BANKRUPTCY AND INSOLVENCY LAW SCHOLARSHIP UNIT (BILS)
ADELAIDE LAW SCHOOL (ASSOCIATE PROFESSORS CHRIS SYMES AND DAVID BROWN)

SUBMISSION TO OPTIONS PAPER: MODERNISATION AND HARMONISATION OF THE REGULATORY FRAMEWORK APPLYING TO INSOLVENCY PRACTITIONERS IN AUSTRALIA

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1. We note that New Zealand is currently considering an Insolvency Practitioners Bill. We have submitted to the New Zealand government that they should closely track the progress of the Australian Options Paper, and in any event, for reasons of Trans-Tasman Harmonisation (and the Mutual Recognition Treaty as it affects registered occupations), should engage in ongoing dialogue with Treasury/A-G in Australia.
2. We note that the paper starts from a premise that a common regulator such as recommended by the Senate Inquiry will not be pursued. However, we make the general point that many of the discussion and options in the Paper attempt to replicate procedures and standards from one area (generally from the Bankruptcy Act) to another. Given that many insolvency practitioners will continue to be overseen by two separate regulators in relation to personal and corporate work, we suggest that the issue of a common regulator should be given more detailed and serious consideration by the Government. The rejected model proposed by the Senate Inquiry is expressed as being a transfer of the corporate insolvency practitioner regulation function from ASIC to ITSA. In fact, a new body would not have to be seen as a transfer from ASIC to ITSA, as opposed to a merger in relation to IP regulation. Furthermore, we question the rationale for rejection of this model, as set out in para 5, namely that ASIC's corporate regulation over directors such as insolvent trading, would be impacted. We see no basis for this, since the qualifications and performance etc. of insolvency practitioners does not have to be overseen by the same body as oversees other aspects of substantive insolvency law. If harmonisation of corporate and personal insolvency law (ie substantive law) were to be pursued, there would be more force in the argument put in the paper. But if that is not going to be pursued, there is no reason why ASIC's responsibility for overseeing and taking action against directors of insolvent companies should mean that regulation of practitioners who take appointments over those companies should remain with ASIC. ASIC has a MOU with ITSA, so there is no reason why it could not have one with any new body, or an extended one with ITSA if that was to take over the regulation of IPs.
3. Related to the above point 3, we note that the Paper does not attempt to bring about, or contemplate in the near future, any harmonisation or closer alignment of substantive personal and corporate insolvency. However, following on the recommendations of the

Productivity Commission and many other stakeholders and previous reports, we consider that harmonisation or closer alignment, to the extent possible, of personal and corporate insolvency law will bring about efficiencies and costs savings. We made submissions to the Productivity Commission, which were mentioned in its Report and we have delineated several areas where closer harmonisation could occur, particularly in relation to notices, meetings and other procedural aspects of the Bankruptcy Act and Corporations Act.

Several of the questions posed in this Paper would be resolved by such closer alignment. Notwithstanding that the Paper eschews substantive harmonisation, at times it conflates substantive insolvency law and regulation of practitioners, for example in relation to the distinction between creditors meetings in voluntary and court liquidations. It is suggested that it is understandable that the Paper should do so, because it illustrates the interconnectedness between substantive harmonisation and regulatory harmonisation. Whilst they are separate issues, they are interdependent.

