Information flows between regulators

67. Concerns have been raised whether the statutory frameworks under which both regulators operate are sufficient to support the cooperative aspirations embodied in the current Memorandum of Understanding between the regulators[31] signed in 2002 to promote cooperation between the agencies and facilitate joint investigations where a director of an insolvent company is also a bankrupt. It is important to ensure that regulators are able to pass on necessary information to other law enforcement agencies, both State and Federal.

Information flows between regulators and professional bodies

68. Interruptions to the information flow between regulators and the professional bodies can prevent the regulator, or the professional body, from being aware of all facts that could potentially be considered in determining whether a registered liquidator remains a fit and proper person or whether an investigation into a registered liquidator by the regulator may be warranted. Currently, there is no power for ASIC to share information with the IPA or the law societies in each State and Territory. As at 31 December 2009, 85 per cent of registered liquidators and registered trustees were members of the IPA.

69. There do not appear to be similar concerns regarding the flow of information in personal insolvency as the Inspector-General may make such inquiries and investigations as he or she thinks fit with respect to the conduct of a registered trustee in respect of a bankruptcy; the conduct and examinable affairs of a debtor subject to a bankruptcy proceeding; and any offences under the Bankruptcy Act and may provide a copy of any report that results from these inquiries and investigations to any person that the Inspector-General thinks fit.[32]

Information flows between regulators and other stakeholders

70. While ASIC and the IPA have developed basic information sheets on corporate insolvency, a number of submissions to the Senate Inquiry commented on the lack of materials available for creditors to understand the external administration process and their rights in that process[33]. As noted above, there are significant asymmetries in knowledge and skills between practitioners and creditors (particularly, trade creditors), employees and other interested parties who often are encountering an external administration for the first time.

71. The level of communication between ASIC and creditors was raised as a significant concern during the Senate Inquiry. While there is no explicit statutory provision for either ASIC's or ITSA's role in providing education and information to stakeholders impacted by the regimes, this is generally considered to be an incidental function of all regulators.

Surveillance

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

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[31] A Memorandum of Understanding was signed by ASIC and ITSA in 2002 to promote cooperation between the agencies and facilitate joint investigations where a director of an insolvent company is also a bankrupt.

[32] Section 12 (1)(a)-(b) of the Bankruptcy Act.

[33] Mr Ian Fong, *Committee Hansard*, 14 April 2010; Mr Nicholas Bishop, *Submission 74*

made the allegation. ASIC is constrained in the extent of any information that it might otherwise similarly provide.

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

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

75. The current wording of some of the statutory powers to conduct investigations and to communicate the outcomes of those investigations under the *Australian Securities and Investments Commission Act 2001* is more restrictive than the commensurate powers for ITSA under the Bankruptcy Act. For example, while some of ASIC's powers are exercisable only where it suspects that there has been a contravention of the law, the Inspector-General is not similarly constrained.

Ability to intervene in an external administration or bankruptcy

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

77. However, currently there is limited scope for ASIC to communicate information or provide copies of records to relevant stakeholders that have been obtained through their regulatory activities or under their information gathering powers. In personal insolvency the Inspector-General can provide copies of reports that result from inquiries and investigations.[34]

INHERENT MARKET FAILURES

HIGHLY HETEROGENEOUS SERVICE

78. In many circumstances, insolvency practitioners provide a highly heterogeneous service. Assessments of the services to be provided, for the purpose of setting appropriate fees, must be made on a case by case basis. This requires greater skill and knowledge, access to appropriate information for each administration and involves higher costs to participants, than when there are more homogenous services being offered.

79. The proper and efficient administration of 'similar' insolvencies may involve significantly different costs. This may occur due to the potential for qualitative factors to have a high impact on costs. Qualitative factors are notoriously difficult to assess. Less information is generally available regarding qualitative factors, which makes accurate assessment difficult. Fee setters (in particular persons setting fees prospectively) are in a poor position to assess appropriate fee levels in administrations where such factors are prevalent.

[34] Section 12(1)(b) of the Bankruptcy Act.

80. However, many small and assetless administrations can be administered by fairly similar and standard processes, even though the subjects of the companies in external administration may be different. A large portion of total corporate insolvencies are small and low asset administrations[35].

81. An even greater portion of bankruptcies are no asset bankruptcies. ITSA's *Profiles of Debtors 2009* reported that seventy per cent of all bankrupts disclosed no 'divisible' or 'realisable' assets and another fifteen per cent of bankrupts disclosed divisible assets between $Nil and $4,999. These very low or nil asset bankruptcies are almost exclusively administered in bulk by the Official Trustee via streamlined and standardised processes.

SCOPING OF WORK FORMS PART OF THE SERVICE

82. Unlike in most service provider/client relationships, the scope of work to be performed is uncertain at the time of engagement of the service provider. It is part of the role of an insolvency practitioner to determine what work should be performed. Additionally, the insolvency practitioner determines the work to be performed without needing to obtain the approval of their clients.

83. The inability of clients to make their own cost/benefit analyses of proposed courses of action and to choose which actions should be undertaken reduces their ability to control costs. The inability to determine what work should and should not be performed also impacts upon their bargaining power with the insolvency practitioner.

INFORMATION ASYMMETRIES

84. Information asymmetries exist between debtors, directors, insolvency practitioners, creditors and members. For example, at the commencement of an insolvency administration, the insolvency practitioner may have little information about the financial affairs of the debtor. The debtor (or in the case of a company, its directors) may be uncooperative in completing and lodging a Statement of Affairs (or Report as to Affairs).

ASYMMETRIES IN TECHNICAL KNOWLEDGE AND SKILLS

85. Insolvency administration services may involve a high level of technical complexity. Creditors, particularly small business creditors and non-business creditors, may lack the knowledge and skills to properly understand the full nature of the 'product' that is being offered. It may therefore be difficult for clients to determine what a reasonable and appropriate fee is for such services.

ASSERTIONS OF HIGH RATES OF FEES AND THE NEED TO ASSESS SIGNIFICANT RISK PREMIUM

86. There is no fixed industry wide scale of remuneration in personal or corporate insolvency and very few restrictions on how work can be charged. Fees are most commonly charged at hourly rates which have been scaled to reflect the level of the employees involved with the work, and practitioners generally obtain approval for this fee structure at the start of their appointment or shortly after. Practitioners have two other forms of fee payment: fixed fee and commission based services, each of which is less widely used than an hourly rate.

87. Concerns have been raised about the apparently high rate of fees being charged by practitioners, and whether the rate was unnecessarily so. Because practitioner remuneration is paid from assets, they are often not remunerated in full, or at all, because no assets remain.

[35] According to estimates provided in initial external administrators' reports provided to ASIC, 4812 external administrations (out of a total of 14,046 external administrations) were expected to have less than $10,000 in assets in 2009-2010.

It has been asserted that this may lead to overcharging for services where there will be money available, as a recoupment action.

88. The unrecovered costs borne by practitioners in assetless administrations, or administrations with insufficient assets to meet remuneration and disbursements incurred, may be seen as being borne by other administrations through the charging of these risk premiums. Concerns have been raised from both within and outside the industry about the effects of this cross-subsidisation.

THE PREVALENCE OF TIME BASED CHARGING

89. One of the major problems with time-based charges relates to the complexity of insolvencies. It is difficult to ascertain how complex an insolvency will be at the outset of an appointment. Time-based charging is thought to be an uncertain way for creditors to pay remuneration.

90. Time-based charging: incentivises assigning more highly qualified people than necessary to work on a particular insolvency because of their higher charge out rates, and for rewarding inefficiency; reduces the ability of clients to assess the reasonableness of the remuneration and to compare services between practitioners, as there is little indication of the total cost; and does not effectively transfer the risks of cost blowouts to those best able to manage them.

FRACTURED DECISION MAKING BY CLIENTS

91. Whereas fees are normally negotiated with service providers by individual clients, the fee setting body in an insolvency administration (i.e. generally the creditors as a whole) is a group of individuals or organisations. This may have an adverse effect on the ability of fee setters to organise and cooperate in the assessment, negotiation and setting of fees.

92. The collective nature of the fee setting body may increase monitoring and transaction costs associated with the governance of insolvency administrations.

THE CONFLICT BETWEEN INDEPENDENCE, DUTY AND FLEXIBILITY IN FEE SETTING

93. Fee approvals have the potential to have a coercive effect on the conduct of practitioners and could potentially impermissibly infringe on their independence and the performance of their legal and fiduciary duties.

94. However, the extent to which the law relating to the independence and obligations of practitioners does in fact interfere with flexible fee setting arrangements is uncertain. While the applicable trust law and law on the duty of practitioners to maintain independence appears to be relatively clear; and the law on fee setting is likewise relatively clear, there is a lack of case law on how the two bodies of law interact when they are in conflict.

CROSS ENGAGEMENT BY INSOLVENCY PRACTITIONERS

95. Fee setters, their advisers or their decision makers, may also have commercial relationships with insolvency practitioners. A common example is that a solicitor for a creditor in an administration may be engaged by an insolvency practitioner to perform legal work on behalf of the insolvency administration. The fee setting behaviour of some creditors or their agents (as well as other behaviour that impacts on fee setting, such as initial selection of practitioner) may thereby be consciously or unconsciously influenced by considerations other than maximising the value for money received by all service recipient clients generally.

96. There may be legitimate reasons why cross-referrals are in the interests of clients in a particular matter.

OBJECTIVES OF GOVERNMENT ACTION

97. To restore confidence in the corporate insolvency regime, the Government is seeking to: empower all stakeholders (creditors, liquidators, and regulators) to be better able to protect their own interests; provide for a more efficient provision of insolvency services by private insolvency practitioners; and provide a regulatory environment that encourages a competitive market for insolvency services in Australia.

