REGISTRATION REQUIREMENTS

6.1. This chapter deals with the specific criteria for eligibility for registration. The issues discussed are the classification system of registered and official liquidators and the entry requirements, including educational and experience requirements.

FEATURES OF THE CURRENT SYSTEM

6.2. In the current system:

- corporate insolvency registration is governed by the Corporations Law and the policy and practice of the ASC; and
- there are two classes of practitioner, the registered liquidator and the official liquidator.

6.3. Options for changes to the institutional arrangements for the registration system are considered in Chapter 5. Two further key issues regarding registration were identified by the Working Party for the purpose of obtaining public comment:

- the classifications of insolvency practitioners; and
- the setting and content of entry standards.

CLASSIFICATION OF PRACTITIONERS

6.4. A threshold issue regarding the registration requirements for insolvency practitioners is whether the current classifications of registered and official liquidators should be retained.

6.5. In the Harmer Report, the ALRC recommended that, in place of the current system, there should be three classes of insolvency practitioners classified according to experience, skill and ability, along the following lines:

- Class A, who would be eligible for appointment to all administrations but would be the only class eligible for appointment in windings up ordered by the Court and under the voluntary administration regime;

- Class B, who would be precluded from the two administrations reserved to Class A practitioners, but would be eligible for any other insolvency work including bankruptcies, Part X administrations and receiverships; and

- Class C, who would only be eligible to administer a members' voluntary winding up where there is no element of insolvency or a debt payments plan.[1]

6.6. The intention of the Harmer Report recommendations was to take account of the range and complexity of insolvency work and the need to ensure competent practitioners were appointed to each administration, rather than to reduce anti-competitive effects. In its report on the accounting profession, the former Trade Practices Commission also recommended that consideration be given to establishing new classes of practitioners which recognise the varying degrees of complexity involved in administrations. This would allow persons with lesser qualifications and experience to perform the less complex administrations.[2] It was argued that the specific skill and experience requirements would be confined to those areas where the public interest requires them, thus gaining advantages in terms of efficiencies and cost savings.

6.7. The recommendations contained in those reports were made on the assumption that the corporate and personal insolvency systems would be merged. However, even if that option is not pursued, it is worthwhile considering whether further tiers of admission should be introduced into the corporate insolvency sphere.

Comment on the Classification System

6.8. The majority of submissions received by the Working Party argued strongly against the introduction of further tiers. However, there was some support for a phase-out of the existing tiers in favour of a single category of corporate insolvency practitioner.

Tiers Based on Complexity/experience Levels

6.9. The arguments in favour of introducing further tiers included the following:

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1 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 943.

2 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 72–73.

- the existing system does not expressly classify insolvency practitioners based on skill and ability, but restricts their activities and the nature of the work they may perform according to whether they are registered or official liquidators;

- it is logical to differentiate between compulsory windings up and voluntary windings up, the latter cases requiring less dependence on knowledge of some elements of the Corporations Law;

- it is appropriate that a system be introduced so that certain insolvency practitioners are recognised in the market place as being able to conduct more complex liquidations.

6.10. The arguments advanced against the introduction of further tiers included:

- any system involving more than two levels of registration would be cumbersome and costly to administer, too prone to a wrongful appointment and would create confusion in the business community;

- any attempt to define types of insolvency administrations by their complexity is fruitless, because the complexity of an administration would not be entirely known until after the practitioner's appointment and investigations into the financial affairs of the company have commenced;

- those who are required to select the practitioner are unlikely to have the experience and ability to assess the complexity of the administration before they select the practitioner they believe to be the most appropriate for the job. Further, if a less experienced practitioner were appointed to an administration which becomes complex, it would be necessary to provide a mechanism for replacing that practitioner with a more experienced one;

- the creation of further tiers would serve to increase anti-competitive elements (at least in the upper levels) and increase the administrative burden; and

- it would not be beneficial to implement the classifications proposed in the Harmer Report because the law and practice since the report has moved on. In particular:

  – the proposed Class A practitioner is the equivalent of the current official liquidator;

  – the Class B liquidator is the equivalent of the current registered liquidator; and

– there is no need for a Class C practitioner because most members' voluntary liquidations involve either proprietary companies or the subsidiaries of public companies and as such do not require a registered liquidator.

A Single Class

6.11. A number of submissions advocated the phasing out of the distinction between registered and official liquidators so that there would be only a single class of corporate insolvency practitioner. It was argued that there is no corresponding tiered arrangement in the personal insolvency framework and there is no apparent reason for having it in the Corporations Law. Almost all those who argued in favour of a single class acknowledged that such a course would need to be pursued over a long period in order to allow time to ensure that all those registered were capable of performing all administrations to the requisite standards.

6.12. A number of issues would have to be resolved concerning formulation of entry criteria in implementing this proposal as one of the current criteria for becoming an official liquidator is registration as a registered liquidator[3] and to become a registered liquidator requires an applicant to work under the supervision of an official liquidator for a certain period.[4] Clearly, these entry criteria would not be workable if there were only to be one class of liquidator. If registered liquidators were permitted to perform all types of administrations, there may need to be a 'tightening up' of requirements to ensure that all registered persons are capable of performing court-ordered administrations in a manner acceptable to the Court. In this regard, it may be advisable not to allow existing practitioners to maintain their registration automatically, but require that they meet the new criteria. This would allow removal from the register of those practitioners who have not conducted an administration for some time.

6.13 One submission recommended the retention of the registered/official distinction, but with the following changes to the responsibilities of each category:

- registered liquidators should only be allowed to conduct voluntary liquidations; and

- official liquidators should be able to conduct all forms of corporate insolvency administrations.

This could mean, at least in the short term, that an additional number of official liquidators would need to be appointed. It would also result in diminished work for the vast majority of currently registered liquidators.

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3 ASC Policy Statement 24, *ASC Digest*, PS 9/17.