4. We believe that it is a mistake to exclude ITSA and the services they provide in taking appointments as trustee or liquidator, from the scope of the Paper, particularly because of their major role in personal insolvency. The goals of insolvency reform set out at page 4, particularly consistency, efficiency, and market competition, cannot be adequately examined by confining the enquiry to the private sector.
5. One of the problems in this area is that the 'clients' or 'customers' of insolvency practitioners' services are heterogenous and dispersed, and often not engaged in repeat dealings with particular practitioners or more generally. Inevitably this means that submissions and consultation will occur amongst the profession itself, with some exceptions. The Government should strive to consult as widely as possible outside of the professional bodies (such as the IPA, Law Council, ICAA). Many of the concerns expressed in the Senate Inquiry, albeit from a small cross-section of creditors and their representatives, suggest the need for communication, transparency and independence. If the insolvency profession itself does not choose to improve voluntarily in these areas, we endorse the approach that the Government and its regulatory agencies should adopt the appropriate regulatory mix of methods to bring about improvements.
6. We note that there was much debate in the Senate Inquiry, and subsequent comment in relation to the funding and resources of ASIC devoted to its insolvency practitioner regulation work. The message about whether ASIC did have the resources it required, and/or has subsequently realised the need for further resources, has been a mixed one. Whatever the reality in regard to funding, we believe that many of the problems which led to, and were identified as concerns during, the Senate Inquiry, were not caused by lack of powers or any major deficiencies in the regulatory framework. They are caused by lack of enforcement by ASIC, and lack of adequate and timely response to complaints.
7. In particular, we believe that leaving aside procedural delays and a failure to communicate adequately with complainants, ASIC's strategy is to pursue major cases, and to carefully pick which to pursue. In the area of insolvency practitioner regulation, we suspect that there are many breaches of the Corporations Act by insolvency practitioners which might be regarded as minor transgressions (for example reporting

requirements and deadlines), but which ASIC would not regularly follow up or pursue. Yet in terms of accountability and communication with stakeholders, these are the most important on a day-to-day basis.

8. We have for some time made the point, as was made in the Senate Inquiry by several submitters, that much of the discussion in corporate insolvency is speculative due to the lack of adequate and detailed statistics. Contrast has been made with statistics supplied by ITSA, although even those could be broken down into more detail and made publicly available. Whilst we acknowledge some small recent improvements to the ASIC publication of statistics, the lack of available (and free) data, and any analysis, is woeful given the role of ASIC as laid down in the ASIC Act in relation to the wider economy. Whilst we appreciate that ASIC is slowly rolling out new technology to improve collection, unless a more visionary and long-term approach is taken by ASIC to the collection, analysis, and availability of this data for its own and for wider research purposes, the new technology will not cure the problem of anecdote and conjecture influencing policy (for example in relation to insolvent trading law, or remuneration rates of insolvency practitioners, or Sons of Gwalia actions). The alternative is to hand over the statistical collection and analysis function to Australian Bureau of Statistics office or some other body.

GOALS OF INSOLVENCY REFORM

Para 26- Consistency of personal and corporate insolvency. This suggests alignment, and that the laws should only differ where specific policy considerations outweigh the benefits of alignment. Whilst we agree with this, and with the benefits identified in para 27, we note that this Paper does not go on to explore the possibilities for closer alignment or harmonisation of substantive insolvency law, as recently recommended by the Productivity Commission and others. We urge the Government to reconsider the Commission's recommendation. Note our comments above about the interdependence of substantive and procedural insolvency law, and regulation of its practitioners.

Para 28-29- Improving Communication

This should not just be seen as communication by practitioners. The role of regulators, as the repositories of vital information and statistics on insolvency, and on insolvency practitioners, should be considered. Whilst we endorse the goal of better communication and transparency to creditors, there are wider stakeholders to consider, including the role of insolvency information as part of the wider economic system about which information is required by analysts, researchers and other government agencies and international bodies.

Para 32 et seq- Promoting market competition on price and quality
As stated above, this cannot be considered without the role of the state through ITSA, since it plays a significant role in setting price and in selection of practitioners.

Paras 35 et seq- Strengthening regulatory frameworks

The comments about the nature of insolvency practitioner's services in relation to the 'product' and 'consumers' of those services, suggest that the role of the ACCC should not be

overlooked. On a number of occasions, most recently that of Advanced Medical Institute, and also on the question of sales of businesses and assets, the ACCC has been concerned about consumer issues, including potential and future creditors of companies in insolvency proceedings. If creditors are the 'consumers' of insolvency services, further thought and communication between ACCC and ASIC needs to take place.

