NEW ZEALAND
LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

6 October 2016

Ministry of Business, Innovation and Employment
Corporate Law Division
PO Box 1473
Wellington 6140

Email: Corporate.Law@mbie.govt.nz

Review of corporate insolvency law

The New Zealand Law Society welcomes the opportunity to comment on *Report No. 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations*, July 2016 (report).

Overview

Insolvency practitioners play an essential role in ensuring the efficient allocation of any assets remaining after a corporate insolvency, and their integrity and skill plays an important role in the proper management and protection of other people's money and property. The Insolvency Working Group has concluded that currently "too many providers of insolvency services fall well short of the standards of integrity and skill that the New Zealand public is entitled to expect".[1] The problems with the status quo relate to unprofessional conduct and incompetence; examples include acting insolvency practitioners acting in their own self-interests, debtor-friendly conduct and substandard decision-making.[2]

The Law Society supports the Working Group's conclusion that the current situation with respect to regulation of insolvency practitioners is unacceptable and that occupational regulation of insolvency practitioners is needed.

The Working Group notes that comparable jurisdictions have formal insolvency practitioner regulation, and considers that "the absence of comprehensive occupational regulation means that New Zealand is not within the range of internationally accepted regulatory insolvency practitioner systems for a developed country".[3] The Law Society agrees.

The Law Society also agrees that the occupational regulation model in the Insolvency Practitioners Bill (a basic registration system) is not adequate. The Law Society supports the recommendation for

1 *Report No. 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations*, July 2016, p 3.
2 Report, at [39], [40] – [45].
3 At [34].

a professional body/independent regulator co-regulation model. As outlined in the report, that would:[4]

- make it difficult for dishonest and incompetent persons to become insolvency practitioners,
- provide accredited professional bodies with power to suspend or cancel licences where necessary, and
- provide for supervision of conduct in accordance with the public's expectations.

Background

Insolvency practitioner regulation has been considered a number of times over the last 30 years including, in particular, the Insolvency Practitioners Bill (Bill) introduced in 2010.

The Bill has been on hold since its 2nd reading in November 2013, and the Working Group was subsequently established by the Minister of Commerce and Consumer Affairs to provide expert advice to the Minister on corporate insolvency law and regulation.

The Working Group was asked to consider whether the Bill should be withdrawn, progressed or replaced by a licensing regime. The Working Group has recommended that the registration system proposed in the Bill not proceed and, instead, that there should be a licensing system based on a co-regulation model.[5] This would comprise a 'frontline' regulator – a professional body with statutory powers to regulate entry, monitor insolvency practice and intervene when needed – and an independent government regulator to monitor and report on the adequacy and effectiveness of the frontline regulation.[6] The Law Society's submissions on the Bill in 2010 and 2011 supported a licensing regime with co-regulation.[7]

The Working Group has also recommended a range of enhancements to the Bill (to improve existing statutory provisions in the Companies Act and Receiverships Act) that should be implemented, regardless of whether the registration system proposed in the Bill is introduced.[8] If the recommendations of the Working Group are implemented and a new (or amended Bill) is re-introduced the Law Society would welcome the opportunity to make more detailed submissions at that stage.

A new self-regulatory regime by the Chartered Accountants Australia and New Zealand (CAANZ) and the Restructuring, Insolvency and Turnaround Association of New Zealand (RITANZ) has recently been implemented, covering:

- minimum entry and ongoing qualification requirements;

---

[4] At [132].

[5] Recommendation 1, p 5.

[6] Report, p 4. This is Option C, described in further detail at [119] to [123].

[7] *Submission on the Insolvency Bill*, 11 October 2010, http://www.lawsociety.org.nz/__data/assets/pdf_file/0017/32921/insolvency-practitioners-bill.pdf; *Insolvency Practitioners Bill – options for regulating insolvency practitioners*, 26 January 2011, http://www.lawsociety.org.nz/__data/assets/pdf_file/0005/36662/insolvency-practitioners-bill-options-for-regulating.pdf

[8] Report, summarised at pp 3-4.

- sufficient professional indemnity insurance; and
- a complaints and discipline regime.

As at 31 May 2016, there were 89 accredited practitioners. While a positive step, this scheme is voluntary and does not remove the need for further reform.

Occupational regulation

The Working Group considered four options:

A. Registration as proposed in the Bill

B. No statutory occupational regulation

C. Co-regulation

D. Government Licensing

Option A: Registration as proposed in the Bill

The Working Group considered Option A flawed because it will not stop unsatisfactory practitioners from entering and participating in the market.[9] In addition, it is likely to give a false impression to the public that practitioners on the proposed register have the appropriate minimum standards of competence and honesty. The Law Society agrees with that assessment and made similar comments in its previous submissions on the Bill.