4 ASC Policy Statement 40, *ASC Digest*, PS 9/37.

Working Party Position

6.14. The Working Party doubts that the introduction of more categories of insolvency practitioner would be of benefit. Unqualified persons are already permitted to conduct some types of solvent administrations. Attempting to draw distinctions between the other types of administrations based on the degree of complexity, so that a wider class of person may perform them, is fraught with difficulties. Any type of insolvency administration can become complex, whether or not it involves large sums of money. Further, the introduction of more tiers only increases complexity for the business community and the costs associated with administering the system.

6.15. The Working Party believes the proposal to phase out the existing tiers has merit as the concept of an official liquidator is largely outdated.[5] Although official liquidators are officers of the court, the types of administrations in which they are involved are not necessarily any more complex or onerous than administrations undertaken by registered liquidators. Indeed, with the advent of the voluntary administration system, court ordered liquidations are decreasing in significance and often involve cases where there are no assets for distribution.

6.16. The Working Party considers that it would be possible to allow any nominated registered liquidator to be eligible to undertake a court appointment if the court sanctions the appointment, rather than having a separate class of official liquidators. However, such a system would need to be phased in over a period of time, particularly if the existing entry requirements for registration are to be broadened.

6.17. The Working Party recognises that, in the short term, the two categories of official and registered liquidators may need to be retained. However, 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.

ENTRY REQUIREMENTS

6.18. The rationale behind imposing entry requirements on persons who wish to practice as insolvency practitioners is based on the desirability of ensuring that the public and, in particular, creditors and shareholders can have confidence in the expertise and judgement of practitioners and be confident that returns to them will be maximised. This is clearly an important objective. However, it is also important that the restrictions imposed do not form unnecessary impediments to competition within

5 See the discussion of the history of the official liquidator class in Chapter 3.

the market for insolvency practitioners' services. Anti-competitive effects can result in unnecessarily high costs and reduced efficiency.

6.19. The current entry standards are contained in both the Corporations Law and ASC Policy Statements.

Corporations Law

6.20. Under the Corporations Law, an application for registration as a (registered) liquidator may be approved by the ASC where:

- the applicant:
  - is a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States; or
  - holds tertiary qualifications in accounting and commercial law; or
  - has other qualifications and experience that in the opinion of the ASC are equivalent to either of the above qualifications; and
- the ASC is satisfied:
  - as to the experience of the applicant in connection with the winding up of bodies corporate; and
  - that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.[6]

6.21. While there are no specific provisions which deal with the criteria for registration as an official liquidator, the ASC has power to register as an official liquidator a person who is a registered liquidator.[7] The ASC has the discretion to register as many official liquidators as it thinks fit.[8]

Current ASC Policy

6.22. The ASC has issued two Policy Statements to explain the criteria it will apply in exercising its discretions under the above provisions in the Corporations Law.

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6 Section 1282, Corporations Law.

7 Subsection 1283(1), Corporations Law.

8 Subsection 1283(2), Corporations Law.

6.23. Policy Statement 40 sets out the following experience requirements for eligibility for registration as a liquidator:

- five years in public practice as an accountant;
- three years' continuous experience in a wide range of corporate insolvency work under the direction of an official liquidator; and
- two years' continuous full-time experience in the last five years in the supervision of corporate insolvency administrations.

Policy Statement 40 also states that the periods will be taken into account whether or not they are concurrent or overlapping. Further, it states that 'the ASC will also accept experience which is *equivalent* to the experience specified...above'.

6.24. Only registered liquidators are eligible for registration as official liquidators. To obtain registration as an official liquidator, a registered liquidator must satisfy the ASC that he or she possesses the necessary experience and resources to undertake court appointments. The main requirements in Policy Statement 24 are that the registered liquidator has:

- since registration, had at least two years' continuous experience in insolvency administrations, working at the most senior level, and under the direct supervision of an official liquidator;
- a demonstrated involvement in the liquidation of insolvent companies, including contribution to decisions taken in administering complex windings up ordered by the court; and
- staff and other resources sufficient to undertake court appointments.

6.25. In addition to being satisfied that an applicant for registration as an official liquidator has the necessary experience and resources, the ASC will take into account other relevant factors, including:

- the amount of work generally available to official liquidators;
- the need for official liquidators to be appointed to tasks with sufficient frequency to maintain satisfactory skills; and
- membership of, and participation in, programs of continuing education offered by professional organisations.

Broadening the Requirements

6.26 Although it is not strictly necessary that applicants for registration hold qualifications in accounting, it is unlikely that persons in occupations other than accounting would be able to fulfil the current experience requirements.

6.27. The former Trade Practices Commission argued that insolvency practice is only indirectly linked to the accountancy profession and, in fact, other skills are also usually required for a good insolvency administration, including management skills, negotiation skills, legal skills and sound business judgement.[9]

6.28. Persons in favour of broadening the entry criteria argue that, even though some level of accounting skills must be exercised in insolvency administrations, the skills required are not necessarily of a high order. In any event, there is no reason the necessary accountancy work could not be performed by someone other than an insolvency practitioner, just as, for example, administrators currently use external legal advisers. It is argued that the essential qualities required of an insolvency practitioner are an understanding of business and financial affairs which allows the practitioner to make an assessment of the business of the company concerned.[10] Those qualities are not necessarily confined to the accounting profession.

6.29. In its report on the accounting profession, the former Trade Practices Commission recommended that the present entry requirements to insolvency practice be broadened to allow competition from a wider pool of appropriately qualified practitioners. In particular, it recommended that consideration be given to broadening the category of persons who can be registered as liquidators and official liquidators by accepting experience gained as a trustee in bankruptcy or in other relevant fields of employment as meeting the experience qualification for registration as a liquidator for at least the less complex insolvencies. The Commission stated that persons who are currently excluded from obtaining registered or official liquidator status but who may be able to provide comparable services include:

- registered liquidators unable to obtain registration as official liquidators because they do not have the opportunity to work under direct supervision of an official liquidator;
- trustees in bankruptcy who are not eligible for registration as liquidators;
- lawyers with experience in the legal side of insolvencies; and

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9 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 72.

10 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 71.