STANDARDS FOR ENTRY INTO PROFESSION

Our initial comment is that, notwithstanding the need for balance set out in the opening paragraph of the chapter, this chapter, and the Senate Inquiry, is ambivalent as to whether what is being attempted is a widening or loosening of 'barriers' to entry into the insolvency profession, and on the other hand an improvement of professional standards through tighter qualification and experience requirements. It is questionable whether there is any need in this particular profession to widen the market for entry, and the more pressing problem would seem to be the lack of suitability, skill and resources of a small number of those currently performing this work, who are not properly regulated and monitored. Given that insolvency work is becoming increasingly specialised and sophisticated, but still largely best performed by accountants, the most appropriate option is one that requires higher standards of education and experience more closely attuned to the nature of the work today.

Thus making it easier for those with a legal or an MBA qualification to enter the profession is not appropriate or necessary. First, lawyers have not (other than in a few highly unusual cases, where they would act alongside an accountant) taken up appointments, even where they are qualified to do so under current provisions. Secondly, an MBA is a broad church= there are MBAs of all types, in Australia and elsewhere. We are not aware of any which have study of insolvency law as options, and even if the thinking is that MBAs will give a broader business education at postgraduate level, that will again depend on the type of MBA. Very few are general anymore, and the quality of them is variable.

We think that the current requirements set out in s1282 of the Corporations Act for qualification and experience are appropriate, but that in addition, there should be more specific requirements for insolvency education. The current requirement for commercial law and accounting study does not guarantee study of all but a week or two of insolvency law at a very general level. Furthermore, since registered liquidators can take on corporate rescue or turnaround work as well as straight liquidation and receivership work, the required skills are very different, so that it should not be possible for someone to conduct Voluntary Administration work and equivalent rescues without some educational or experiential requirement. We are aware that ASIC operates discretion in accordance with its Guidelines RG 186 for applicants, but we would like to see this written into the statute.

However, the suggestion of 'one year' of insolvency study needs further thought. Most educational and training courses are becoming part or fully online, particularly when aimed at busy professionals. Therefore it is no longer appropriate to think in terms of months, terms or years, since an intensive course could satisfy the requirements. Any requirement should therefore be measured in hours.

We think that ASIC should have the power to impose 'restricted' conditions as per discussion in para 46. That way, it could issue a limited licence, for example as to the size and type of

appointment. This would be a good balance between ensuring market competition without compromising quality.

We do not agree that the position of 'official liquidator' should survive, because the distinctions between official and registered liquidator in terms of the qualifications, were removed some time ago, therefore what remains is a non-transparent method of appointing official liquidators. Given that this gives access to certain types of appointment, and is tied with status as officer of the court, there should be more transparent criteria for such differentiation, else it should be removed and simply replaced with a seniority criteria spelt out in the RG 186 guidelines.

Comment on Options:

Option One: This option, for concurrent study, is unobjectionable.

Option Two: Flexibility as between three years of accounting, two years of commercial law, or vice versa, is unobjectionable.

We support a specific insolvency educational requirement, measured in hours not months or one year. The IPA course is referred to as being taken into account by ASIC, but we favour a requirement to be written into the legislation for specific insolvency law and practice study, not confined to the IPA course, since not everybody has to belong to the IPA.

We also note that if the Government was minded to make a recommendation for specific insolvency law and practice education, it should consider how such a course would fit into the Australian Qualifications Framework, i.e at what level of study on that framework.

We do not support the suggestion in para 69 from the Senate report. As stated above, we do not think it is necessary or desirable for lawyers or those with an MBA (unless they hold the other qualifications for insolvency practice) to be eligible, particularly as they would not have any insolvency law and practice qualifications.