98. In so doing, the Government is seeking to :

98.1 reduce legal complexity, risk and duplication for insolvency practitioners, creditors, shareholders, regulators and other stakeholders arising from unnecessary divergence by aligning Australia's personal and corporate insolvency practitioner regulation and insolvency administration governance;

98.2 reduce the uncertainty of expected outcomes arising from insolvency processes; improve stakeholders' ability to assess and compare the value of insolvency services; and improve their ability and opportunity to effectively protect their own interests by ensuring that those with an interest in the conduct of an insolvency process are able to access information necessary to protect their own interests;

98.3 place downward pressure on the price of the service, upward pressure on quality and promote innovation by increasing competition within the market for insolvency services;

98.4 improve the efficiency of external administrations and personal bankruptcies through reducing unnecessary regulatory costs; and

98.5 promote high levels of professionalism and competence of insolvency practitioners to ensure consumer confidence in the insolvency services industry.

OPTIONS THAT MAY ACHIEVE THE OBJECTIVES

99. Three options for addressing the problems raised above have been identified.

- Option One — status quo.
- Option Two — co-regulation.
- Option Three — align and improve personal and corporate insolvency practitioner regulation and insolvency administration governance.

100. Options Two and Three are representative of the recommendations made in two significant reviews of corporate insolvency.

100.1 Option Two reflects some of the recommendations made in the 1988 Harmer Report to move further toward a co-regulatory model of practitioner registration, and regulation. This is also reflects, to a certain extent, the regulatory framework currently in place in the United Kingdom.

100.2 Option Three reflects the underlying tone of the recent Senate Inquiry Report that recognised that the regulatory framework for the registration, remuneration and regulation of registered trustees was providing stakeholders in that market with greater

confidence in the personal insolvency system, than the current framework was providing stakeholders in the corporate insolvency system.

101. The costs and benefits of each of these options are now considered with reference to the Government's stated objectives. While the RIS has attempted to quantify the costs and benefits, little information to quantify costs and benefits associated with any changes to the status quo is available. Where possible, benchmark costs have been used to provide some quantification of costs and benefits. In the absence of quantification of costs and benefits, qualitative analysis has been used to assess the costs and benefits.

102. The merger or harmonisation of regulator powers and roles generally is not being considered. Reforms to align, merge or improve the efficiency of the general rules that must be followed when carrying out insolvency administrations (e.g. those governing, court ordered liquidations, creditors' voluntary liquidations, members' voluntary liquidations, voluntary administration, deeds of company arrangement, personal bankruptcy, controlling trusteeships, personal insolvency agreements) are also not proposed. Reforms are not being considered in relation to the separate regime for regulating personal insolvency debt agreements.

OPTION ONE – STATUS QUO: DIVERGENT REGULATION OF CORPORATE INSOLVENCY AND PERSONAL INSOLVENCY

103. Under this option, the current frameworks for the regulation of registered liquidators and external administrations, as set out in the Corporations Act, and for registered trustees and personal bankruptcies, as set out in the Bankruptcy Act, are maintained.

104. The high entry standards for registration as a liquidator set out under section 1282 of the Corporations Act are maintained. Liquidators seeking to be appointed to Court-appointed windings up continue to be required to seek further registration as official liquidators with ASIC.

105. The consideration of applications for registration as a liquidator are completed "on the papers". Once registered a liquidator remains registered until deregistered voluntarily or involuntarily.

106. Where ASIC determines that a liquidator should be deregistered or disciplined, ASIC is required to either refer the matter to CALDB or the Court. Alternatively, where ITSA determines that a registered trustee should be deregistered or disciplined, ITSA is required to convene a three-person Committee to determine the matter or refer the matter to the Court. Any person, regardless of whether the person has a financial interest in an external administration, is able to commence proceedings in relation to a practitioner's conduct of an administration.

107. The rules regarding: the treatment of estate monies; the obligation on registered liquidators and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and ITSA respectively; the keeping of books and the period of time for which those books must be retained remain divergent between the corporate and personal insolvency systems. Registered trustees are required to keep the original administration books for six or fifteen years.

108. Creditors and COIs are able to request information regarding an external administration, however the practitioner is not obligated to provide the information unless they are a registered trustee. Creditors of a company in external administration wishing to call a meeting are required to pay the costs of calling and holding the meeting, regardless of the number or percentage of debt held by the creditors in the company.

109. Liquidators continue to hold annual and final creditors meetings, as well as send out hard copies of biannual reports to creditors, regardless of the interest of the creditors for whose benefit the meetings are held.

110. If the creditors of a company in external administration believe that the liquidator appointed is not providing value for money, or otherwise should be removed, the creditors is required to petition the Court for the liquidators' removal. However, creditors in a bankruptcy are able to remove a registered trustee through a creditor resolution.

110.1 Upon removal of a practitioner (whether it be a liquidator, administrator or registered trustee) from a matter, the administration documents (as opposed to the books of the company itself) likely remain the property of the outgoing practitioner, subject to an express order of the Court.

111. Provided a practitioner obtains the approval of the creditors for his or her remuneration, the form of the approval generally remains up to the practitioner subject to any requirements imposed by the practitioner's professional body. A liquidator retains a casting vote on a resolution for the approval of their own remuneration where the vote is deadlocked.

112. Where the company has few assets, and the expected remuneration of the liquidator is $5,000 or below, the liquidator is required to convene and hold a meeting to consider the remuneration resolution, regardless of whether a quorum would be likely. If the meeting is held, and a quorum is not reached, the creditors will be taken to have approved $5,000 in remuneration for the liquidator. Creditors may set remuneration entitlements at levels below $5,000 that may not adequately compensate a practitioner for carrying out the functions mandated by law, including public interest functions such as misconduct and offence referrals to the regulator.

113. ASIC is able to provide information to ITSA where the information will enable or assist it to perform a function or exercise a power, and vice versa. This power is at the discretion of the regulators. There is no obligation on either regulator to seek or provide information in relation to dually registered practitioners.

113.1 ASIC is also able to provide information to enable or assist the CPA and ICAA to perform one of its functions, but not the IPA. ITSA is able to provide a copy of any report resulting from its inquiries and investigations into the conduct of a registered trustee or a bankruptcy administration to any person.

113.2 Where a stakeholder's attempt to obtain information from a practitioner is improperly obstructed by an insolvency practitioner, the stakeholder can go to Court to get an order to obtain access to the information.

114. ASIC is empowered to investigate the files of a liquidator where it has reason to suspect that the liquidator has contravened the corporations legislation; or has not, or may not have, faithfully performed his or her duties. The requirement for ASIC to have reason to suspect a contravention before commencing an investigation may inhibit the ability of ASIC to undertake a surveillance program on a proactive basis.

115. Where a creditor requests that an insolvency practitioner hold a meeting and that request is ignored or unreasonably rejected, the creditor maintains a right to apply to Court for an order requiring a meeting to be held.

IMPACT ANALYSIS

116. Under Option One, there are no costs associated due to the imposition of new regulatory requirements. There would therefore be no costs for transition of business systems as a result of changes to the rules with which insolvency practitioners are required to comply.

117. For Government there would be no additional costs associated with developing a response, whether regulatory or non-regulatory. The costs would therefore be zero as there would be no changes or transitions required.

117.1 The Australian Tax Office (ATO), in its role as a significant creditor in both personal and corporate insolvencies, will continue to be negatively impacted like any other creditor (as discussed below).

118. Consumer's rights would not be amended, and therefore while they would remain subject to the inefficiencies of the current insolvency systems, there will be no new costs.

118.1 Creditors, particularly creditors of a company in external administration and a related director in bankruptcy, will continue to face high costs in obtaining legal advice to protect their rights under the two divergent systems.

118.2 If those creditors are able to understand their rights, they will continue to face high costs in protecting their interests e.g. costs to apply to Court to obtain information or remove a liquidator from an external administration.

118.3 Creditors will continue to face high costs of insolvency services, as there will be no change to the competitive forces in the market, either through an increase in market participants or through providing a cost-effective method for the removal of a practitioner once appointed.

118.4 Returns to creditors would continue to be adversely affected by the current possibly unnecessary costs in the system, such as requirements for meetings to be held or reports to be posted where there is little interest from creditors.

119. **High level impact analysis table: Status quo**

Stakeholder	Cost	Benefit
Industry (including registered liquidators and registered trustees)	• Current inefficiencies remain.	• No additional compliance costs.
Consumers (creditors including lenders, trade creditors, and employees)	• Current inefficiencies remain.	• No additional costs in understanding amended rights.
Government (including regulators)	• As a creditor (ATO), the current cost of insolvency services due to a less efficient market.	• No further policy development costs. • No further regulatory changes.
Economy wide benefits	• Less consumer	• No impact on cost of

	empowerment, which can reduce demand-side competitive tensions.	insolvency services associated with further regulatory intervention.

120. **Assessment of option against Government objectives: Status quo**

Objective	Option One - Status quo
Alignment of personal and corporate insolvency law	• Not achieved. • The regulation of corporate and personal insolvency will remain divergent.
Informed stakeholders	• Not achieved. • While creditors, and other stakeholders, will be able to request information from the liquidator in an external administration, the liquidator will not be required to provide the information requested. • Creditors will be unable to call a meeting to obtain information unless they are willing to pay the costs of the meeting. • ASIC will have limited ability to provide information to creditors regarding external administrations in which the creditor has an interest.
Competitive market for insolvency services	• Not achieved. • The barriers to entry into the corporate and personal insolvency industries will remain unchanged. • Creditors in an external administration will be unable to remove a liquidator without a Court order.
Improved efficiency through reduced regulatory costs	• Not achieved. • There will be no effect on the regulatory costs incurred by registered liquidators and registered trustees.
Ensure consumer confidence	• Not achieved. • The barriers to entry into the corporate and personal insolvency industries will remain unchanged. • ASIC will be restrained from engaging in a proactive surveillance program analogous to that currently carried out by ITSA.