- those with broader commercial experience who may have particular skills relevant to particular administrations.[11]

6.30. In the Harmer Report, the ALRC recommended that there be no requirement that a registered liquidator be a qualified and practising accountant, or a member of a professional body of accountants.

Comments

6.31. The Working Party received a number of submissions from lawyers and bodies representing lawyers supporting broader entry requirements. It was argued that lawyers with many years of experience in insolvency law and commercial practice would have the necessary skills to undertake liquidations and other administrations. It was proposed that membership of one or more of the legal professional bodies should be an alternative requirement to membership of an accounting professional body.[12] Further, experience as a lawyer working in the insolvency area should be considered appropriate criteria for registration as a liquidator.[13]

6.32. Other submissions, while in principle not opposed to broadening entry requirements, expressed concern at proposals which would water down existing standards. It was argued that entry standards are a vital part of maintaining the integrity of the profession and the confidence of the business community. Other professionals should be admitted only on the basis that they are able to meet appropriate standards.

6.33. There was support for the notion that a requirement such as successful completion of the IPAA's Insolvency Education Program should be mandatory.[14] Some submissions argued that continuing membership of the IPAA should be a requirement for registration as a liquidator.

6.34. The ASC supports the broadening of entry requirements but believes that before admitting further categories of persons to insolvency practice, more detailed work is required to identify the knowledge gaps that new entrants need to bridge.

6.35. A small number of submissions expressed concern about the proposal to broaden the entry requirements on the basis that the insolvency market is limited in

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11 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 69.

12 This proposed change would be achieved by amending Regulation 9.2.01 of the Corporations Regulations to include the Law Council of Australia and/or its constituent bodies as prescribed bodies for the purpose of subparagraph 1282(2)(a)(i) of the Corporations Law.

13 This proposed change would involve amendment of ASC policy statements.

14 This program is described in paragraph 6.76.

size and there may not be enough work to go around if a significant number of additional persons become registered. It was argued that there must be sufficient work for liquidators to maintain their skills and provide worthwhile returns in order to retain the best people in the profession. Relaxing entry standards could lead to an increase in practitioners working on a part-time or limited scope basis which may dilute experience levels and the fee base of experienced practitioners. It would also increase opportunity for 'fly-by-night' operators and opportunists.

6.36. One commentator who was opposed to broadening the entry requirements questioned whether practitioners from another profession would have the ability and time to maintain the level of skill and technical knowledge required by two professions. Further, the continuing relevance of the conclusions reached in the Harmer Report and the former Trade Practices Commission report were questioned on the basis that recent changes in corporate law have resulted in greater demands being placed on practitioners by the community, the greater consulting and advisory role and the increased complexity of assignments now being faced by practitioners.

Working Party Position

6.37 As mentioned in the previous chapter, the Working Party believes that public interest considerations justify the maintenance of entry requirements for insolvency practitioners. In many cases, the consequences of a defective administration are significant and losses are shared by persons who do not have a direct input into the choice of the insolvency practitioner. These considerations weigh heavily in favour of retaining a registration system.

Registered Liquidators

6.38. Having considered the reports of the former Trade Practices Commission and the Australian Law Reform Commission and the comments received in response to its own Discussion Paper, the Working Party considers that, in the interests of increasing the level of competition in the corporate insolvency industry, there is some scope for the broadening of entry requirements to encompass persons from outside the accountancy profession without adversely impacting on standards.

6.39. The next step is to formulate options for how the entry requirements could be broadened. There are five types of entry requirements which the Working Party has considered in this regard:

- tertiary qualifications;
- experience;
- successful completion of specialised courses and/or examinations;

- membership of professional bodies; and
- 'fit and proper person' requirements.

The relevance of each when assessing the capability of persons to practice as corporate insolvency practitioners is discussed below.

Tertiary Qualifications

6.40. In assessing the capability of an applicant for registration as a corporate insolvency practitioner, tertiary qualifications in accounting and commercial law are used as an indicator that the applicant:

- has acquired knowledge in the area of study concerned; and
- has reached a certain minimum level of skill in the practical application of that knowledge.

6.41. There are two issues to be considered in determining whether tertiary qualifications in accounting and commercial law (or equivalent qualifications) should be retained as requirements for registration as a corporate insolvency practitioner. First, are the knowledge and skills acquired in obtaining those qualifications essential to properly perform the duties of a corporate insolvency practitioner? Secondly, is the only reasonable means of obtaining and demonstrating the successful acquisition of the necessary knowledge and skill by way of obtaining tertiary qualifications or their equivalent? If the answer to either or both of those questions is no, there may be grounds for modifying the requirement.

6.42. In relation to the first question, the Working Party considers that accounting and legal skills are essential to the proper conduct of an insolvency administration. However, it has sympathy with the argument that qualifications of a tertiary standard in both disciplines are not absolutely necessary. An administrator should be able to obtain external expert advice on specific accounting or legal issues, so long as the practitioner has the ability to correctly interpret and apply the advice received.

6.43. As to the second question, the Working Party considers that obtaining tertiary qualifications in accounting and commercial law is the preferable, but not the only, means of obtaining the necessary knowledge and skills in those disciplines. Potential applicants with expertise in law alone could acquire an adequate level of expertise in accounting through experience practising in corporate insolvency under supervision and/or by completing a course other than one leading to a tertiary qualification in accounting. Persons with extensive experience working in a corporate insolvency practice would also be likely to acquire the necessary level of knowledge of law and accounting.

Experience

6.44. Knowledge and skills acquired through education, tertiary or otherwise, is not a substitute for experience gained working on insolvency administrations under supervision of a competent insolvency practitioner(s). The current ASC policy requires a number of years experience working on corporate insolvency matters, some of which must be under the supervision of an official liquidator, in order for an applicant to be a registered (or official) liquidator. In this regard, the requirements are comparable with, for example, entry requirements for legal practitioners. Those rules typically require an applicant for an unrestricted practising certificate to have worked for a number of years in legal practice under the supervision of a holder of such a certificate.

Supervision

6.45. It is notable that a person applying to be a registered liquidator is required to have undergone a period of work experience supervised by an **official**, rather than a **registered**, liquidator. At first glance it would appear odd that an applicant for a certain status or position is required to have been supervised by a person who has a status or position other than the one sought.

