PART I

INTRODUCTION

INTRODUCTION

BACKGROUND

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

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

1.3. The members of the Working Party are:

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

---

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

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

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

CONSULTATION

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

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

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

SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS

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

---

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

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

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

Corporate and Personal Insolvency Regulatory Systems (Chapter 4)

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

Registering Authority (Chapter 5)

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

Registration Requirements (Chapter 6)

Categories of Practitioners

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

Registration for Specific Administrations

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

Entry Requirements

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

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

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

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

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

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

General Supervision (Chapter 7)

Ethics and Professional Standards

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

Continuing Education

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

Ongoing Work Experience

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

Surveillance

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

Insurance

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

Ongoing Reporting

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

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

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

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

Discipline and Remedial Supervision (Chapter 8)

Disciplinary Procedures

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

Penalties

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

Inquiries and Reports

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

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

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

Appointment (Chapter 9)

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

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

Selection System

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

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

Remuneration (Chapter 10)

Reporting Obligations

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

Fee Setting

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

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

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

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

Fee Review

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

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

Assetless Administrations

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

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

Duties and Responsibilities of Controllers (Chapter 11)

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

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

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

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

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

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

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

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

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

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

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

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