OPTION TWO – A CO-REGULATION APPROACH TO CORPORATE INSOLVENCY

121. *Co-regulation* refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.

122. Under this option, the regulators would work with the corporate and personal insolvency industries to develop and implement a scheme for the registration, discipline and deregistration of practitioners which would consist of the following.

- A statutory board, in which all powers and functions for the registration and regulation of insolvency practitioners would be vested. The board would be empowered to vest powers and functions to professional associations.

- Professional associations who would then be responsible for the registration and regulation of their members.[36]

123. The statutory board would be responsible for:

- determining appropriate standards for registration of practitioners;
- surveillance of practitioners;
- acting upon complaints received against insolvency practitioners; and
- delegating responsibility for functions to appropriate professional associations.

124. The statutory board would consist of: representatives of major industry representative bodies such as the IPA, the Institute of Chartered Accountants (ICA), CPA Australia and the Law Council of Australia; appointees of the Attorney-General and the Treasurer; and two lay persons. The board would initially be funded jointly by the IPA, ICA and CPA Australia, and the Government.

125. A professional body or bodies would exercise powers delegated by the statutory board, including:

- conducting the registration system for insolvency practitioners; and
- surveillance of practitioners; and
- conducting investigations into complaints concerning insolvency practitioners.

126. This option would not affect the current rules with which liquidators and registered trustees must obey in carrying out an external administration or personal bankruptcy, such as the procedural rules referred to at paragraph 38 to 40; practitioners' obligations to communicate with stakeholders referred to at paragraphs 42 to 47; or the ability to remove and replace a practitioner referred to at paragraphs 52 to 58.

IMPACT ANALYSIS

Industry

127. This option would transfer the cost of determining market entrants from the Government (through the regulators) onto private professional bodies. It would also transfer the cost of disciplining practitioners onto these bodies.

128. Currently, there is no professional body or industry association that is resourced or structured to undertake this type of a role across the whole insolvency industry. The professional body or industry association willing to undertake these obligations would need to be substantially reformed. Up-front and ongoing funding for this reform would need to be obtained from industry members. Given the small size of the industry (662 registered liquidators and 208 registered trustees), the cost per industry participant of maintaining the infrastructure needed for effective co-regulation (including ongoing surveillance, dispute resolution, and continuing professional education etcetera) may be prohibitive.

[36] This scheme is based on recommendations made in the Harmer Report.

129. Once established however, self-regulatory schemes tend to be more flexible and impose lower compliance costs on industry participants than direct government regulation[37].

130. It has been recognised that industry members can be harder on 'erring colleagues than generalist tribunals' because of the appreciation of the damage that reports of errors or neglect can have on the reputation of the professional as a whole. Industry members may also be less easily swayed by clever arguments and will be more likely to be able to quickly perceive where unprofessional errors have occurred[38].

131. By providing more power to industry bodies, there is an increased potential for new entrants to be effectively prevented from entering the market as it is in the interests of the current members to restrict the number of entrants to the market.

Consumers

132. Effective self-regulation can however, limit the presence of overly prescriptive regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations.

133. As co-regulation tends to be cheaper, quicker and less formal than a purely regulatory system, the overall cost of the system may be less than Option One or Option Three. The compliance costs of any system, whether co-regulatory or regulatory, will ultimately be borne by the creditors as it is part of a firm's cost structure[39].

134. Granting professional bodies these responsibilities would provide an opportunity for anti-competitive behaviour where it is in the interests of the bodies' members to restrict the number of entrants to the market. The limiting of competition for insolvency services is likely to result in an increase in the cost of these services.

135. Given the highly complex nature of corporate insolvency, and the presence of significant and entrenched information asymmetry between practitioners and creditors, there is a significant risk of consumers being harmed where a practitioner knowingly, or unwittingly, breaches their duties and obligations.

136. As well, community cynicism regarding industry regulating itself may lead to a distrust of self-regulatory schemes. Professionals, as decision makers, can occasionally be incapable of seeing or reluctant to see the perspective of stakeholders and may be overly attentive to the burdens on fellow professionals[40].

Government

137. Any movement toward further co-regulation will encompass transition costs for the Government in the immediate term. However, following the initial transitory period, the cost to Government (in particular, the cost to ASIC and ITSA) of co-regulation should be reduced compared to a purely regulatory system.

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[37] Page 3 *Industry Self-regulation in Consumer Markets* prepared by the Taskforce on Industry Self-regulation; "*Bankruptcy and Insolvency: Change, policy and the vital role of integrity and probity*", the Hon. Michael Kirby, address to IPA National Conference, 19 May 2010, page 25.

[38] the Hon. Michael Kirby, as above, page 23.

[39] the Hon. Michael Kirby, as above, page 26.

[40] the Hon. Michael Kirby, as above, page 24.

138. The Court would retain its powers to censure or deregister practitioners. The cost borne by Courts in dealing with applications for investigation or deregistration would not be effected.

139. **High level impact analysis table: Co-regulation**

Stakeholder	Cost	Benefit
Industry (including registered liquidators and registered trustees)	• Transition costs. • Transfer of regulation costs onto the industry itself. • New entrants may face increased barriers to entry.	• Lower compliance burden. • Discipline by peers.
Consumers (creditors including lenders, trade creditors, and employees)	• Costs to industry will be passed on through increased remuneration. • If barriers to entry are increased, consumers will have diminishing numbers of practitioners to engage.	• Access to affordable dispute resolution. • Possible reduction in costs due to lower regulatory burden on practitioners.
Government (including regulators)	• Transition costs. • If system is not perceived to be fair or transparent, the Courts may face an increased workload as complainants or the regulator seek deregistration via Court.	• Reduce ongoing cost of regulation and oversight of industry.
Economy wide benefits	• Increase possibility of anti-competitive entry requirements. • May decrease confidence in insolvency system with flow on effects to credit costs.	• May increase efficiency of insolvency system with flow on effects to the cost of credit.

140. **Assessment of option against Government objectives: Co-regulation**

Objective	Option Two - Co-regulation
Alignment of personal and corporate insolvency law	• Achieved in part. • This would align the registration, deregistration, and surveillance of registered trustees and liquidators. • It would not affect the currently divergent: procedural rules; insurance requirements; communication obligations; ability for creditors to remove a practitioner; or powers of the respective regulators.
Informed stakeholders	• Not achieved. • This would not provide stakeholders with the right to obtain any further information. Creditors will be unable to call a meeting to obtain information unless they are willing to pay the costs of the meeting. • ASIC will have limited ability to provide information to creditors regarding external administrations in which the creditor has an interest.

Competitive market for insolvency services	• Not achieved. • Professional bodies may limit the entrance of new practitioners into the industry. • Creditors in an external administration will be unable to remove a liquidator without a Court order.
Improved efficiency through reduced regulatory costs	• Achieved in part. • May reduce costs for registration and deregistration of compliance with surveillance. • There will be no effect on the regulatory costs incurred by registered liquidators and registered trustees. • A practitioner would remain subject to the current procedural rules; insurance requirements; communication obligations; ability for creditors to remove a practitioner; or powers of the respective regulators.
Ensure consumer confidence	• Not achieved. • Perceptions of conflict of interest arising from insolvency practitioners 'club'. • Reduction in Government control of entrants into insolvency services market, and ongoing oversight of practitioners. • Detrimental effect on perception of oversight of registered trustees.

OPTION THREE – ALIGN AND IMPROVE PERSONAL AND CORPORATE INSOLVENCY PRACTITIONER REGULATION AND INSOLVENCY ADMINISTRATION GOVERNANCE

141. Under this option, reforms would be made to the Corporations Act and Bankruptcy Act to align and enhance the regulatory frameworks that apply to the regulation of registered liquidators and registered trustees, and the governance of corporate and personal insolvency administration. All reforms would be adopted into the current respective legislative vehicles.

FRAMEWORK FOR REGULATION OF INSOLVENCY PRACTITIONERS

142. The current registration, deregistration, disciplinary and maintenance of registration mechanisms in the Corporations Act and Bankruptcy Act would be replaced[41] with a new regime, based on the current Bankruptcy Act provisions. This regime would introduce a common set of provisions, with minor tailoring to the needs of each system.

Registration of insolvency practitioners

143. A new aligned registration process based upon the existing Bankruptcy Act provisions would be introduced replacing the current systems for registration of liquidators and registered trustees. There would be a single class of practitioner in corporate insolvency (although registrations may be conditional or restricted to some kinds of administration). The separate class of official liquidator, as well as debtor company specific registration, would be removed. Registered liquidators would be able to perform all functions currently restricted to official liquidators.

[41] These amendments will not affect the regulatory framework for the registration and deregistration of debt agreement administrators under the Bankruptcy Act.

Initial and ongoing requirements for registration

144. Applicants would be required to meet a set of minimum initial and ongoing standards for registration as an insolvency practitioner. These requirements would be relevant not only to initial registration, but also to subsequent disciplinary processes.

145. An individual would be able to be registered where they do not meet the prescribed academic requirements, but a Committee convened to consider the application is otherwise satisfied that the individual would be able to satisfactorily perform the duties of a registered liquidator or registered trustee.

    145.1 The Committee would consist of a member of the relevant regulator, a representative of the IPA, and a representative of the relevant Minister. The Committee would be convened on an ad hoc basis to consider applications for registration, as well as disciplinary matters (see below).

146. A practitioner would not be registered if their registration is involuntarily suspended in the other regime. If during registration, the practitioner is involuntarily suspended in the other regime, the practitioner would be automatically suspended.

147. The current residency requirement (that exists in corporate insolvency) would be removed. However, the regulator would be empowered to impose conditions to address non-residency.