6.46. The rationale for this was that, in practice, registered liquidators had limited experience not only in court-ordered liquidations but also in other types of major administrations. In this regard, it seems that creditors tended to restrict their appointments for large receiverships and other major administrations to official liquidators, notwithstanding that a registered liquidator could legally perform those roles. Registered liquidators were, in practice, limited mainly to relatively small and less complex administrations.

6.47. With the advent of voluntary administrations, however, the market has changed significantly. Although official liquidators still tend to dominate the major administrations, the work of many registered liquidators now encompasses some fairly large and complex voluntary administrations and, in some cases, subsequent liquidations which would otherwise have been court-ordered.

6.48. Arguably, it is now more difficult to justify the requirement that an official liquidator supervise an applicant for registration, since working for a registered liquidator is likely to expose an applicant to an appropriate range of administrations.

6.49. The Working Party therefore considers that the existing requirement for an applicant to have work experience supervised by an official liquidator should be changed to allow supervision by a registered liquidator instead. The need for a change to this requirement would become essential if the classification of official liquidator was removed, as recommended by the Working Party.

Alternative Experience

6.50. One issue that the Working Party has considered in relation to the current experience requirements is whether they should be broadened to allow experience gained other than by way of working in corporate insolvency practice under direct supervision of an official liquidator to count towards the experience requirements. The types of experience most likely to be relevant in this regard is experience gained while working as a registered trustee in bankruptcy or experience providing legal advice in corporate insolvency matters. Arguably, however, broader commercial experience should also be considered relevant.

Trustees in Bankruptcy

6.51. In a previous chapter of this report,[15] the Working Party discussed the possibility of having only one type of insolvency practitioner who may practice in both corporate and personal insolvency. Reference was made in that discussion to the argument that personal insolvency practice is very similar to corporate insolvency practice. Although there are differences of opinion about how similar it actually is, it is beyond doubt that many of the principles and practices involved are comparable.

6.52. The Working Party considers that, due to the similarities involved, practice as a registered trustee in bankruptcy, or working directly under the supervision of a registered trustee on business-related personal insolvency matters should count toward the experience requirements for registration as a corporate insolvency practitioner, provided that this experience is accompanied by work under the supervision of a registered liquidator.

6.53. Precisely what weight experience in personal insolvency work should carry when applying for registration as a corporate insolvency practitioner should be a matter for the registering body to determine.

Legal Work

6.54 The proposition that some lawyers would be suitable persons to become registered liquidators has been mentioned above. Lawyers would not usually be in a position to meet the current experience requirements because they generally would not have been working under the supervision of an official liquidator.

6.55. Possession of a high level of skill in advising on the legal issues involved in an insolvency matter does not necessarily mean a person also possesses a high level of skill in, for example, making business decisions and forecasts about a company's prospects. Experience in the legal side of administrations is not a substitute for

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15 See Chapter 4.

experience in managing administrations under supervision of a corporate insolvency practitioner.

6.56. However, an understanding of the legal aspects of an insolvency matter is essential for a corporate insolvency practitioner. Accordingly, the Working Party considers that lawyers who have extensive experience in advising parties in relation to insolvency matters should be given credit for that experience in the context of the registration requirements for liquidators. There are, however, some practical difficulties in formulating the details of such a rule.

6.57. Insolvency practice is specialised. Active registered and official liquidators generally perform insolvency work as a substantial part of their practice. If a potential applicant has been working in the office of one of those persons for a number of years, they will have gained significant experience in various aspects of corporate insolvency administrations.

6.58. The practice of law, on the other hand, is usually not so specialised. The majority of legal practitioners who advise on corporate insolvency matters would also practise in other areas of law. Some of the experience gained in working on other legal matters regarding, for example, bankruptcy or general corporate law matters, would be useful in the corporate insolvency context, but experience in unrelated areas may not be as relevant.

6.59. Having regard to the above, it may be possible to formulate a criterion which requires years of legal experience exclusively in corporate insolvency matters in order to count towards experience for registration. However, that formulation is likely to disqualify all but a handful of lawyers from registration. Another approach is to draw up a list of matter types which qualify. However, this is likely to give rise to anomalous results.

6.60. Another option may be to introduce a requirement based on the number of administrations dealt with, which could be used in addition to, or instead of, the years of experience requirement. One difficulty with this option is that close involvement with a very large and complex administration, in terms of experience, could be worth far more than advising on a number of routine matters. Furthermore, even if applicants were required to list the administrations they have advised on, it would not be possible for an admission authority to verify the extent of the applicant's involvement in each administration.

6.61. It would be possible to use words like 'mainly' or 'predominantly' in the requirement and leave it to the admission body to determine whether that requirement is satisfied on a case by case basis. This option has drawbacks because it is less certain. While it could be made more certain by specifying a fixed percentage, it would not be desirable or practical for applicants and/or admission authorities to calculate the number of days or hours spent on corporate insolvency matters as opposed to other matters while working as a lawyer. Even if they did, verification

would be a problem and, at least at the margins, the result would have little or no bearing on the quality of the work performed.

6.62. On balance, the Working Party considers that the preferable course would be to specify a number of years working 'predominantly' on the legal aspects of insolvency matters and allow the admission authority a degree of discretion in interpreting and applying that requirement. Applicants would be entitled to submit whatever evidence they felt was necessary to convince the admission authority of the value of their experience and, where appropriate, the admission authority could 'discount' the number of years of experience claimed if a proportion of the experience was not considered relevant.

The Public Practice Requirement

6.63. ASC Policy Statement 40 includes a requirement that an applicant has spent five years working as an accountant in public practice. Although not expressly stated, unless there are exceptional circumstances, this effectively means an applicant must have worked for five years in the office of a person who holds a public practising certificate issued by one of the accounting bodies. The experience may also count towards the requirement to work under the supervision of an official liquidator.

