

## **PART III**

# **OPTIONS FOR CHANGE**

## CORPORATE AND PERSONAL INSOLVENCY REGULATORY SYSTEMS

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

### EXISTING ARRANGEMENTS

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

**Table 4.1: Existing Institutional Arrangement for Registration and Supervision**

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

**Table 4.1: Existing Institutional Arrangement for Registration and Supervision continued**

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

## MERGING THE SYSTEMS

4.3. Possibly the most fundamental issue facing the Working Party in the course of this review is whether the existing separate registration and supervisory systems for corporate and personal insolvency practitioners should be merged. A merged system was recommended by the Australian Law Reform Commission ('the ALRC') in the Harmer Report of 1988,<sup>1</sup> and in 1992 the former Trade Practices Commission recommended that consideration should be given to this issue.<sup>2</sup> In mid 1993, a

<sup>1</sup> Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 933.

<sup>2</sup> Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 73.

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

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

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

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

4.6. When preparing the Harmer Report, there was unanimous support for a merged system in the submissions received by the ALRC.<sup>3</sup> However, a significant number of the submissions received by the Working Party argued against a merger. These submissions emphasised that the experience and skills required in each area differed too significantly to be dealt with by the same body.

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<sup>3</sup> Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 933.

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

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

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

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

## **Working Party Position**

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

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

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

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

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

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

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

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