Application to become a practitioner

148. Under an aligned registration system, the regulators would be responsible for: accepting initial applications; determining that they are complete and accompanied by the relevant fee (the 'application fee') (estimated to be approximately $2,000); and referring them to a Committee convened to determine whether the applicant should be registered. The current requirements for how an application is considered in personal insolvency would substantively be adopted under both regimes.

149. If a Committee determines that a person should be registered, the regulator must register them subject to their taking out insurance and paying a registration fee (estimated to be in the range of $1,000-$1,500) which would be imposed as a tax. This registration fee is in addition to the application fee.

150. However, in order to limit the cost for the relevant regulator, it would have a discretion to determine whether to process applications as received or consider applications on a periodic basis not more than six months apart.

151. A person would be able to apply for restricted registration. This will provide flexibility in the system to increase the number of participants in limited sections of the market. For example, an applicant may seek registration as a liquidator restricted to performing receiverships only.

Procedure of Committees

152. The procedures of a Committee would be based upon current personal insolvency Committees. A Committee would also be entitled to dispense with a hearing and determine a matter on the papers with the consent of the practitioner.

153. Where a practitioner is dually-registered or seeking registration under both insolvency systems, the other insolvency regulator would be able to attend and have access to materials relating to a Committee process in respect of that person.

Renewal of Registration

154. Registration would be for a three-year period. A practitioner would be required to apply to the respective regulator for renewal of their registration. A fee, which would be imposed as a tax, would be payable (estimated to be in the range of $1,500-$2,000).

155. Renewal would be granted where the applicant has provided proof of insurance and has:

- no outstanding administration related taxes or fees in excess of a certain amount; or
- no money outstanding to an administration as a result of a review process (administrative remuneration review in personal insolvency; any review of practitioner conduct or remuneration by the Court for corporate or personal insolvency); and
- complied with any continuing professional education obligations.

156. This renewal requirement is in addition to the current annual return process, which will be amended to require practitioners to provide proof of insurance annually.

Conditions on Registration

157. Practitioners would be obliged to comply with any conditions on their registration, whether they are industry wide conditions, or specific conditions imposed on the practitioner by a Committee or by agreement with the regulator.

Industry-wide conditions

158. Regulators would be empowered to approve industry wide conditions in relation to:

- continuing professional education;
- the periodic or other review of the practitioner's insolvency work by the regulator;
- compliance with insurance obligations;
- establishment and maintenance of a system for resolving complaints;
- the persons practice in their first two years of registration;
- the persons practice where the practitioner has not accepted any new appointments for a period exceeding 12 months; and
- practitioners resident outside of Australia.

Practitioner specific conditions

159. A Committee would be empowered to impose conditions upon specific practitioners. There would be no limitation on the kind of conditions that the Committee could impose.

160. Regulators would also be able to impose conditions with the consent of the practitioner. Regulator imposed conditions would be capable of being varied by the Regulator with the consent of the person; or removed by the Regulator (without consent).

Involuntary deregistration and disciplinary processes

161. A new aligned deregistration and disciplinary process based upon the existing Bankruptcy Act provisions would be introduced replacing the current systems for deregistration and discipline of liquidators and registered trustees. The system would be modelled on the current system for registered trustees.

An aligned Committee system

162. Where a regulator believes that a practitioner has breached their duties or obligations under the respective statute, the regulator will be empowered to issue a show-cause notice to the practitioner and, if not satisfied with the response, refer the matter to a Committee convened by the regulator for that purpose (on an ad hoc basis) to determine the matter. A Committee convened would again consist of three members, including a delegate of the regulator, a representative of the IPA, and a third member selected by the Minister. The procedures for the Committee would be the same as for a Committee established for registration of a practitioner.

163. The regulator would also be required to issue a show cause notice and make a referral where, in the opinion of the regulator, a practitioner no longer meets the ongoing requirements to maintain registration; or is no longer actively practicing as an insolvency practitioner.

163.1 Where a practitioner is dually-registered, the regulator commencing action against the practitioner will be required to provide a copy of the show cause notice to the other regulator.

164. A Committee would be empowered to grant a wide range of remedies, including: deregistration; suspension; suspension of the person's ability to accept new appointments; imposition of conditions; admonishment or reprimand; and removal of a practitioner from a specified administration.

165. Remedies might also include restricting a practitioner's ability to act as a delegate of another practitioner following deregistration or during a period of suspension.

166. A unanimous decision would be required of the Committee.

167. The relevant regulators would be bound to give effect to the decision of a Committee. The regulator would also be empowered to publicise or require publication of, as it sees fit, the decision and reasons for the exercises of its powers.

168. A Committee that has convened would be empowered to disband if it no longer serves any practical purpose.

Regulator disciplinary powers

169. In parallel to being able to refer a matter to a Committee, the regulator would be empowered to impose a restricted class of remedy (deregister or suspend only) on a restricted set of grounds without referral to a Committee.

170. The regulators would also be empowered to:

- suspend a practitioner's ability to accept new appointments, without requiring a reference to a Committee, if the practitioner fails to comply with a notice directing them to lodge an outstanding annual administration or practitioner return;

- direct that a practitioner corrects an inaccurate return previously lodged; and
- appoint replacement practitioners upon a vacancy arising following suspension or deregistration of a practitioner.

171. The regulator must afford natural justice to the practitioner prior to determining whether to exercise this power.

Maintenance of Registration

172. While registered, a practitioner would be obligated to notify the regulator of certain events that would amount to a breach of the practitioner's requirements for ongoing registration. A new offence would apply for failure to comply with this obligation.

173. An annual return would be required to be lodged by practitioners with the relevant regulator. It would be open to the regulator to determine the contents of the annual return; however, proof of insurance would be mandated. A lodgement fee (imposed as a tax), capable of variation depending upon the number of administrations commenced or current during the period, would be prescribed for the lodgement of this return (estimated to be in the range of $0-$100 per administration).

174. The current penalty for breaching a practitioner's obligation to take reasonable steps to maintain: adequate and appropriate PI insurance; and adequate and appropriate fidelity insurance, for claims that may be made against the person in connection with externally-administered bodies corporate would be significantly increased.

175. Details of registration of practitioners would be maintained on a public register.

Court control over practitioners

176. The power of persons to seek a review of a liquidator's conduct in various kinds of insolvency administration would be aligned and consolidated. In particular, there would be alignment of the persons who have standing to seek court reviews of practitioner's conduct. A person would be required to have a financial interest in an administration in order to seek a review in relation to the administration.

177. A Court would be empowered, when considering whether to remove a person from a particular administration, to take into account public interest considerations (such as maintaining confidence in the insolvency system as a whole) that may override the individual interests of the practitioner, creditors and members in a particular administration.

Impact analysis: regulatory reform to registration, deregistration and discipline

178. Consistent with the broader objective outlined at paragraph 97, the purpose of the regime would be to maintain professional standards within the insolvency profession; to maintain confidence in the insolvency profession; and to promote or enforce compliance. The regime for practitioners would be based on the current personal insolvency provisions.

179. **Impact analysis: regulatory reform to registration, deregistration and discipline**

Proposal	Cost	Benefit
Aligned registration system, based on the current system for registration of registered trustees.	• Possible decrease of market participants through increased costs to applicants resulting from new requirements/ expansion of experience periods. • Transitional and minimal increased ongoing cost to ASIC due to requirement for Committee consideration, interview of applicants, amendments to renewal process to accept proof of insurance. • New renewal fee for current and future registered liquidators (approx. $1,500-$2,000 every three years).	• Possible increase of market participants through: – reduction of experience period for applicants into corporate insolvency market; – removal of residency requirement; and – greater clarity of academic study requirements for registered trustees and liquidators. • Reduction in complexity for market participants seeking registration in both the corporate and personal insolvency services markets.
Single class of practitioner in corporate insolvency.	• Possible reduction in value of reputation for firms currently in the market for court-ordered liquidations. • In order for a person to petition the court to wind up a company, the petitioning creditor will likely have to provide a guarantee of a minimum amount to the liquidator, in order for the liquidator to agree to the appointment.	• Possible increase in market participants for court-ordered liquidations. • Minimal reduction in cost to ASIC of maintaining processes for registration of official liquidators. • No liquidator will be obliged to consent to act in a court ordered winding up.
Conditions.	• Increase in oversight costs for regulators. • New compliance costs for practitioners with conditions imposed.	• Possible increase of market participants through registration of applicants, who otherwise would have been barred from entering the market.
Aligned deregistration and disciplinary system, based on the current system for deregistration of registered trustees.	• Transitional costs for ASIC in establishing the procedures and processes for a committee system. • Minimal ongoing costs for ASIC in secretariat support for committee system. • Cost to current practitioners in becoming up-to-date with amendments to disciplinary	• Reduction in funding and scope for current disciplinary system in corporate insolvency (i.e. CALDB). • Reduction in fixed costs to Government when no referrals are made to the disciplinary system. • Potential for increased speed of disciplinary processes for

	system.	applicants and Government participants.
Maintenance of registration.	• Possible new compliance cost to practitioners due to changed notification requirements and offence. • Cost to practitioners (and ultimately creditors) through increase of lodgement fees in corporate insolvency. • New cost to Government from changes to current registers of practitioners to show conditions on registration.	• Assist regulators in the identification of practitioners operating without insurance at any time during the registration period. • Provide an increased incentive for practitioners in breach of their registration obligations to inform the regulator at an early stage. • Improve the knowledge of the regulator regarding the insolvency industry.
Court control over practitioners.	• Possible increase in legal costs as Courts are able to consider public interest considerations. • Possible loss of income for practitioners removed from administration as a result of commencement of disciplinary proceedings. • Limitation of standing for persons without a financial interest in administration.	• Reduction in cost of obtaining legal advice due to consolidation and increased clarity of standing rules. • Limitation of possibly frivolous or vexatious challenges to liquidators' actions by persons with a financial interest in the administration.