Option Three:

We support harmonisation of the process and requirements for registered trustees and corporate insolvency practitioners. We agree that generally, experience of personal insolvency administrations is relevant for corporate insolvency, and vice versa. (Para 75 inaccurately states that there are 'two professions'- this is not the case, there are some insolvency practitioners who do personal and corporate work, but in future we would hope that alternatives to bankruptcy such as debt agreements will increase in usage, so that there will be less bankruptcy work for private practitioners. It might be possible to require those practising as registered trustees to undertake a course in corporate insolvency, and vice versa, but that should be additional to the experience requirements suggested in the Paper. We support amendment to enable ASIC to impose conditions as suggested in para 79. This is one of the few suggestions in the Chapter that balances the need for market competition with quality assurance.

REGISTRATION PROCESS FOR INSOLVENCY PRACTITIOERS

Option One- It makes no sense to retain separate regimes. It is inconsistent with inefficiency, certainty and alignment identified in the Goals section of the Paper. Therefore we do not support this enhanced status quo option.

Option Two-We support this option, since the registered trustee procedure seems to be more rigorous.

Further Discussion Questions (p23)

- Yes, applicants for registered liquidator or trustee should be interviewed
- No, they should not generally be required to sit an exam, since we have earlier supported a specific insolvency educational requirement. However, a course in personal or corporate insolvency could be required for those wishing to transition from registered trustee to registered liquidator or vice versa, and this could be a condition of removal of a restricted license
- Yes, a 'fit and proper' requirement should be uniform across insolvency practitioners. It is an important aspect of gatekeeping for fiduciary standards. Symes, Fitzpatrick and Brand have examined an elucidation of that concept which could be spelt out in more detail in the legislation and/or in regulatory guidelines.
- The official liquidator role should not be maintained. However there should be transparency in the selection of court liquidators from amongst registered liquidators.
- Conditions of renewal of registration of a registered liquidator and trustee could cover compliance with statutory reporting requirements (ie reporting to creditors and to ASIC/ITSA), payment of fees and charges, no pending complaints against the practitioner.
- Renewal should include a fee on a cost recovery basis

REMUNERATION FRAMEWORK FOR INSOLVENCY PRACTITIONERS

In relation to statistics in paras 169 and 170, we question whether low asset corporate or personal insolvencies should continue to be handled by the private sector. In New Zealand these are handled by the State insolvency service, as with personal insolvencies.

In relation to some of the competition issues, disclosure and transparency about fees charged would certainly assist. We have mentioned elsewhere the paucity of statistics available in corporate insolvency, though information is collected by ASIC in relation to proposed fees in statutory reports from practitioners during appointments. More collation and analysis of this fee information could be made available, so that creditors faced with a proposed fee from an appointment holder would have a better range of comparables (though of course this would not tell them more than the reasonableness of the rates charged, as opposed to whether the work was properly and reasonably incurred), There is no reason why, in time, the rates charged could not become a matter of competition and branding advantage in the industry.

In addition, proposals for an Insolvency Ombudsman with an educational and exhortative role might include an ability to publicise and comment on fee practices in the industry. As we have mentioned elsewhere, we also see a role here for ACCC if the view is taken that creditors and other stakeholders are 'consumers' of insolvency practitioners' services.

Option One- We agree that registered liquidators should not be able to use their casting vote to approve their own remuneration. The courts have stated this already in some cases but it should be confirmed in legislation and we disagree with the view in the PJC that the existing law is clear enough to leave it to the practitioners' view of creditors' interests.

Option Two- We agree with this suggestion re disbursements.

Option Three- We have reservations about incentivising creditors to challenge remuneration in return for increased or superpriority from the saved funds. We agree with the suggestion in para 232 regarding alignment of BA and CA in respect of benefits in excess of remuneration.

Discussion Questions:
Para 233- Yes, agreed.
Para 234- Yes it should be aligned, and provided in standard form. Failure to comply could be a condition for refusal of ongoing registration.
Para 235- Cross subsidisation could be removed by the Government administering all assetless and low-asset administrations, as in New Zealand.
Para 236- Implement proposals in the Paper
Para 237- A cap with ability to go back to creditors or committee of inspection is reasonable
Para 238- We have reservations about this approach, as it may create perverse incentives, particularly for third party funders
Para 239- No, absolutely not.

