EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

Bankruptcy Act 1966

Insolvency Practice Rules (Bankruptcy) 2016

Section 105-1 of Schedule 2 to the *Bankruptcy Act* (the Act), which commences when the *Insolvency Law Reform Act 2016* (the Amending Act) commences, provides that the Minister may make rules prescribing matters required or permitted by Schedule 2 of the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Schedule.

The Amending Act implemented the Australian Government's reforms to create common rules for the regulation of corporate insolvency and personal bankruptcy that will:

- remove unnecessary costs and increase efficiency in insolvency administrations
- align the registration and disciplinary frameworks that apply to registered liquidators and registered trustees
- align a range of specific rules relating to the handling of personal bankruptcies and corporate external administrations
- enhance communication and transparency between stakeholders
- promote market competition on price and quality
- improve the powers available to the corporate regulators to regulate the corporate insolvency market, and
- improve overall confidence in the professionalism and competence of insolvency practitioners.

A number of legislative instruments, including the *Insolvency Practice Rules (Bankruptcy) 2016* (the Instrument), are required to fully implement the Australian Government's reforms. A mirroring instrument, the *Insolvency Practice Rules (Corporations) 2016* (the Corporations Instrument), will be made by the Minister for Revenue and Financial Services.

The Instrument sets out:

- the details to be placed on the Register of Trustees
- the qualifications, experience, knowledge and abilities required by applicants for registration
- the rules for the operation and conduct of matters considered by committees formed to determine registration and discipline of registered trustees
- further exceptions to the prohibition on an external administrator deriving a profit or advantage from the administration of a personal insolvency

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- when it is not reasonable for external administrators to comply with requests for information from creditors and committees of inspection
- what information must be provided to creditors and when during an external administration
- the rules regarding the holding of meetings during an external administration
- the ability of individuals to be appointed and removed from a committee of inspection, and
- the powers and duties of the Inspector-General in Bankruptcy to review the conduct of an external administration of a personal insolvency.

Details of the Instrument are set out in Attachment A.

The Instrument has been informed by public consultation on a proposals paper outlining the contents of the instrument released in 2015 and on a draft of the instrument in 2016.

The Final Assessment Regulation Impact Statement has been submitted to the Office of Best Practice Regulation (OBPR number 19720). The Final RIS is set out in Attachment B.

The Instrument commences on the day that the Amending Act commences (which will be 1 March 2017), with Part 3 of the Instrument commencing on 1 September 2017.

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Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Insolvency Practice Rules (Bankruptcy) 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Legislative Instrument

This Instrument is aimed at ensuring the framework for insolvency practitioners promotes a high level of professionalism and competence by practitioners, promotes market competition on price and quality, and encourages greater transparency and communication between stakeholders.

Alignment of the personal and corporate insolvency systems is a key aim of this package. The Government is committed to reducing unnecessary regulatory burdens stemming from the differing regulatory treatment of corporate and personal insolvency practitioners.

The Instrument will provide for the operation of disciplinary mechanisms for insolvency practitioners in the style of disciplinary committee framework for both personal and corporate insolvency. These changes may have impacts on certain human rights, which are detailed below.

Human rights implications

This impact of this Instrument on the following human rights has been considered:

- the right to a fair trial and the presumption of innocence
- the right to work and rights in work, and
- the right to privacy and reputation.

The right to a fair trial and the presumption of innocence

Article 14 of the ICCPR includes the right to a fair trial and the presumption of innocence. Specifically Article 14(1) provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” and Article 14(3) provides for minimum guarantees in a fair trial.

Division 50 of the Instrument sets out the requirements for committees established to consider the discipline and potential deregistration of insolvency practitioners accused of breaching his or her obligations under the law. In this regard, the Instrument must be considered in conjunction with Division 50 of Schedule 2 to the Bankruptcy Act inserted by the Amending Act.

Section 50-15 provides that a committee member (one of three members required to sit on a committee) appointed by the insolvency profession to consider the matter must have recent knowledge and experience of the industry in order to ensure competency.

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Section 50-50 requires committee members to disclose any interests which may compromise his or her independence in considering a matter, and sections 50-30, 50-35, 50-40 and 50-45 provide for the removal of the compromised member and their replacement.

Section 50-55 requires that a practitioner facing deregistration or any other disciplinary action be granted natural justice by the committee. To avoid all doubt section 50-85 provides that a practitioner facing deregistration must receive an interview.

Section 50-90 requires that a committee must use its best endeavours to decide a disciplinary matter within 60 days after the matter is referred to the committee.

The right to work and rights in work

The right to work and rights in work are contained in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights. The right to work and rights in work may be engaged if the Instrument deals with aspects of employment or workplace relations.