INSOLVENCY REGULATION

Committees of inspection

180. The current divergent rules governing COIs in liquidations, voluntary administrations, deeds of company arrangement, bankruptcies, controlling trusteeships and personal insolvency agreements would be aligned. The rules for convening a COI would be common in all administrations, unless there are substantive reasons for divergence.

181. COIs would be required to be convened without the involvement of a company's members[42] unless there is a reasonable prospect of members having a financial interest in the conduct of the administration.

182. Eligibility for membership of a COI would mirror the current non-pooling corporate and the personal insolvency provisions.

183. In order to reduce disincentives for major creditors providing assistance to the liquidator during the external administration, members will be able to be reimbursed out of the administration, to a capped amount, for reasonable expenses incurred in participating in meetings. This will only apply for public companies, due to the potentially disproportionate use of administration assets being paid to some creditors over other creditors in small insolvencies or personal bankruptcies.

[42] A member of a company is commonly called a shareholder.

183.1 Reasonable expenses incurred by COIs in all forms of administration would be borne out of the administration up to a capped amount.

183.2 Creditors may approve reasonable remuneration for COI members in all forms of administration up to a capped amount.

184. Members of a COI would be banned from receiving benefits or purchasing assets from the administration without the approval of the Court or the general body of creditors (excluding the parties to the transaction).

Ad Hoc individual requests for information

185. The obligations on all insolvency practitioners to comply with reasonable requests for information from creditors and members/debtors in liquidations, voluntary administrations, DOCAs, bankruptcies, controlling trusteeships and personal insolvency agreements would be aligned. An insolvency practitioner would be required to give, or make available, information about the administration of the estate to a creditor who reasonably requests it, as is currently the case under the Bankruptcy Act.

186. As creditors would have increased rights to information, a practitioner would not be required to provide creditor lists in voluntary liquidations to all creditors, but instead would be required to notify creditors of their rights to request a copy.

Annual returns

187. For every estate that an insolvency practitioner administers during a year, the practitioner would be required, within a specified period after the end of that year, to give the respective regulator a return, in the approved form, in relation to the administration of that estate. This would align the laws to the current personal insolvency requirements. The current offence under the Bankruptcy Act would however be removed. Instead, the practitioner would be liable to personally pay a default late lodgement fee (the fee would be imposed as a tax).

Reporting to stakeholders generally

188. Creditors (and COIs, if delegated by creditors) would be empowered to pass resolutions imposing reasonable reporting requirements regarding the debtors affairs and administrations. A default reporting standard would be prescribed that covers: when reports must be sent out or made available to creditors/ members; the matters that must be covered in those reports; and how those reports must be sent/ made available. Creditors would be able to amend that standard through an ordinary resolution.

189. The current mandatory reporting requirements (including annual and final reporting to creditors, and annual and final meetings requirements in corporate insolvency) will be removed, as will the initial creditors' meeting in a voluntary winding up.

189.1 In order to ensure that creditors in a creditors' voluntary liquidation are able to have an opportunity to replace the liquidator early in the liquidation, the threshold for holding a creditors meeting would be lowered to five per cent by value for replacement resolutions requests made in the two weeks following notification of the commencement of an administration.

189.2 Given the short timeframes involved in voluntary administrations, which reduces the practicality of relying on requests to call meetings, initial meetings in this form of administration would be retained.

Meetings of creditors

190. A practitioner in any form of administration would be required to convene a meeting of creditors whenever: the creditors so direct by resolution (at meeting or postal vote); the COI so directs; it is so requested in writing by at least 25 per cent by value of creditors; or it is so requested in writing by less than the specified threshold of the creditors, being a creditor, or creditors who together, represent 10 per cent by value AND who have lodged with the trustee sufficient security for the cost of holding the meeting.

191. During an administration, a resolution of any form would be able to be passed through a postal vote.

Funds handling, record keeping, and audit requirements

192. The requirements on liquidators and registered trustees to handle estate funds under all administrations would be aligned with minor enhancements, although this would not extend to rules regarding the investment of estate funds.

193. Separate accounts will not be required to be kept for each insolvency administration unless actual or anticipated receipts exceed prescribed amounts and numbers.

194. Penalty interest will be payable by practitioners and will apply to late banked monies or monies withdrawn from accounts without authority. A strict liability offence will apply where a practitioner fails to bank funds into the correct account.

195. Corporate insolvency record destruction rules will be reproduced in personal insolvency law, but with record destruction dates aligned with trustee release timeframes seven years rather than with the current five year timeframe in corporate insolvency. The regulators will be empowered to allow electronic copies to be preserved in substitution of hard copies of documents. The unauthorised destruction of records or failing to keep records will be an offence.

196. Rules regarding the audit of insolvency administration accounts will be aligned, with audits being able to be initiated by court order as well as at the regulator's initiative. A decision by the regulator to initiate an audit would be reviewable by the AAT.

197. Regulators and the court would also be empowered to initiate reviews by third party insolvency practitioners of administrations. A decision by the regulator to initiate a review would be reviewable by the AAT.

Removal of practitioner by resolution

198. Creditors (and members in a members' voluntary winding up) in all forms of administration would be empowered to remove a practitioner through an ordinary resolution. Currently, creditors in a personal bankruptcy are able to remove a liquidator without obtaining a Court-order, but creditors in a corporate insolvency do not maintain a general right.

199. In order to protect against abuses of process, insolvency practitioners would retain a right to apply to Court to prevent removal in restricted circumstances. The Court would not, however,

be empowered to conduct a merits review of the collective decision of members/creditors to remove a practitioner.

200. Insolvency practitioners would be obligated to provide, in the initial notifications to creditors in all administrations, information on creditors' rights to remove and replace practitioners.

Transfer of records

201. Where an insolvency practitioner is replaced, possession of both debtor and administration records would now pass to the newly appointed practitioner; with rights for former practitioners to inspect and obtain copies. The regulators would also be empowered to take possession of, and transfer, administration and debtor records to new practitioners. This would include any circumstance where there is a temporary vacancy.

Impact analysis: reform to insolvency regulation

202. Consistent with the broader objective outlined at paragraph 97, the purpose of the regime would be to maintain professional standards within the insolvency profession; to maintain confidence in the insolvency profession; and to promote or enforce compliance. The regime for practitioners would be based on the current personal insolvency provisions.

203. **Impact analysis: reform to insolvency regulation**

Proposal	**Cost**	**Benefit**
Align and consolidate rules regarding COIs.	• Minor costs will be incurred by industry in adapting their internal processes to reflect changes to COIs. • Creditors in public companies under administration would incur increased costs of reimbursement of COI member costs and possible remuneration. • Curtailing of members rights to be present on a COI, unless they possess a reasonable prospect of a financial interest.	• Possible reduction in legal/ time costs for creditors and practitioners in understanding the differing rules regarding COIs. • Possible increased efficiency of external administrations resulting from appropriately resourced COIs. • Possible increased efficiency as only creditors with a reasonable prospect of a financial interest will make up the membership of a COI.
An insolvency practitioner would be required to give information about the administration of the estate to a creditor who reasonably requests it.	• Minor costs will be incurred by industry in adapting their internal processes • Possible increased costs for liquidators in complying with requests from information from stakeholders. These costs will ultimately be borne by the creditors as a whole. – The presence of this obligation may increase the likelihood of creditors to seek	• Minimise cost to creditors and other stakeholders in obtaining appropriate information in the majority of cases (i.e. creditors will merely incur the cost of requesting the information, instead of seeking a Court order for it to be supplied). • Practitioners would no longer be required to mail copies of creditor lists to all creditors,

	information.	but rather make available electronically.
Introduce default general reporting requirements to stakeholders. Removal of current mandatory reporting requirements.	• Costs will be incurred by industry in adapting their internal processes to reflect changes. • Creditors may choose to require increased reporting be completed by the practitioner. This cost will ultimately be borne by the administration as a whole. • An administration may be required to incur increased costs due to meetings called by creditors now being at the expense of the administration (approx. $3,500-5,000 per meeting).	• Possible reduction in time costs for creditors and practitioners in understanding the differing reporting rules (particularly in an interrelated bankruptcy/ administration). • Increased flexibility for creditors to remove reporting obligations considered unnecessary by them in a particular administration. • The administration will no longer be required to incur costs for: – annual and final reporting to creditor's (approximate saving of $1,000 - $2,000 per report for each of 6,369 voluntary windings up each year[43]); or – annual and final meetings in corporate insolvency (approximate saving of $3,500-$5000 per meeting for each of the 6,369 voluntary windings up each year); and – the initial creditors' meeting in a voluntary winding up (approximate saving of $3,500-$5,000 for each of the 6,369 voluntary windings up each year). • Increased flexibility to obtain resolution via postal vote (approx. $3,000 - $4,000 from mail out, versus approx. $3,500-$5,000 from calling and holding a meeting).
Alignment of annual return requirements.	• Minor costs will be incurred by industry in adapting their internal processes to reflect	• Liquidators would only be required to report once a year to ASIC, instead of twice a