6.64. Working for a significant period in an accounting firm under supervision of the holder of a public practising certificate is likely to provide the person with a fundamental working knowledge of one or more areas of accounting, which may or may not be related to insolvency practice. The person may also have gained an appreciation of the ethical issues which confront an accounting practitioner. The requirement to work under supervision as an accountant is comparable with requirements imposed by the professional bodies in relation to the granting of a public practice certificate.[16]

6.65. It would not, however, be possible for persons other than accountants to meet the public practice requirement. Given the discussion above concerning the relevance of accounting qualifications to corporate insolvency practice, it should be considered whether the five year public practice requirement (which may or may not include insolvency practice) could be modified, supplemented or removed.

6.66. If it is accepted that accounting and finance skills of a high order are not essential to successfully conduct a corporate insolvency practice on the basis that those skills could be provided externally when necessary, arguably the five year accounting public practice requirement should be removed.

6.67. However, a contrary argument is that the requirement is not directed at the acquisition of accounting and finance skills specifically, since the skills acquired may

16 See, for example, ASCPA By-Law 704.1.

be in such areas as audit or taxation which may not be directly relevant to corporate insolvency practice. Rather, the requirement is aimed at ensuring applicants have had a reasonable level of exposure to professional practice generally. If this view is taken, it would not be appropriate to remove the requirement, even if it is accepted that accounting skills of a high order are not essential. Rather, it should be broadened to include equivalent types of experience in other relevant disciplines, such as legal practice. The Working Party supports this approach in respect of legal practitioners. Accordingly, the five year rule should be expanded so that five years' experience in legal practice should be made an alternative requirement to five years' experience in accounting practice.

Business Experience as an Alternative

6.68. The former Trade Practices Commission suggested in its report on the accounting profession that some persons with a broad commercial experience may have particular skills relevant to specific administrations and those persons may be able to enter and provide comparable services to persons who may currently become registered.[17]

6.69. Although the Working Party considers that argument has merit, there are significant practical difficulties in devising any meaningful and workable guidelines for the type of 'broad commercial experience' which should qualify. There is a wide range of commercial experience which people could be exposed to which could conceivably equip persons to conduct external administrations. Years of experience as a company director, chief executive or financial controller of some companies could, arguably, be sufficient. However, depending on the size and type of company involved, the extent of the person's responsibilities, and the success or otherwise of the enterprise, the experience gained may not be valuable in terms of conducting external administrations.

6.70. On balance, the Working Party considers that applicants with demonstrated commercial/business experience, including basic legal and accounting knowledge, should be eligible to apply for registration notwithstanding they do not possess tertiary qualifications in accounting or law. However, a further requirement should be to have five years experience working in insolvency practice, at least three of which were under the supervision of a registered liquidator or registered trustee. This formulation allows persons with broad commercial experience to have it recognised, but still ensures applicants have an appropriate level of directly relevant experience.

6.71. The Working Party further considers that significant directly relevant experience, such as seven years working in insolvency practice under supervision of a

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17 Trade Practices Commission, *Study of the Professions, Final Report—July 1992, Accountancy*, p. 69.

registered liquidator or registered trustee, should also be available as an alternative requirement to tertiary qualifications. This would allow persons who have worked for long periods in insolvency practice an avenue to become registered.

6.72. The Working Party notes that there is already a facility for persons with specific skills to apply to the ASC for permission to conduct a 'one-off' liquidation.[18] In particular, where an application is made for registration as a liquidator of a specified body corporate, the ASC may grant the application and register the applicant as a liquidator of the body concerned if it is satisfied that:

> 'the applicant has sufficient experience and ability, and is a fit and proper person, to act as the liquidator of the body, having regard to the nature of the property or business of the body and the interests of its creditors and contributories, but otherwise...shall refuse the application.'[19]

The provision gives the ASC a wide discretion which has not been elaborated upon in a policy statement.

6.73. The existing provision goes some way toward addressing the point made by the former Trade Practices Commission that persons who have specific skills relevant to specific administrations could utilise them in the context of an external administration. However, the facility of the ASC to register persons for the purpose of conducting 'one-off' administrations currently only applies to liquidations. Voluntary administrations and receiverships fall outside its ambit—persons conducting those administrations must be permanent registered liquidators.

6.74. The Working Party considers that there may be scope 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. The Working Party recommends that the Government consider making amendments to the Corporations Law to this effect.

Specialised Courses/Examinations

6.75. There is currently no specific entry examination in connection with the requirements to become a registered or official liquidator. The system relies on a combination of tertiary qualifications and experience.

6.76. If the entry requirements are to be broadened to provide opportunities to persons who do not have a background in both law and accounting, it may be desirable

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18 Paragraph 1279(1)(c), Corporations Law.

19 Subsection 1282(3), Corporations Law.

to establish a mechanism to test the fundamental knowledge of those persons in these areas. It has also been suggested in submissions to the Working Party that **all** applicants, regardless of their tertiary qualifications, should be required to pass a specialised admission examination which would be similar to the examinations currently held in conjunction with the IPAA's Insolvency Education Program. This program is an extension of the IPAA's Advanced Insolvency Course, which commenced in 1991 and continued until 1995. The current program commenced in the 1996 academic year and is run by the IPAA in conjunction with the University of Southern Queensland's Commerce Faculty. It consists of two modules covering 'terminal' and 'non-terminal' administrations and is designed to cater for graduates seeking IPAA membership. Successful completion of the modules, and active participation in the IPAA's Workshop Program, are requirements for full membership of the IPAA.

6.77. The ASCPA Centre of Excellence for Insolvency and Reconstruction has prepared a detailed paper in which it sets out options for entry examinations. The following table is based on the model proposed by the ASCPA:

Table 6.1: Options for Entry Examinations (ASCPA)

Applicant's Qualifications	Examinations Required
(a) Accounting	Specialised admission examination in insolvency practice based on IPAA Insolvency Education Program ('Insolvency')
(b) Law	Accounting + Insolvency
(c) Tertiary (other than accounting or law)	Bridging examinations in Business Law, Ethics, Accounting and an Aptitude Test *plus* Admission examinations in Accounting + Business Law + Ethics and Professional Responsibility + Insolvency
(d) None, but significant (ie 10 years) work experience in corporate insolvency	Admission examinations in Accounting + Business Law + Ethics and Professional Responsibility + Insolvency

6.78. The Working Party considers that the ASCPA proposal has merit in that, if it was implemented, there would be a high level of confidence that all applicants have a minimum required level of knowledge and skills in the various areas, particularly if the experience requirements were opened up to other professions.