COMMUNICATION AND MONITORING

We agree that personal and corporate insolvency requirements for reporting to creditors could be aligned, as stated in para 302.
Para 304 relates to electronic communication but does not seem to be preceded by any discussion. It is difficult to see that there are any impediments to electronic communication, other than perhaps until the National Broadband Network extends to all areas of the country. However, more physical impediments to attendance at creditors meetings exist now. Communication of information via websites should be enhanced. Online meetings via Skype or similar software should be feasible by unanimous agreement.
We favour Option Two. We agree that the proposals in paras 306 and 307 should be explored. A higher threshold of 25% would be appropriate in corporate insolvency too, in order for the need to have regard to cost implications of meetings.

The term 'committee of inspection' is archaic, and inconsistent with that in voluntary administration. Certainly as the Paper emphasises, COIs don't inspect liquidators, or effectively have the ability to supervise them at present. We endorse the concerns raised in the paper and suggest that creditors' committees (as they should be called) should be given uniform powers in all external administrations, and consideration be given to the matters raised in 287 to 292. However, the Paper does not give any statistics as to the frequency and size of insolvency case in which creditors' committees occur. Their effectiveness as a supervisory and accountability mechanism for practitioners will depend on whether the estate can bear the costs of having a committee.

FUNDS HANDLING AND RECORD KEEPING

We favour alignment or corporate and personal insolvency requirements for reporting and funds handling.
We also favour option three suggestions, noting that this could also be a condition of renewal of registration (ie compliance with these requirements).
However, we note that, in response to question para 289, enforcement of 'minor' breaches is necessary, not just increase of penalties. ASIC needs to introduce a regular inspection programme equivalent to that of ITSA. ASIC's latest figures suggest generally high compliance with reporting requirements, but these figures were published in response to the Senate Inquiry, and need to be produced regularly as part of an inspection and monitoring programme.

Late lodgement etc. should not automatically lead to removal from office, but persistent non-compliance should lead to ability to apply to court for removal. In New Zealand prohibition orders were introduced in 2006 for persistent breaches of statutory requirements by insolvency practitioners, and if these were available in Australia they could also lead to non-renewal of registration.

INSURANCE REQUIREMENTS FOR INSOLVENCY PRACTITIONERS

We would not favour a fidelity fund, but our only comment is that perhaps the UK Insolvency Act requirements for a bond proportionate to the likely estate should be explored.

DISCIPLINE AND DEREGISTRATION OF INSOLVENCY PRACTITIONERS

There are benefits to maintaining CALDB. The Board is able to bring together peers to adjudge the performance of insolvency practitioners. The powers bestowed upon CALDB are sufficient to impose the cancellation of registration or suspension as a liquidator. It could be argued that CALDB is not broken and does not need fixing given that appeals from CALDB have generally been unsuccessful, and the decision of the Board is not generally one with which the courts will intervene.

ASIC monitors whether or not practitioners are adequately and properly performing their duties, and it is ASIC (and also APRA) that can bring complaints before CALDB under s1292, with appeals to the Administrative Appeals Tribunal, which can then go to court on matters of law.

ASIC must maintain a sufficient budget and the ability to have experts assist with their investigations if they do not have the expertise in-house.

The history of CALDB can be traced to the States' Companies Act in the 1930s, and its present form was established under the Corporations Act 1989 and the ASIC Act 1989. It was reformed in 2003. Such history suggests that there is an established profile and it is a 'known commodity' that exists to discipline wayward liquidators.

In recent times there have been relatively few matters brought by ASIC before the CALDB. This does seem like regulatory inattentiveness. If ASIC is not going to be active and funded appropriately, then it may be preferable to consider alternatives. These alternatives could be to impose a mandatory code enforced by the profession or enhanced standing to permit others such as the professional body, creditors or even directors to 'prosecute' thorough CALDB.