[43] Average of number of creditors winding-up from 2008-09 to 2010-11 (*ASIC, Australian Insolvency Statistics, Series 2: Insolvency appointments, January 1999–July 2011; Table 2.3 - Insolvency appointments–Appointment type, ANNUAL, QUARTERLY).*

	changes. • Registered trustees would become personally liable for a late fee where they do not lodge the annual return within the stated timeframe.	year.
Alignment of funds handling rules (except investment of funds rules).	• Minor costs will be incurred by industry in adapting their internal processes to reflect amendments. • Administrations in significant personal bankruptcies would now be likely to incur costs for the opening of separate accounts. • Liquidators will become liable for penalty interest where they breach their obligations to accurately bank estate monies or not withdraw estate monies without authorisation. • Liquidators will be required to incur the cost of bank reconciliations.	• Liquidators of small businesses will be able to maintain a single account for numerous liquidations, those savings would ultimately be passed onto creditors. • The change from prescriptive regulation to a principles-based approach will provide practitioners (and registered trustees in particular) with more flexibility to determine the most efficient method to meet their funds handling obligations.
Alignment of record keeping and destruction rules.	• Minor costs will be incurred by industry in adapting their internal processes to reflect changes.	• Possible reduction in time costs for creditors and practitioners in understanding the differing record keeping obligations. • Reduction in costs of maintaining hard copies of documents for registered trustees.
Alignment of auditor appointment rules. Regulator empowered to appoint cost assessor.	• Minor costs will be incurred by industry in adapting their internal processes to reflect changes. • Where a regulator or Court exercises its powers to appoint a person to undertake an audit of an administration, the administration will be required to pay the expenses of the liquidator or registered trustee in complying with the audit.	• Utilisation of current insolvency practitioners' skills and knowledge to more efficiently determine breaches of other practitioner's professional obligations.
Alignment of rules regarding	• Minor costs will be incurred by industry in adapting their	• Reduction in cost to the administration as a whole in

removal of practitioner by creditor resolution.	internal processes to reflect changes. • Creditors may seek to use the power to remove a liquidator in an order to obstruct the proper operation of an administration. For example, creditors being pursued for preferences may seek a change of practitioner to disrupt litigation in progress. • Creditors may make a decision that is for legitimate reasons, but not in their best interests. • Liquidators may adopt their remuneration practices to introduce an increased risk premium to reflect potential for removal.	removing an insolvency practitioner (i.e. an ordinary creditors' resolution instead of Court order). • Reducing the barriers to removal could be expected to encourage better communication between liquidators and creditors. • Improve creditor power to negotiate competitive pricing of services both at the commencement of, and during, an administration. • Increase the incentive for a liquidator, once appointed, to attempt to minimise the cost of the liquidation or to improve quality of service.
Establishment of rules regarding transfer of records between incoming and outgoing liquidator.	• Cost to Government of policy implementation.	• The administration would not be required to pay for incoming practitioner to complete the work already performed by the outgoing practitioner. • Provide greater legal certainty to whether the books of the administration are the property of the company in administration or the practitioner personally.

REMUNERATION

Obtaining approval of fees

204. When requesting approval for his or her remuneration from creditors of an administration, an insolvency practitioner would only be able to seek prospective approval on the basis of a capped fee. The fee would need to be set through a resolution, including a written resolution, of the whole body of creditors or a resolution of a COI where one has been established. Once the initial fee cap is set, that amount may be revised at a later date by a creditor resolution, COI resolution or by the Court.

205. A liquidator would also be prevented from using a casting vote as chair of a creditors' meeting, where the resolution is one for the approval of the remuneration of the practitioner in any external administration. Where there is a conflict between a resolution by number and value, the motion would be defeated.

206. A practitioner would however, be empowered to claim a minimum fee of $5,500 without being required to attempt to hold a meeting to approve fees that failed due to lacking a quorum. Registered trustees currently have this power.

Disbursements

207. A practitioner would be prevented, without approval, from: directly or indirectly deriving a profit or advantage from a transaction, sale or purchase for or on account of the estate; or conferring upon a related party a profit or advantage from a transaction, sale or purchase for or on account of the estate.

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

Cost assessment

209. ASIC or the Court would be empowered to appoint a cost assessor to review and report on the reasonableness of the remuneration and costs incurred in all or part of an administration.

210. A cost assessor would be given rights to access administration records, and to require records of the liquidator's firm relating to the administration (for example, time sheets or diaries) in order to complete a cost assessment. A cost assessor would be under a duty to act independently; in the interests of creditors as a whole; and avoid actual and apparent conflicts of interest. Cost assessors would only be able to report on their findings to creditors as a whole, the COI, the regulators, law enforcement, and the court. Costs, as approved by the initiating body, are borne by the administration. The Court would have a power to set, vary or review costs.

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

212. ITSA would be allowed to initiate a review of a trustee's remuneration by the Inspector-General in Bankruptcy on its own initiative, without a referral from a bankrupt or creditor.

Impact analysis: regulatory reform to practitioner remuneration

213. Consistent with the broader objective outlined at paragraph 97, the purpose of the regime would be to maintain professional standards within the insolvency profession; to maintain confidence in the insolvency profession; and to promote or enforce compliance. The regime for practitioners would be based on the current personal insolvency provisions.

214. **Impact analysis: regulatory reform to practitioner remuneration**

Proposal	Cost	Benefit
Fee caps for prospective approval of remuneration.	• The proposal will restrict the freedom of practitioners, and creditors, to determine all facets of the way in which a practitioner's remuneration will be approved.	• The proposal will encourage increased clarity of understanding about the expected level of remuneration between the approving creditors and the practitioner. This is currently considered to be industry best practice [44].

[44] IPA Code of Conduct, clause 15.2.2.

Ban on liquidator using a casting vote for a resolution on his or her own remuneration.	• Liquidators may incur Court costs for remuneration approval where there has been a deadlock instead of dealing with the issue in the creditors meeting[45].	• The proposal will remove the perception of, and potential for, conflict of interest in relation to remuneration resolutions.
Explicit rule preventing a liquidator deriving, or conferring upon a related party, a benefit without approval by the creditors.	• The proposal will result in increased costs to the administration, due to the need for a resolution.	• The proposal will remove the potential for conflicts of interest in relation to the conferring of a benefit on a related party (for example, a family member etc.). • Alignment will reduce complexity for unsophisticated creditors dealing with both systems (e.g. in relation to the administration of interrelated small companies).
A liquidator would be empowered to claim a minimum fee of $5,500 without being required to, or attempt to, hold a meeting to approve fees.	• Cost to creditors and liquidators in understanding their amended rights. • The proposal will limit the rights of creditors to determine remuneration of an appointed liquidator below $5,500.	• Remove the need for convening a meeting for administrations where the work involved, or the assets in the administration, is not expected to exceed the minimum cost for an administration. Approximate saving to industry of $14.4 million - $19.2 million[46].
ASIC or the Court would be empowered to appoint a cost assessor to review and report on the reasonableness of the remuneration and costs incurred.	• The creditors as a whole will bear the costs of a cost assessor, regardless of whether the majority of creditors believe the assessment is necessary. • The Regulators and Courts will incur increased costs in dealing with applications.	• Regulator and Court will be explicitly empowered to deal with creditors concerns regarding the level of costs incurred by a practitioner in an external administration.

[45] See submissions of the IPA and ICA to the *Options Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia.*

[46] The figure is based on the number of administrations with expected assets under $10,000 from 1 July 2009 – 30 June 2010 in *ASIC Report 225, Insolvency Statistics External Administrators 2010* (4,800) multiplied by $3,000-$4,000 (approximate cost to practitioners/the administration of obtaining fee approval in an assetless/very low asset administrations).

REGULATOR POWERS

Increased regulator powers

215. In order to ensure that both regulators have the powers necessary to conduct proactive practice reviews and reviews of individual administrations, both regulators would be empowered to attend premises at which the practitioner is carrying out administrations or keeps books; to inspect books; to require reasonable assistance; and to utilise copying facilities.

- Suspicion of a breach would not be required for these powers to be exercised.

216. Both regulators would be given a broad power to share:

- regulatory information regarding persons with dual registration with the other regulator (or persons seeking dual registration, or in respect of events/actions taking place at a time when they held dual registration);
- information with the IPA and other relevant professional bodies; and
- information with the Department of Education, Employment and Workplace Relations (DEEWR) in relation to practitioners' conduct regarding the General Employee Entitlements and Redundancy Scheme.

217. Both regulators would be empowered to give written directions to insolvency practitioners to answer questions in respect of an administration or their conduct as a registered practitioner.

218. Both regulators would have discretionary powers to provide or make available to stakeholders (including creditors, members, directors, employees, the bankrupt) any information or material relating to an insolvency administration that would fall within the authority of the practitioner to provide on their own initiative. However, the regulator would not be able to provide or make available information to which legal professional privilege applies.

218.1 Both regulators would also be authorised to direct practitioners to provide information to stakeholders directly.

218.2 Each regulator would need to give the practitioner responsible for an administration notice of its intention to disclose the information.

218.3 Where the cost of providing the information sought may impose a significant burden upon an administration, the regulator may require the person seeking access to recompense the administration by an amount determined by the regulator as being reasonable as a precondition of it exercising this power.

219. Both regulators would be empowered to share information in such circumstances to enable the adoption of a 'one stop shop' approach for creditors and other stakeholders with an interest in interconnected personal and corporate small business insolvencies.

Power to administratively suspend a director for failure to provide RATA or books of company

220. The penalty for failure to lodge a report as to affairs (RATA) in a corporate insolvency would be aligned with the current penalty in personal insolvency.

221. ASIC would be empowered to issue information gathering notices requiring the former directors or officers to complete the report as to affairs within a stipulated timeframe. This power will mirror that currently afforded to ITSA[47].

222. It is proposed that a new streamlined director suspension (not full disqualification) provision would be introduced to support compliance with director obligations to lodge RATAs. The suspension power would also apply to non-compliance with demands by practitioners to directors at the commencement of administrations to deliver the company's books and records.

223. Where a director does not comply with their obligations to lodge a completed RATA or to provide books and records, liquidators would continue to refer the breach to ASIC.