6.79. The trade-off is that a significant administrative workload would be imposed on the admission authority and a large burden on applicants. For example, in order to gain entry through Category C, nine separate examinations would be required, each of which would probably comprise a number of parts. The admission examination in law would be likely to include areas such as insolvency, contract, trade practices and taxation laws.

6.80. It is questionable whether the expense involved in preparing and conducting all the examinations in the proposed framework can be justified on the basis that it should result in an increase in competition between insolvency practitioners. The number of persons who might use the alternative schemes is, arguably, too small to warrant the resources required to develop the regime and the ongoing expense of its administration. Accordingly, the Working Party does not support the establishment of a 'multi-stream' system of bridging and entry examinations at this stage.

6.81. However, the Working Party considers that there is scope for use of the IPAA's Insolvency Education Program examinations (or demonstrated equivalent knowledge, as approved by the registering authority) for **all** applicants. This would provide a 'safety net', since it would ensure that applicants are cognisant with fundamental insolvency principles, irrespective of their background. It should be possible to incorporate appropriate accounting content in the course to cater for persons from different backgrounds. The registering authority should have power to exempt persons from the requirement to complete the course in exceptional cases.

Membership of Professional Bodies

6.82 One of the alternative entry requirements set out in the Corporations Law is that an applicant be a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States.[20] However, other qualifications and experience will suffice if, in the opinion of the ASC, they are equivalent.[21] The ASC has not released guidelines regarding the types of experience and qualifications it would consider to be equivalent to membership of those bodies.

6.83 The membership requirements for the ICAA and the ASCPA are similar. The ASCPA requires applicants for membership as a Certified Practising Accountant ('CPA') to:

- be the holder of tertiary qualifications in accounting;
- produce evidence of good character;

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20 Subparagraph 1282(2)(a)(ii), Corporations Law and Regulation 9.2.01, Corporations Regulations.

21 Subparagraph 1282(a)(iii), Corporations Law.

- prove they have passed approved examinations in auditing, Australian business law and Australian taxation law;

- provide documentary evidence of work experience in accounting or finance supervised by a CPA member or another accountant with equivalent or higher status for at least three years, or five years non-supervised experience, or an approved mixture of supervised and non-supervised experience;

- make a commitment to undertake 20 hours per annum continuing professional development; and

- comply with any other conditions and possess such other qualifications as are prescribed—generally or in any particular case.[22]

6.84. The requirements for becoming a CPA, therefore, contain comparable requirements concerning accounting qualifications, character and work experience as the registration requirements for liquidators. However, there are no requirements concerning continuing professional education in the registration regime for liquidators. Furthermore, registered liquidators do not necessarily have to be subject to the disciplinary regimes and monitoring activities carried out by the professional bodies.

6.85. The ICAA and the ASCPA have jointly issued a number of documents relating to technical matters, quality control, professional conduct and ethics of their members. Those documents form part of a joint members' handbook and are in addition to the codes of professional conduct adopted by each organisation.

6.86. The joint documents include a Statement of Insolvency Standards (APS 7). Compliance with the standards set out in the statement is mandatory for members, and a breach may result in disciplinary proceedings. The standards are a set of basic principles governing professional responsibilities which a member must exercise in the course of insolvency practice. The statement is currently under review and an exposure draft of an amended standard was recently issued (copy at Schedule 2). The exposure draft includes standards relating to independence and objectivity, conflicts of interest, appointment, competition for appointment, inducements, property dealings, confidentiality, continuing education and availability of resources.

6.87. The standards imposed by the accounting professional bodies are, in the Working Party's view, an important part of the regulatory framework for insolvency practitioners. However, the Working Party doubts whether mandating membership of an accounting or other professional body for registration is the most appropriate means of achieving those regulatory goals. In particular, prescribing membership of a professional body as a mandatory requirement could be seen as anti-competitive and, possibly, contrary to the spirit, if not the letter, of the *Trade Practices Act 1974*. This

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22 ASCPA By Law 102.1.

is so despite that nearly all of the existing registered liquidators are members of a professional organisation.

6.88. In any case, requiring membership of a professional body in order to obtain registration does not ensure practitioners remain members. The prescribed form of the triennial statement does not require practitioners to indicate whether they remain members of a prescribed body and the ASC has no other means of monitoring whether registered insolvency practitioners remain members.[23] Also, ceasing membership of the ICAA or the ASCPA (or an equivalent body) is not a ground for deregistration.

6.89. The Working Party considers that there should be no mandatory entry requirement in the law relating to membership of a professional accounting or other professional body. The Working Party's views on the preferred means of dealing with the issues of ongoing supervision and discipline of practitioners are set out later in this report.[24]

Streamlining of Applications from Members of Professional Bodies

6.90. Although the Working Party considers that there should be no entry requirement in the law relating to mandatory membership of a professional organisation, the Working Party believes that, if a professional organisation can demonstrate that its own entry requirements ensure that its members are suitable to become registered insolvency practitioners in that they meet or exceed the prescribed entry requirements, then applications from members of that organisation should be capable of being streamlined so they do not need to go through the full processes in relation to their applications.

6.91. One organisation which may fit into this category is the IPAA. The IPAA was, until mid-1992, an organisation whose full members consisted only of persons who held a licence to practice as a registered trustee or a registered liquidator. More than 90 per cent of those license holders were full members of the IPAA. In mid-1992, the IPAA changed its constitution, primarily to raise the qualifying standards for its members. New members after that date are required to:

- be a member of a professional accounting body or law society within Australia;
- pass two semester examinations of the IPAA's Insolvency Education Program (covering both corporate and personal insolvency);
- possess or be deemed to possess prescribed accounting knowledge as detailed in the IPAA's regulations; and

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23 Form 904, Corporations Regulations.