Option B: No statutory occupational regulation

Option B is effectively the status quo and, as with Option A, does not go far enough to ensure insolvency practitioners have the requisite skills. Although the self-regulatory CAANZ/RITANZ scheme is now in place, it is voluntary and is not comprehensive enough in its application to ensure adequate consumer protection.

Options C (co-regulation) and D (government licensing)

The Working Group preferred Options C and D, on the basis that both would deliver far greater confidence in the qualification and competence of insolvency practitioners and ongoing supervision. The Working Group considered Option C to be more cost-effective compared to Option D. The Law Society agrees, and supports the recommendation that co-regulation of insolvency practitioners be introduced.[10]

The Working Group proposes that the role of a government regulator would include:[11]

- considering applications from professional bodies to be accredited to regulate members who offer insolvency services;

9 At [127].
10 Recommendations 3 – 7, pp 5 – 6.
11 At [120].

- setting the criteria for accreditation;
- monitoring and reporting on the adequacy and effectiveness of each accredited professional body's regulatory system and processes; and
- setting minimum requirements to be applied by accredited bodies for licensing insolvency practitioners who provide insolvency services.

The Working Group also notes that "it should be relatively easy to modify CAANZ/RITANZ accreditation to become a frontline system".[12]

Insolvency practitioners may already be part of a regulated profession (such as lawyers). Care would need to be taken when setting criteria for accreditation and minimum requirements for insolvency practitioners, to avoid regulatory duplication. The regime should be principles-based and any requirements specific to insolvency practice (such as competencies and continuing professional development) must be considered within the overall context of the regulated profession. Clear definition and delineation would also be required in relation to separate spheres of regulatory responsibility. This is vital so that there is no uncertainty for consumers about the appropriate regulator to raise concerns with.

The Law Society would welcome further discussion with MBIE in relation to a potential co-regulatory system, what might be required and what bodies might be suitable.

The Law Society endorses the Working Group's recommendation that a comparison be undertaken with the UK co-regulation regime, and suggests that the comparison should also be extended to the Australian regime.[13] Although Australia's regime is closer to Option D, it is currently amending the licensing system through the Insolvency Law Reform Act 2016[14] and it would be beneficial to understand the potential scope for trans-Tasman alignment.

Processes that should be covered by occupational regulation

The Law Society supports the Working Group's conclusion that any licensing system needs to apply comprehensively to the full range of processes where the practitioner has duties to manage, protect, realise or distribute other people's assets (i.e. to liquidations, administrations and receiverships, along with trustees under the Insolvency Act).[15]

The Working Group distinguishes between solvent and insolvent liquidations: solvent liquidations would not be reserved to licensed insolvency practitioners but could be carried out by qualified accountants or lawyers.[16] The Law Society agrees the distinction between solvent and insolvent liquidations is valid, but suggests that caution is required. The transition between a business being solvent and insolvent is often fluid and it would put a considerable burden on the accountant or lawyer involved to be vigilant as to when the solvency of a company changes. Any failure to immediately transfer the company to a licensed insolvency practitioner may result in disciplinary

---

12 At [163].
13 At [146].
14 Insolvency Law Reform Act 2016 (Cth).
15 At [147].
16 At [150].

action,[17] and practitioners are therefore likely to take a precautionary approach, which may to some extent frustrate the policy objective. The Law Society recommends that guidance be developed to assist practitioners and professional bodies in this area.

Voluntary Liquidations

The Working Group concludes that licensing of insolvency practitioners would also reduce many of the concerns about voluntary liquidations being misused.[18] The Working Group notes concerns about voluntary liquidations being used to avoid latent defects. The Law Society agrees that latent defect problems are issues best dealt with by building and construction sector law rather than by insolvency law.[19]

The Working Group makes three additional recommendations in relation to voluntary liquidations, which it says should be implemented regardless of a licensing regime.[20] The Law Society agrees with the first two, which relate to removing the ability to appoint a liquidator after service of a liquidation notice and avoiding transfers of assets after service of a liquidation application. However, the Law Society recommends that further consideration be given to the third recommendation.

The third recommendation is to introduce a director identification number, as has recently been proposed in Australia.[21] The rationale is that this would make it easier for stakeholders to identify and trace the activities of a director. It is unclear how this would work on a practical level.

While a unique identifier may have merits, it has far broader implications and these need to be considered in more detail. For example, there are restrictions in relation to the assignment of unique identifiers under the Privacy Act 1993 and a reliable personal verification system would be required as part of the process. The policy justification for introducing a director identification number in New Zealand needs to be considered in more detail.

Conclusion

If further discussion about these issues would be helpful, please contact the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully

Andrew Logan
Vice President

---

17 At [150].
18 At [167], [178].
19 At [185].
20 At [167].
21 At [199].