

REGISTERING AUTHORITY

5.1. In this chapter, the institutional arrangements for registration of corporate insolvency practitioners are considered.

JUSTIFICATION FOR A REGISTRATION SYSTEM

5.2. In some overseas jurisdictions there is no registration or licensing system for insolvency practitioners. In New Zealand, for example, any natural person (subject to certain exclusions regarding personal bankruptcy, insanity and relationship to the company) may act as a privately appointed liquidator.¹ However, the High Court of New Zealand may disqualify persons from acting as insolvency practitioners for persistent failure to comply with the relevant legislation. The position in New Zealand may be reviewed in this regard in the context of a wide ranging review of its insolvency legislation, although the Working Party understands that at this point there are no specific proposals to introduce occupational regulation of insolvency practitioners.

5.3. Another option, which is used in the United States of America, is the mechanism of certification. In the United States, there are no entry requirements to engage in insolvency work and sometimes teams comprising members from a number of professions are involved in an administration. Accountants are usually involved, but often lawyers take a lead role because the United States system is principally litigation driven. Although there is no statutory registration scheme, there is an organisation known as the American Bankruptcy Board of Certification ('the ABBC'), which is a non-profit organisation accredited by the American Bar Association. The ABBC's aim is to assist the public to identify those lawyers who have met certain rigorous standards laid down by the ABBC in relation to insolvency laws. In order to become certified, lawyers must pass the ABBC's examination. However, certification is voluntary only, and failure to become certified is not a bar to practising in the insolvency area.

¹ Compulsory appointments are initially made in favour of an 'Official Assignee' who is an officer of the Court and a public servant. Creditors and contributories may require another person to be appointed. In these circumstances, that person must provide certain information and security before taking up the appointment.

5.4. Would it be desirable for Australia to introduce a regime similar to New Zealand, where there are no licensing requirements, or that of the United States, which has voluntary certification only? Arguably, this approach would increase competition in the market for insolvency practitioners and reduce administrative costs.

5.5. There are three key arguments in support of maintaining registration requirements.² First, where there are no registration requirements, creditors and other relevant persons such as courts may have difficulty in making an informed choice about practitioners. Secondly, the consequences of poor administrations can impact severely on a large number of persons, including secured and unsecured creditors, directors, employees and shareholders. In a few cases an entire industry can be affected. However, few of the affected persons have any direct influence on the selection or supervision of the practitioner. Protecting the interests of those persons supports a system of registration, rather than certification. Finally, a registration system provides a mechanism to address the maintenance of professional independence and integrity of all insolvency practitioners.

5.6. So far as the apparent savings in administrative costs which could be gained by dispensing with the registration system are concerned, it should be noted that it is possible, if not likely, that more investigations and remedial action would be required to address complaints in relation to practitioners if unqualified persons were permitted to conduct all kinds of insolvency administrations. The potential for increased overall costs associated with the extra investigations and remedial action may offset the administrative savings made by removal of the registration system, although it is not possible to quantify the amounts involved with any kind of precision.

5.7. The extent of the anti-competitive impact of a registration system depends on the nature of the registration requirements and how they are applied. This issue is discussed in detail in Chapter 2.

5.8. The Working Party considers that dispensing with the registration system altogether in Australia is not an option which should be considered at this stage. The public interest considerations mentioned above justify the retention of some kind of registration system.

5.9. Currently, the ASC performs the registration function for registered and official liquidators. The details of the system are outlined in Chapter 2.

² Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 70–71.

OPTIONS

5.10. In the Discussion Paper released by the Working Party, the following options regarding the appropriate authority which should undertake the registration function were identified:

- I. maintain the present system of registration by the ASC in accordance with qualification requirements contained in the legislation and against experience criteria set by the ASC in consultation with professional bodies (with or without modifications to those requirements and/or criteria);
- II. designate certain professional bodies to set registration requirements and/or to undertake the registration process, either by direct statutory conferral or under delegation from the ASC; or
- III. establish a new statutory body to set registration criteria and determine eligibility for appointment.

I. Maintenance of Present System

5.11. The present system for registration involves general requirements set down in legislation administered by the ASC in accordance with more specific criteria set out in policy guidelines. A disadvantage with this system is that the ASC incurs significant administration costs. In this regard, it is arguable that the most suitable body to determine appropriate standards for entry and whether a person is fit to perform the role of an insolvency practitioner is a body comprised of persons who are highly familiar with that role themselves.

5.12. On the other hand, it can be argued that having an independent body undertake the registration function ensures that a more open, objective process will be followed.

II. Conferral of Registration Function on Professional Bodies

5.13. It would be possible to relieve the ASC of its registration functions and place responsibility for that role on one or more of the professional bodies by statutory conferral.

5.14. Although a number of professional bodies might theoretically be considered for this purpose, such as the ICAA, the ASCPA, the IPAA and (possibly) the

professional law bodies,³ the Working Party considers it would be premature to spread responsibility for the registration functions by having more than one body with parallel responsibility. In particular, the Working Party considers that if the registration of liquidators were to be opened up to the legal profession, as recommended later in this report, it would be undesirable, at least initially, for there to be a multiplicity of registering bodies, bearing in mind that in respect of the legal profession there is a registering body in each State and Territory. The large number of potential registering bodies would lead to difficulties in maintaining consistency in the application and administration of the requirements.

5.15. Other matters which would need to be carefully considered if the registration functions were delegated to the professional bodies are the need for appeal procedures, funding arrangements and the position of persons who have a conscientious objection to becoming members of a professional organisation.

III. Formation of a New Statutory Registration Board

5.16. A further option would be to establish a new statutory board having responsibility for the registration function. Such a board might comprise representatives from the IPAA, the ICAA, ASCPA, the ASC, the Law Council of Australia (or the State/Territory legal professional bodies), and possibly also the Government.

5.17. The advantage of this approach would be that all relevant interest groups would have direct input into the process, particularly in relation to the issues of who are appropriate persons to practice as liquidators and what their standards of conduct should be. The main issue to be considered in relation to the establishment of such a board would be funding, both for the expenses of the board and those of any delegate.

5.18. It is worth noting here that the registration system in relation to registered trustees under the *Bankruptcy Act* was recently revised so that the registration function is now performed by a statutory committee. The functions of assessing applications for registration, assessing applications to change practising conditions, and deciding on termination of registration are now performed by committees consisting of the Inspector-General in Bankruptcy, an officer of the Attorney-General's Department and a representative appointed by the IPAA.⁴

³ The professional law bodies would need to be considered if entry requirements were extended to include lawyers—see further below.

⁴ Sections 155, 155E, 155H, *Bankruptcy Act 1966*.

CONCLUSION

5.19. The Working Party is not aware that the current system has caused any major difficulties for applicants. The ASC has established administrative procedures to deal with applications for registration which are operating satisfactorily. It is the content of the requirements, rather than the identity of the administering body, which has been subject to most comment. It would be possible to allow bodies other than the ASC to have input in setting the requirements for registration without necessarily changing the institutional arrangements for administering them. Further, there are advantages in having an independent body responsible for the registration function to avoid any perceptions regarding lack of objectivity.

5.20. The Working Party considers that there would be merit in an independent board undertaking the registration function only if there was a merger of the registration and supervisory functions for corporate insolvency practitioners with the equivalents for personal insolvency practitioners. Without such a merger, the costs of establishing a new board would not seem to be justified.

5.21. The Working Party recommends that the registration function for corporate insolvency practitioners should continue to be carried out by the ASC. However, the registration function should be carried out by a statutory board if, in the longer term, a merger of the regulatory systems for personal and corporate insolvency proceeds.