CALDB has no power to order recompense or mandatory remedial education, two areas that are incorporated into the EBRD/World Bank Principles on Insolvency Officeholders.

With regard to Option 1 we support the enhancement of CALDB along the lines suggested in para 481-489. As indicated we would support the removal of the category official liquidator and as a result support the measures to remove different treatment.

With regard to Option 2 we support the co-existence of regulatory schemes given that for many practitioners operate in both systems. We note that the personal insolvency system is working satisfactorily and with such poor numbers presenting to CALDB we recognise that this trimmed down alternative to CALDB could be more responsive. We support the majority of suggestions that go to make up this option namely para 494 -503. We also see great benefit in having dedicated expertise making up the committee. We do not support the committee to be comprised of a member of the IPA but suggest this be rephrased as 'experience practitioner of at least seven years standing' or similar on the grounds that IPA membership is voluntary and not universal.

We observe that neither Option 1 nor Option 2 will improve the present situation if ASIC is not appropriately funded, active in both its surveillance and 'prosecution' and exhaustive.

With regard to Option 3 we note it is more of a supportive measure to Options 1 and 2 than a true option and we support the legislative changes to further empower the court as suggested. With regard to giving creditors standing we support this move but suggest that the wording contemplate for example 'other interested persons' as we have known instances where the directors are aware of problems with the insolvency practitioner's performance but have not been able to communicate that as they have been disenfranchised from calling company meetings and cannot gain easy access to former creditor contacts.

Response to para 634 Option of Ombudsman

Attached is a recently published refereed article on the topic.

Specifically
1. The office of an insolvency ombudsman (IO) should be a statutory body
2. The IO should be independent of both ASIC and ITSA and must cover both corporate and personal insolvency as the complainants should not be expected to know the differences when they have a complaints and it may well be their first contact with the insolvency system.
3.It is not so much the functions that exist with ITSA and ASIC but as a main complaint receiving body they would need power to investigate fully the complaint and this could mean subpoena of evidence and witnesses and permission to inspect.

4. The IO must be funded by the government and it should not contemplate a user pays. The present system has been severely criticised for not addressing creditor complaints and it appears inappropriate to implement a system that would cost creditors more given they are already losing due to the insolvency.
5. The IO must have an educative role particularly using the media and furthermore would be ideally positioned to inform regulators of necessary changes to the broader insolvency law and practice.
6. The IO must have the power to initiate its own investigations as the predicament is one where creditors are going to be able to give little time and energy to advancing the complaint, remembering they have already lost money and may have already spent time serving on a committee of inspection/creditors.
7. The IO should not be confined in what matters they can deal with and as remuneration is such a complained of area it should be within the gambit.

REMOVAL

568- Yes there should be an initial creditors meeting giving creditors the chance to replace the liquidator.
569- Assetless administrations should be handled by the government, but otherwise yes, there should be an exception where the costs of the meeting cannot be met.
However a postal vote is not a 'meeting', and should not be used for this purpose. Postal votes do not give the opportunity for discussion and explanation.
570- No. It is doubtful whether the current scheme for registered trustees contains sufficient safeguard against abuse.
571- If they have an economic interest in a solvent winding up, then yes.

REGULATOR POWERS

To the extent that this chapter suggests ASIC's powers could be enhanced (e.g para 599) we are in favour of giving ASIC, such powers as it needs to align it with those of ITSA.

We favour all of the suggestions in Option One. In addition to MoU and information sharing between ITSA and ASIC, this should be extended to ACCC and ATO, in relation to the conduct and performance of insolvency practitioners and compliance with their tax and consumer law obligations.

Para 629 power to require an exam. This seems to overlap with the discussion of renewal of registration, and educational qualifications for entry. If an insolvency law and practice requirement is made for entry (as we suggest), then it would not be necessary to require an exam to be sat to test ongoing compliance, though it might be appropriate for the regulator to have this power to do so in exceptional cases of 'staleness' of qualifications and experience.
We do not think testing staff of the practitioner is desirable or necessary. If a registered practitioner has been registered to take on appointments, it should imply that he or she has the resources to take on appointments, unless on a restricted licence for certain types or size of appointments.