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

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

Power to direct that a meeting of creditors be called

226. Both regulators would be given broad powers to direct that a meeting of creditors be called. Regulators would also be empowered to require the inclusion of certain material in convening documents; and attend and participate at meetings of creditors and COIs (ITSA currently has this power in relation to meetings of creditors in personal insolvency).

Impact analysis: reform to regulators powers

227. Consistent with the broader objective outlined at paragraph 97, the purpose of the regime would be to maintain professional standards within the insolvency profession; to maintain confidence in the insolvency profession; and to promote or enforce compliance.

228. **Impact analysis: reform to regulators powers**

Proposal	Cost	Benefit
Increase regulator powers necessary to conduct proactive practice review of registered liquidators. Suspicion of a breach would not be required for these powers to be exercised.	• Registered liquidators may have an increased chance of incurring costs to comply with the practice review. This cost would be in accordance with the current costs incurred by industry in complying with a practice review required as a result of stakeholder complaints.	• Increase chance of identifying misconduct that might not otherwise be detectable to creditors or other stakeholders. • Surveillance programs also have an educative role for the practitioner through the identification of minor issues for improvement in the practices of the practitioner.

[47] Section 77CA of the Bankruptcy Act; with an offence provision for non-compliance in section 267B.

Increase regulator power to share information with: the other regulator; the professional bodies; and DEEWR.	• Costs may be borne by the regulators in providing information and assistance to other regulators.	• The effectiveness of the regulators may be improved by increased access to information.
Regulators empowered to give written directions to insolvency practitioners to answer questions in respect of an administration or their conduct as a registered practitioner. Increase regulators ability to provide information to creditors.	• Costs for industry participants (ultimately borne by the estate) in complying with request from ASIC. Cost will include investigation costs and mailing costs. • Possible increased cost to ASIC of dealing with new requests for information by creditors.	• Potential for increased communication between stakeholders and liquidators due to presence of an alternative avenue where initial request is rejected by the liquidator. • Reduction in monitoring costs may improve governance of insolvency administrations, with consequential improvements of administration efficiency. • Potential for creditors to apply to the regulator may have a positive effect on the communication between liquidators and relevant stakeholders. • By increasing the information provided to concerned creditors, disputes between creditors and liquidators may be dealt with at an earlier stage with flow on savings to the administration.
Adoption of a 'one stop shop' approach for creditors and other stakeholders with an interest in interconnected personal and corporate small business insolvencies.	• Cost for regulators in establishing processes to provide for a one stop shop approach.	• Simplified process for stakeholders wishing to complain about a liquidator or registered trustee. • Increase confidence of stakeholders dealing with regulators in respect of interconnected personal and corporate insolvencies.
Regulators to direct that a meeting of creditors be called and supporting power to require the inclusion of material in convening documents.	• Possible increased cost to ASIC in exercising new power. • Compliance costs for liquidators (ultimately the administration). • Liquidators may be more	• The potential for creditors to apply to the regulator may have a general positive effect on the communication between liquidators and relevant stakeholders.

	likely to call a meeting where it is not in the interests of the administration as a whole, in order to avoid a potential order from a regulator.	• Provides a more cost effective method of having a meeting called than a Court process, where the liquidator is inappropriately preventing the meeting.
ASIC to be able to attend and participate in meetings of creditors.	• Possible increased cost to ASIC in exercising new power.	• Increased creditor confidence in the integrity of a creditors meeting, particularly where the issues are contentious or the liquidator has a personal interest in the outcome.
Suspension of director for not providing a RATA or books of company to a liquidator.	• ASIC will incur some costs in implementing new regime. • Directors unaware of their legal obligations may be temporarily deprived of the ability to continue in their chosen profession or trade.	• Directors unaware of, or who willing disregard, legal obligations will be effectively prevented from establishing a new business unless those previous breaches are remedied. • Better means to obtain RATA and books of administration. • Incentive for directors to make themselves aware of their legal obligations regarding keepings of books.

229. **Assessment of option against Government objectives: Alignment with minor enhancements**

Objective	**Option Three – alignment with minor enhancements**
Alignment of personal and corporate insolvency law	• Achieved to a significant extent. • Registration, deregistration and disciplinary processes would be aligned. • Procedural rules; insurance requirements; communication obligations; ability for creditors to remove a practitioner will be substantially aligned with divergence only where necessary. • Rules regarding remuneration would remain substantially divergent.
Informed stakeholders	• Achieved in part. • Liquidators would be required to provide information to creditors where request is reasonable. • Both regulators would now be able to require practitioners to provide information to creditors where deemed appropriate. • Creditors would have increased ability to call creditor meetings.
Competitive market for insolvency services	• Achieved in part. • Barriers to entry into the market for insolvency services would be amended to better reflect the requirements of the industry, but

	remain high. There will however be increased flexibility for the entrance of practitioners who ought to be registered but don't quite meet the requirements, to be registered with conditions in place. • Creditors will have increased power to obtain information regarding an administration, and where desired remove a poorly performing practitioner. • Restricted registration for receivers should result in increased entrants into that segment of the market.
Improved efficiency through reduced regulatory costs	• Achieved in part. • Alignment of procedural rules; insurance requirements; communication obligations; ability for creditors to remove a practitioner will be substantially aligned with divergence only where necessary. • Obligatory reporting will be substantially removed with cost savings; replaced by increased rights for creditors and regulators to request and receive information.
Ensure consumer confidence	• Achieved in part. • Liquidators will now need to be interviewed before obtaining registration. • The powers of ASIC and ITSA to engage in surveillance programs will be clarified. • Increased flexibility for Committees to impose conditions on the practice of new practitioners. • Increased ability for clients to obtain information, monitor, and then remove a practitioner from an administration in which they have an interest.

CONSULTATION STATEMENT

2010 SENATE INQUIRY

230. During its inquiry, the Senate Committee received 94 submissions from industry representatives, industry participants, academics, Australian Government agencies and other affected parties. It also held hearings in Canberra, Adelaide, Newcastle and Sydney.

231. Concerns were raised during the Inquiry about a perceived lack of regulatory oversight of liquidators by ASIC. In particular, a perception that ASIC:

- pursues a reactionary and slow approach rather than a proactive approach to the supervision of liquidators and liquidations; and

- is reluctant to take enforcement action when a complainant, such as a creditor or director, has their own private remedies such as the right to seek orders from the Court.

232. The Committee also received submissions, and testimony, on a wide range of issues including:

- the current level of regulatory oversight of liquidators and administrators;

- the timeliness and cost-effectiveness of the CALDB;
- the difficulty of obtaining private remedies against a liquidator;
- the level of remuneration charged by insolvency practitioners; and
- a range of miscellaneous issues regarding the adequacy of a range of basic rules regarding maintaining insurance cover, record keeping rules and other procedural requirements in respect of which there have allegedly been abuses.

2011 OPTIONS PAPER

233. 34 submissions were received in response to the options for reform outlines in the Options Paper released on 2 June 2011. A list of the submitters to the Options Paper is provided at Appendix 2.

234. Generally, the submissions from industry stakeholders favoured alignment of the corporate and personal insolvency systems. This was, however, subject to comments that change should only be made where it was considered appropriate in the circumstances.

235. The majority of submissions from private individuals expressed disappointment in the Options Paper as those individuals did not feel that the failures of ASIC to act on complaints were adequately recognised or addressed.

236. Following the receipt of submissions, the Parliamentary Secretary to the Treasury and Treasury officials met with key industry stakeholders to discuss the problems raised by the submissions, and the options for addressing those problems.

237. The vast majority of all reforms suggested in Option Three were canvassed in some manner through the discussion paper.

238. The views of all submitters were taken into account in understanding the problems facing creditors in dealing with insolvencies, as well as the inefficiencies present in the current system. The submissions were also taken into account in determining the scope of the package of reform proposals in Option Three, as well as the construction of those proposals.

239. A high level summary of the responses received to the Options Paper is provided at Appendix 3.

CONCLUSION

240. Three options are considered:

- Option One: Maintaining the status quo;
- Option Two: Co-regulation; and
- Option Three: Alignment of the regulation frameworks affecting personal and corporate insolvency with minor enhancements.

241. As noted above, quantification of the costs and benefits of the options is not currently possible. The following conclusions are therefore based on qualitative assessments.

242. The preferred option is Option Three. Option Three will have the highest cost to the regulators and the profession as their internal processes will need to be amended in a manner that allows them to implement and meet the new requirements. However, this option will significantly align the systems for corporate and personal insolvency in a manner that:

- provides greater flexibility for appropriately qualified candidates to enter into the market for insolvency services, while maintaining high standards through the requirement of a face-to-face interview;
- reduces the complexity and duplication of rules regarding COIs, funds handling, record keeping, and audit of an administration for creditors, employees and insolvency practitioners;
- provides creditors and other stakeholders with greater access to information that those participants require in order to protect their own interests during an administration;
- empowers all creditors to protect their own interests more effectively and efficiently through the ability to remove a poorly performing practitioner without recourse to the Court; and
- makes the approval process for insolvency practitioner remuneration more transparent and efficient.

243. Option Three will also improve confidence in the system as a whole by providing:

- a more streamlined, and cost-effective, process for the consideration of the discipline or deregistration of practitioners that are not meeting the expected standards;
- a more effective deterrent to practitioners willingly or absent-mindedly failing to maintain necessary insurance; and
- the respective regulators with powers to ensure that they can proactively monitor the practices of insolvency practitioners; provide information to stakeholders with an interest in an administration; and direct that a meeting of creditors be convened and attend where deemed necessary.

244. Option One will have no financial impact on the industry or the regulators. However, it will not address the problems identified earlier in this RIS.

245. Option Two will require the insolvency industry to bear the costs of registration, regulation, complaints handling and deregistration of practitioners. This will have significant up-front costs, and increased ongoing costs to industry. Owing to the small number of industry participants these costs may remain high over the long-term. These costs will be passed onto consumers through increased costs for services. There will however, be a reduction in costs to the Government of providing these functions.