24 Supervision is dealt with in Chapter 7. Discipline is dealt with in Chapter 8.

- have worked for a period of at least three years of the previous five years doing professional work under the supervision of a full member who has been carrying on business in Australia the practice of a registered trustee or a registered company liquidator.

6.92. It would be possible to formulate systems whereby membership of some organisations enables the application to be partially streamlined. For example, a member of a professional accounting body could have their application streamlined in so far as the educational requirements are concerned, so that the registering authority need only be concerned with assessing the experience and other general aspects of the application.[25] If the current requirements are broadened to allow lawyers to become registered, a similar system could operate in relation to members of professional legal bodies.

6.93. At the end of the day, the question of streamlining applications would be a matter for the registering body (that is, the ASC) to consider. However, the Working Party would strongly encourage the registering body to adopt a streamlining system to facilitate registration processes.

General Suitability and Fit and Proper Person Requirements

6.94. The current requirements include a provision which enables the ASC to reject an application if it is not satisfied that the applicant:

- is capable of performing the duties of a liquidator; or

- is not otherwise a fit and proper person to be a liquidator.[26]

6.95. This provision is really a 'catch-all' provision which, on its face, gives the ASC a wide discretion to reject applications. The ASC has not elaborated upon how it will apply the provision in a policy statement. However, it should be noted that a decision to reject an application on this ground would be subject to review by the AAT.

6.96. There has been no indication that the provision has been frequently used by the ASC to refuse applications from persons who might otherwise have qualified for registration. Nor has there been any suggestion that the provision has been used unfairly.

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25 This is effectively how the system works now in relation to members of the ICAA and the ASCPA—see subsection 1282(2), Corporations Law.

26 Subsection 1282(2), Corporations Law.

6.97. In the view of the Working Party, a general suitability provision should be retained regardless of the other qualifications and experience requirements. It should also remain subject to administrative review.

Conclusions

6.98. The Working Party recommends that the entry requirements for registered liquidators should be broadened so that persons with various combinations of qualifications and practical experience, as set out in the following table, would be eligible to apply for registration.

6.99. In addition, all applicants should be required to successfully complete the IPAA program in insolvency practice (or demonstrate equivalent knowledge as approved by the registering authority), and satisfy the 'fit and proper person' requirements.

6.100. 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 IPAA, ASCPA, ICAA and the legal professional bodies) in order to facilitate the registration process.

6.100 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 senior lawyers with significant insolvency experience.[27]

6.102. The following table illustrates how the proposed registration criteria would operate in connection with qualifications and experience:

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[27] Discussion of the proposed transitional arrangements for lawyers with significant insolvency experience commences at paragraph 6.103.

Table 6.2: Proposed Registration Criteria for Insolvency Practitioners

Tertiary Qualifications	Experience
Stream A (Accountants)	
Accounting and Commercial Law	5 years accountancy practice *plus* 3 years under supervision of registered liquidator or registered trustee
Stream B (Insolvency lawyers)	
Law (including company and commercial law)	5 years in legal practice *plus* 3 years practising predominantly in insolvency law *plus* 3 years under supervision of registered liquidator or registered trustee
Stream C (Substantial experience)	
Qualification other than accounting or law	Demonstrated commercial/business experience, including basic accounting and legal knowledge *plus* 5 years predominantly working in corporate insolvency practice, 3 of which was under supervision of a registered liquidator or registered trustee
OR	**OR**
No qualification	7 years in corporate insolvency under supervision of registered liquidator or registered trustee

Notes

Stream A: This category of applicant roughly corresponds to the persons who currently are eligible to apply for registration, but the experience requirements have been modified so that experience as **trustee in bankruptcy** and **working for registered liquidator** can be substituted for experience working under the direct supervision of an official liquidator. The Working Party envisages that this category would make up the bulk of applicants.

Stream B: This category of applicant is a significant addition to the current system. It would allow lawyers who have specialised in insolvency law to become registered liquidators. Note, however, that applicants in this category must have 3 years of supervised experience in corporate or personal insolvency practice acceptable to the registering authority.

Stream C: This category allows persons without tertiary qualifications in accounting or law to apply provided they have 7 years' experience working full time under the supervision of a registered liquidator, **OR** a tertiary qualification, 5 years' insolvency experience (including 3 years supervised experience), and a demonstrated knowledge of accounting, legal and business matters. The Working Party does not envisage that many persons would be eligible for this category.

Transitional Arrangements for Lawyers with Significant Experience

6.103. The Working Party considers that there are a very small number of senior lawyers with significant experience in corporate insolvency work who are already suitable to become registered liquidators, but who have been excluded from registration under the existing requirements. It would be neither necessary nor feasible to require those persons to undertake employment under supervision of a registered liquidator or registered trustee.

6.104. Accordingly, the Working Party proposes a transitional arrangement whereby those persons could become registered liquidators without having satisfied the requirements regarding supervised insolvency work. This facility would be available only for a limited time, such as one year from the commencement of the new regime. After that time, all lawyers seeking registration would have to satisfy the usual requirements, including supervised experience.

6.105. To be eligible for the transitional exemption regarding experience requirements, lawyers would be required to demonstrate to the registering authority that they have significant experience (at least seven years out of the last ten) advising predominantly in corporate insolvency matters, and that their experience covers a broad range of issues affecting corporate insolvency practice.

6.106. Lawyers who have expertise sufficient in insolvency to qualify for the transitional exemption from the experience requirements may also qualify for exemption from undertaking the IPAA program. However, whether this exemption is also available should be a matter for the discretion of the registering authority, as mentioned in paragraph 6.81. The Working Party envisages that members of the class of persons eligible for the concession from the IPAA education program would include those who have been conducting the IPAA program or those who could demonstrate similar knowledge and experience through, for example, preparation and delivery of papers, lectures, seminars and courses and contributions to submissions made by the Law Council's Insolvency and Reconstruction Committee or by the IPAA.