Option Two : Ombudsman

Attached is a recently published article by one of the authors (with J Fitzpatrick) on the topic.

Specifically

1. The office of an insolvency ombudsman (IO) should be a statutory body
2. The IO should be independent of both ASIC and ITSA and must cover both corporate and personal insolvency as the complainants should not be expected to know the differences when they have a complaints and it may well be their first contact with the insolvency system.
3.As a main complaint-receiving body, the IO would need power to investigate fully the complaint and this could mean subpoena of evidence and witnesses and permission to inspect.
4. The IO must be funded by the government and it should not contemplate a user pays system. The present system has been severely criticised for not addressing creditor complaints and it appears inappropriate to implement a system that would cost creditors more given they are already losing due to the insolvency.
5. The IO must have an educative role particularly using the media and furthermore would be ideally positioned to inform regulators of and recommend necessary changes to broader insolvency law and practice.
6. The IO must have the power to initiate its own investigations as the predicament is one where creditors are going to be able to give little time and energy to advancing the complaint, remembering they have already lost money and may have already spent time serving on a committee of inspection/creditors.
7. The IO should not be confined in what matters they can deal with and as remuneration is such a contentious and frequent area for complaint it should be within the ambit. Independent cost assessors have been used and recommended in other jurisdictions (e.g UK and NZ).

SPECIFIC ISSUES FOR SMALL BUSINESS

Many if not most of these problems could be solved by transferring the role of administration of small corporate insolvencies to the Government, as in other jurisdictions. The Assetless Administration Fund and its personal insolvency equivalent are designed to ensure that private practitioners are funded to carry out public interest aspects of insolvency law and regulation. It is not clear what the rationale is, for example, in relation to bankruptcy, where the Government handles small estates but private trustees handle larger ones, but then the Government has power to fund the private trustees to carry out some of the public interest role.

Some of the issues raised (but not resolved through discussion questions) are wider than the scope of the paper (e.g lack of incentive to appoint external administrators).

Option One- This is sensible, in those cases where there is conflict/overlap
Option Two- This is sensible but could just as well be done through extension of Government dept cooperation/MoU rather than changing the law.

Option Three- Mention is made of the NZ amendments in 2006. Has any research been done on whether that power has actually been taken up by liquidators in NZ? Also, it should be questioned whether it would be appropriate under the differently worded Australian provisions (e.g insolvent trading,) because there is strong argument that these actions do not 'vest personally in the liquidator', albeit they can only be pursued in liquidation.

Directors duties are not owed to the liquidator, and can be enforced by others (e.g creditors and ASIC) Besides, is there any evidence that there is a funding problem that cannot be met at present after the Movitor and Hall v Poolman cases?

Director disqualification- in principle this would have to be circumscribed- reference is made to 'the directors', but obviously disqualification has to take into account the circumstances and role of each director, it is not a collective board disqualification. It is unclear exactly what the proposal expressed in paras 672 and 673 envisages in this respect, and thus there is a danger it could be framed oppressively. It is doubtful whether such a proposal should be taken in isolation from examination of the director disqualification provisions. Lack of adequate records is not just a problem of phoenixism.

A number of discussion questions are put, which are not preceded by any narrative in the chapter.
In particular, para 680 asks about automatic disqualification for a company failure. It is not clear why this chapter appears in this Paper, the scope of which was about Regulation of IPs. The issues of phoenixism and director disqualification where companies have failed, as a different topic, and one that was not even within the direct scope of the Senate Inquiry. Whilst the Government has been involved in a review of Phoenix activity and has clearly decided to take certain responses to that, it is unhelpful for it to be tacked onto the end of a paper about something else.