246. The current community concerns regarding the integrity of the insolvency system, and the corporate insolvency system in particular, are likely to be amplified by the introduction of a co-regulatory model, where the Government is not responsible for the entry and removal of practitioners from the insolvency industry. Insolvency practitioners are fiduciaries, and the Court expects them to uphold the highest standards of integrity and professionalism in

accordance with the standards expected of Court officials[48]. A decrease in confidence in the insolvency system would negatively affect the confidence of lenders, as well as trade creditors more broadly, in dealing with other businesses in the economy.

STRATEGY TO IMPLEMENT AND REVIEW THE PREFERRED OPTION

247. The reform would be implemented through amendments to the *Australian Securities and Investments Commission Act 2001*, Australian Securities and Investments Commission Regulations 2001, *Bankruptcy Act 1996*, Bankruptcy Regulations 1996, *Corporations Act 2001*, Corporations Regulations 2001, *Corporations (Fees) Act 2001* and Corporations (Fees) Regulations 2001.

248. It is anticipated that a proposals paper setting out the preferred option will be released for community consultation in late-2011/ early-2012. Where the consultation results in substantive changes to the proposals, a supplementary RIS will be completed.

249. It is anticipated that the amendments form part of a Bill to be introduced in 2012. It is anticipated that amending regulations will be made in 2013. Prior to the introduction of these amendments into the Parliament, an exposure draft of the Bill and any accompanying Regulations will be released for public consultation.

250. The amendments will apply prospectively.

251. To review the effectiveness of the changes it is proposed that the Treasury, Attorney-General's Department, ASIC and ITSA undertake a review five years after implementation. The review would assess the impact of the proposal and its effectiveness in meeting its objectives, taking account of any implementation and administrations costs.

[48] ASIC v Edge [2007] VSC 170 at paragraph 39.

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APPENDIX 1

GLOSSARY

AA Fund	the Assetless Administration Fund
AAT	the Administrative Appeals Tribunal
ASIC	the Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Bankruptcy Act	collectively refers to the *Bankruptcy Act 1966* and the *Bankruptcy Regulations 1996*
CALDB	Companies Auditors and Liquidators Disciplinary Board
COI	committee of inspection or committee of creditors. A COI is a small group of creditors appointed by the creditors as a whole to assist the liquidator, approve fees, and approve the use of some of the liquidators powers on behalf of all creditors
corporate insolvency	the insolvency of corporate entities
Corporations Act	collectively refers to the *Corporations Act 2001,* Corporations Regulations 2001, the *Corporations (Fees) Act 2001*, the *Corporations (Review Fees) Act 2003*, the Corporations (Fees) Regulations 2001, and the Corporations (Review Fees) Regulations 2003.
external administration	except where the context otherwise provides, includes the voluntary administration of a company, the winding up of a company, the administration of a scheme of compromise or arrangement or a DOCA, or as a receiver or controller over all or part of the assets of a company.
insolvency	except where the context otherwise provides, both personal and corporate insolvency
insolvency practitioner	both registered liquidators and registered trustees
ITSA	the Insolvency and Trustee Service Australia
Official Trustee	the Official Trustee in Bankruptcy **-** a government trustee able to administer personal bankruptcies
official liquidator	a registered liquidator who is able to accept all appointments to externally administer corporate entities including court-ordered liquidations, provisional liquidations and all cross-border insolvency matters
personal insolvency	the insolvency of natural persons
Personal Insolvency Agreement	a personal insolvency agreement is a voluntary, statutory alternative to bankruptcy which is dealt with in Part X of the Bankruptcy Act
registered liquidator	a natural person who is registered with the Australian Securities and Investments Commission to undertake the external administration of corporate entities (except court-ordered liquidations, provisional liquidations and some cross-border insolvency matters)
registered trustee	a registered trustee is a private practitioner who administers personal bankruptcies
regulators	ASIC and ITSA

APPENDIX 2

SUBMITTERS TO THE OPTIONS PAPER

Adelaide Law School (Chris Symes and David Brown)

Arnold Bloch Liebler

Australian Council of Trade Unions

Australian Institute of Company Directors (AICD)

Australian Manufacturers Workers Union (AMWU)

Confidential

Consumer Action Law Centre

Council of Small Business of Australia

Crouch Amirbeaggi

Mr Pierre Della-Putta

Mr Bill Doherty

Mr Edward Fong

Ferrier Hodgson

Ms Celia Fields

Shirley Hinds

Insolvency Practitioners Association (IPA)

Institute of Chartered Accountants in Australia (ICAA)

Insurance Council of Australia (ICA)

JMA

Mr P J Keenan

Mr Stephen Koci

McGrathNicol

Mr Russell Morgan

Mr Brian Muir

New South Wales Supreme Court (Justice Barrett)

PPB Advisory

Turnaround Management Association of Australia

Mr Ryan Shaw

Mr Trevor Walsh

APPENDIX 3

SUMMARY OF SUBMISSIONS TO THE OPTIONS PAPER

Registration

252. Of those submitters that addressed the issue of the framework for registration, there was:

- general support for the adoption of a committee system in corporate insolvency; an interview of the applicant being part of the registration process; and periodic renewal of registration;
- split views on whether an examination should be part of the registration process; and
- some support for empowering the regulators to impose conditions on new entrants as part of the registration process

253. Of those submitters that addressed the issue of entry standards, there was:

- general support for the requiring insolvency specific education;
- general disapproval of lowering the experience requirements for new entrants. This conflicts with the desired outcome to encourage new competent practitioners to enter the market for insolvency services. Where there was support, it was considered that conditions should be placed on those new entrants. This approach was adopted in the development of Option Three; and
- split views on whether a bias should remain in favour of accounting studies as a requirement for new entrants.

Discipline and deregistration framework

254. Of those submitters that addressed the issue of the framework for deregistration and discipline of practitioners, there was:

- split views on whether CALDB should continue to be used to determine disciplinary matters regarding registered liquidators, or a Committee system should be introduced;
- split views on whether ASIC, or a Court, should have the ability to remove a practitioner where the practitioner is no longer 'fit and proper';
- some support for enhancing the powers of the Court to: take into account public interest considerations when contemplating the removal of a practitioner; and clarify that the Court can remove a practitioner from a file where he or she is before a disciplinary process or appealing one, whether concerning a related appointment or not;
- one submitter who argued that the regulators should be able to recognise and take account of disciplinary action or deregistration orders obtained in the other system; and
- one submitter who supported requiring ASIC to investigate all allegations of maladministration.

Funds handling and record keeping

255. Of those submitters that addressed the issue of funds handling and record keeping, there was: general support for alignment of the provisions of the respective provisions in the corporate and personal insolvency laws; and split views on whether penalties for breaches of these requirements should be increased.

Insurance

256. Of those submitters that addressed the issue of whether reform of the current insurance requirements of practitioners was necessary, there was: general support for the alignment of insurance requirements for all insolvency practitioners, and the periodic review of practitioners' insurance as part of the renewal of their registration; and split views on the need to increase penalties for failing to hold insurance.

Communication and monitoring

257. Of those submitters that addressed issues of possible reform to an insolvency practitioners obligations to communicate with creditors, and creditors' ability to monitor an administration, there was:

- general support for the alignment of the corporate and personal insolvency laws;
- mixed views on the need for amendments to enhance the use of electronic communication between practitioners and creditors;
- support for changes that would require the administration to bear the cost of calling a meeting where 25 per cent of creditors call the meeting, although concerns were expressed about whether this should apply when an administration is assetless; and
- split views on whether a mandatory annual meeting of creditors in corporate insolvency should be retained.

Removal and replacement of insolvency practitioners

258. Of those submitters that addressed whether the current ability for creditors to remove a practitioner are sufficient, there was:

- general support for the introduction of clear rules and processes for the transfer of books from an outgoing practitioner to an incoming practitioner.
- split views on whether an initial creditors meeting should be mandated to provide an opportunity for the replacement of the liquidator;
- split views on creditors being empowered to remove a practitioner via resolution.

Remuneration

259. Of those submissions that addressed whether reform of the current rules regarding the remuneration of insolvency practitioners was necessary, there was:

- general support for preventing a liquidator from using a casting vote to vote on their own remuneration, as well as for preventing practitioners from claiming benefits in addition to remuneration;
- some support for changes to the current rules regarding the claiming of disbursements;
- mixed support for introduction of fee caps; and
- support from union submitters for an increased role for employee representatives during the insolvency process.

Regulator powers

260. Of those submissions that commented on the role and powers of the regulators in administering corporate and personal insolvency, there was:

- a general belief that that the poor performance or lack of enforcement action taken by ASIC is a significant issue;
- some support for ASIC undertaking proactive surveillance of practitioners analogous to the current inspection program undertaken by ITSA;
- some support for increasing ASIC's powers to communicate information to an interested stakeholder relevant to an administration, provided the information is not commercial in nature or in breach of a practitioners' right to natural justice;
- there was mixed views on whether a regulator should be able to apply conditions to all practitioners in the market;
- some support for extending information sharing between ASIC and ITSA to other regulators (for example, the ATO and the ACCC);
- general support for clarifying the regulatory obligations of ASIC and ITSA to adopt a cooperative approach to investigations;
- mixed views regarding the expansion of the scope of the Assetless Administration Fund to enable registered trustees to access the fund where they come across breaches of corporate law; and
- mixed views to providing a semi-automatic process for the disqualification of directors for failure to keep financial records.

261. There was also general support for the establishment of an ombudsman in the insolvency industry. An independent statutory body was supported over the establishment of a private body. The establishment of an ombudsman would have high upfront set-up costs due to the need to establish a new body to deal with these complaints, and possible duplication of roles with regulators.