Official Liquidators

6.107. Earlier in this chapter, the desirability of retaining the class of official liquidator was discussed. Although the Working Party considers that a special class of official liquidator is no longer necessary, if its existence is to continue, at least in the short term, the question arises whether the current requirements for this class are appropriate.

6.108. The history of the official class of liquidators was summarised in Chapter 3. The ASC's current guidelines for admission as an official liquidator have four main elements:

- experience requirements;
- a willingness to conduct court ordered administrations and the resources to conduct them;
- membership of professional associations and participation in continuing education; and
- the amount of work generally available.[28]

6.109. The ASC has advised the Working Party that it is currently in the process of revising these guidelines. The changes being considered are:

- modifying the experience requirements to recognise the increasing incidence and importance of voluntary administrations; and
- removing the reference to restrictions on numbers of persons registered as official liquidators.

Experience and Resources

6.110. The major criticism levelled at the current experience requirements is that they require applicants to have work experience under direct supervision of another official liquidator. Accordingly, registered practitioners who do not have an opportunity to work under the direction of an official liquidator, such as those in regional areas, will not qualify for official liquidator status even though they may be involved in some complex administrations. The result of this policy is that there is potentially a closed shop of official liquidators who operate primarily out of the capital cities.

6.111. A response to this criticism is that it is important that all official liquidators have a sound knowledge of the conduct of court-ordered windings up and only persons who have worked under the direct supervision of an official liquidator will obtain that kind of experience. Further, there are no regulations preventing an official liquidator from setting up a regional practice. They generally choose not to do so for economic reasons. Adjusting the experience requirements may not necessarily change those factors. Accordingly, such a change may not result in more regional practitioners qualified as official liquidators, but rather a lowering of standards generally.

A Regional List

6.112. One approach which has been used in relation to practitioners in regional areas is the establishment of a separate list of official liquidators who practice only in a

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28 ASC Policy Statement 24, *ASC Digest*, PS 9/17.

particular region. In New South Wales, a 'country list' of official liquidators was established in 1987 by the former New South Wales Corporate Affairs Commission in consultation with the NSW Supreme Court, the IPAA and the professional accounting bodies. This list was established primarily so that creditors of a company in liquidation in regional areas would have easy and low cost access to an official liquidator. Furthermore, the appointment of a local liquidator would generate cost savings to the administration.

6.113. The country list operates by allocating a defined area of the State to liquidators whose practice is in the country. The NSW Supreme Court and the Federal Court appoint only official liquidators on the country list to wind up companies whose principal place of business or major assets are in their defined area.

6.114. It was suggested in the report of the former Trade Practices Commission that practitioners on the New South Wales country list may not satisfy the normal experience requirements to be an official liquidator and they are only appointed to perform the less complex regional liquidations.[29]

6.115. The ASC Policy Statement on official liquidators recognises the practice in New South Wales in relation to rural areas and states that, pending the outcome of this review, the ASC will continue to support this practice.[30] The policy statement indicates that practitioners who restrict their practice to a particular geographic area will only need to show that they have the staff, resources and backup facilities necessary to conduct a practice in that particular area.[31] The ASC's policy statement does not expressly state that ASC support of the New South Wales practice translates into a lessening of the experience requirements for practitioners who wish to be granted official liquidator status on the country list. However, there is no statement to the effect that a lower standard will *not* be accepted for applicants wishing to restrict their practice to a particular geographic location. By contrast, such a statement was included in the policy statement relating to admission requirements for registered liquidators in December 1993.[32]

6.116. The practice in New South Wales effectively creates, at an administrative level, a sub-category of official liquidator who is entitled to work only in regional areas. Those persons are not required to meet the levels of staffing and backup facilities required of city practitioners. Further, although it is not expressly recognised in current ASC Policy Statements, the Working Party accepts that the statement in the former Trade Practices Commission report that 'regional liquidators...may not have

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29 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 140.

30 ASC Policy Statement 24, *ASC Digest*, PS 9/17 at paragraphs 10A–10B.

31 ASC Policy Statement 24, *ASC Digest*, PS 9/17 at paragraph 8.

32 ASC Policy Statement 40, *ASC Digest*, PS 9/37 at paragraph 5.

satisfied the normal experience requirements to be an official liquidator' is likely to be accurate.

Conclusion

6.117. While the Working Party is sympathetic to the desire to maintain the availability of local insolvency practices as a means of keeping costs down in country centres, it does not consider that such considerations should be the determining factor in setting the criteria for registration as an official liquidator. Rather, if the registration process ultimately adopted is fair, competitive and sets a reasonable standard, questions of access to practice by regional practitioners should not arise.

6.118. The Working Party considers that if its recommendations in this report relating to the abolition of official liquidator status and opening up insolvency practice to other professionals are adopted by the Government, many of the concerns of country practitioners should be addressed. Country practitioners would no longer need to meet the additional and stringent experience requirements to retain their official liquidator status and to be eligible for appointment to court-ordered liquidations.

6.119. The Working Party recommends that 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.

6.120. The Working Party considers that the practice in New South Wales of admitting regional practitioners to a separate 'country list' of official liquidators is anomalous and cannot be justified. The Working Party recommends that all future applicants in New South Wales should be required to satisfy the usual requirements for official liquidator status.

Amount of Work Generally Available

6.121. The rationale behind the factor relating to the amount of work generally available seems to be that if too many official liquidators are appointed, each practitioner would perform less work and, therefore, would not be able to maintain an adequate experience level. This assumes that all practitioners granted official status would have an equitable share of the work available.

6.122. As discussed later in this report,[33] the rotation system for appointment of official liquidators does not necessarily result in the work being shared equitably. In any event, the Working Party considers that it should not be the responsibility of the regulatory system to ensure practitioners obtain a certain level of work, particularly if

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33 See Chapter 9.

the means of doing so involves excluding others who would otherwise be qualified to perform it.

6.123. Maintaining practitioners' work experience levels is an important consideration, but there are alternatives to addressing this issue which do not involve restricting entry to practice.[34]

6.124. The Working Party recommends that 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.

34 See further discussion of this issue in Chapter 7.