However, in answer to para 680, clearly there should not be automatic disqualification for every company failure. Clearly the existing law requires a number of failures, and involvement of the particular director, with some causation required. However, further comment will not be made upon this proposal because if the Government seriously wishes to examine the operation and enforcement of the director disqualification regime, this isolated question will not itself address that. In addition, para 682 raises this issue again in relation to the one factor of inadequate records. See comments above.

2010 CORPORATE INSOLVENCY REFORM PACKAGE

Yes the previous announcements should be reviewed so that, unless for some particular reason, processes and notices should be aligned between personal and corporate insolvency. The alternative in para 713 is probably the most appropriate, but in view of the nature of these changes, it would be preferable if ASIC and ITSA could reach an agreed position on what amendments were most appropriate.

ABOUT BILS

BILS is a new Research Unit. It is one of only a few such centres in the world dedicated to insolvency law research. BILS was formally established in late 2010, capitalising on the arrival of Associate Professor David Brown (in 2009) from New Zealand, and Associate Professor Christopher Symes from Flinders University in Adelaide, who are its two co-directors. The Co-Directors are part of a team of academics with interests in insolvency and related areas in the Law School, and will also work with related disciplines within the Faculty and University.

Its two Co-Directors have extensive specialist insolvency experience in academia, government and professional consulting and practice, spanning several jurisdictions and continents, in both personal and corporate insolvency, as well as corporate, commercial and property law.

BILS exists:

(1) To be the natural home of bankruptcy and insolvency scholarship in Australia and the wider Pacific region

(2) To provide a vehicle and structure for successful attraction, management and completion of bankruptcy and/or insolvency law-related research grants, with the support of the university's Research Office

(3) To attract and encourage PhD enrolments and completions in insolvency law and where possible, involve PhD students in BILS' work

(4) To provide a platform for insolvency scholarship in law and practice, through its website and blog, publications and through seminars and other events

(5) To engage with and assist Government, professions and professional bodies in the field of insolvency and its reform

(6) To provide a vehicle and structure for consultancy projects with government or industry, nationally and internationally, with the support of the university's applied research arm (ARI)

(7) To lead and facilitate co-operation between BILS and other academics and insolvency specialists or other disciplinary experts, in appropriate projects, conferences and workshops

(8) To host the Australasian Insolvency Academics' annual workshop, where required

(9) To encourage visiting overseas and interstate insolvency experts and to provide a public platform for them

(10) To integrate the work of BILS with the teaching of insolvency law at the University of Adelaide, particularly to develop a research and teaching cluster in bankruptcy and insolvency law

(11) To provide, through its website, and other communications with its subscribers, a hub and information resource to develop over time for insolvency law scholars and practitioners.

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David Proudman, Partner, Johnson Winter Slattery, CAMAC member

In the first six months BILS has:

- Collaborated with the President of INSOL International in relation to a proposed review of personal insolvency law in India

- Hosted an inaugural seminar at which Professor Janis Sarra (BILS Advisory Board member) and Professor Samuel Bufford (a former US Bankruptcy Judge) spoke on the Global Financial Crisis and insolvency regulation, and cross-border insolvency and corporate groups respectively

- Hosted a roundtable lunch discussion with Lipman Karas, Lawyers (Adelaide and Hong Kong) on insolvency law reform in Australia

- Hosted a visit of Professor Li Shuguang (Advisory Board member of BILS and architect of Chinese corporate insolvency law), and held discussions with him about future collaboration

- Hosted an international guest speaker in Adelaide, Dr Thomas Telfer (University of Western Ontario), on Personal Property Securities law : lessons from Canada

- Made submissions to the Productivity Commission on harmonisation of insolvency law which were cited in its report in 2010, and had earlier submissions/appearances at Senate Enquiry taken into account and cited in Senate Committee Report

- Presented through its Co-Directors, at conferences in Christchurch, Dublin, Singapore, Brisbane and Sydney

- Presented (as part of the South Australia committee) a session on harmonisation of corporate and personal insolvency law at the Law Council Insolvency Workshop

- Commenced a regular weekly blog on current national or international insolvency law issues