This Instrument provides provisions in relation to the registration, discipline and remuneration of insolvency practitioners. The right to work is only affected, to the extent that a practitioner is suspected of wrongdoing or of not meeting a requirement under the Instrument, such as having adequate insurance. On balance, the right to work and rights in work are not engaged.

The right to privacy and reputation

Article 17 ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy may be engaged if the Instrument involves the collection, security, use, disclosure or publication of personal information.

The Instrument contains provisions to require applicants to provide information to the relevant regulator and such information will be available publicly.

Practitioners will also be required to lodge a notice with the regulator when certain events occur such as when the practitioner becomes insolvent or if they are convicted of an offence involving fraud. These notices will not be made public, but rather inform the regulator.

Conclusion

This Instrument is compatible with human rights. To the extent that the Instrument limits any human rights, those limitations are reasonable, necessary and proportionate.

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ATTACHMENT A

Details of the *Insolvency Practice Rules (Bankruptcy) 2016*

This Attachment sets out further details of the *Insolvency Practice Rules (Bankruptcy) 2016* (the Instrument). All references are to the Instrument unless otherwise stated.

Part 1 – Introduction

Section 1-1

This section provides that the title of the Instrument is the *Insolvency Practice Rules (Bankruptcy) 2016*.

Section 1-5 – Commencement

This section provides that the Instrument will commence in two stages.

Parts 1 and 2 of the Instrument will commence immediately after the *Insolvency Law Reform Act 2016* (the Amending Act) commences (on 1 March 2017).

Part 3 of the Instrument will commence on 1 September 2017.

Section 1-10 – Authority

This section provides that the Instrument is made under the authority of the *Bankruptcy Act 1966* (the Act).

Division 5 - Definitions

Sections 5-5, 5-10 and 5-15

The sections define a range of terms used in the Instrument, including the following.

- *current registration* is defined so that a liquidator's registration will be considered to be current provided it has not been cancelled or not renewed. The commencement of a liquidation will not be impacted by the new registration regime under the Amending Act.
- *disciplinary action* is defined to include actions taken against a registered trustee:
  - by the Inspector-General in Bankruptcy under Division 40 of the Schedule 2 to the Act except for:
    - : the giving of a direction to provide further information that the Inspector-General reasonably suspects in incomplete or incorrect or
    - : the giving of a show-cause notice.

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- in relation to section 155I of the old Act (which relates to involuntary termination of registration and the application of conditions where registration is not terminated)

- *material personal interest* is defined so that a member of a Part 2 committee will be taken to have a material personal interest in a matter if a related entity of the member, as defined under Act, has an interest in the matter.

- *Part 2 committee* is defined to include a committee convened to consider an application for registration, application to vary the conditions of a registration, disciplinary action, or lift or shorten a suspension.

- *regulations* is defined to mean the *Bankruptcy Regulations 1966* as in force from time to time. This is because the Instrument will be updated in future and will refer to the Bankruptcy Regulations as in force at the time of those updates. Access to the most recent versions of these instruments is available on the Federal Register of Legislative Instruments (FRLI) (www.legislation.gov.au).

Part 2 – Registering and disciplining practitioners

Division 15 – Register of trustees

Section 15-1

The Amending Act repealed the previous requirements for the establishment of a Register of Trustees and replaced it with similar provisions in section 15-1, Schedule 2 of the Act.

Section 15-1(2) prescribes the information to be published on the Register for each registered trustee. The register must include details for each practitioner including:

- the name of the individual, the name of the individual's firm and the address of any place of business

- when the person's registration commenced

- any disciplinary action taken in relation to their registration, and

- any conditions placed on their registration.

This information must be made publically available under subsection 15-1(4).

Placing any disciplinary action taken against the practitioner on the public register will assist in improving community confidence in the regulation of practitioners by making the timing of disciplinary matters transparent.

In the event that a party is found to be innocent, a disciplinary committee has the power under section 40-55 of Schedule 2 to the Act to order that the register be amended to state the outcome of the committee's deliberations.

Subsection 15-1(3) provides that Inspector-General may also include other information relevant to the practitioner or the practitioner's practice on the Register.

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This information is not required to be made publically available by the Inspector-General.

Division 20 – Registering trustees

Section 20-1

Under subsection 20-20(4) of Schedule 2 to the Act a person who applies for registration as an external administrator must be registered if a committee formed to consider the person's registration is satisfied that the person meets a range of requirements including having the qualifications, experience, knowledge and abilities prescribed in this Instrument.

Section 20-1 provides for the qualifications, experience, knowledge and abilities that persons applying for registration as a practitioner must possess. The committee must therefore be satisfied that the applicant:

- has completed three years of full-time tertiary study or its equivalent in commercial law and accounting. This means that an individual who has completed a bachelor of accounting, but has not completed any study in commercial law would not be able to be registered as a liquidator or registered trustee.
- has completed two course units of tertiary study or its equivalent in insolvency. This would currently be satisfied through the completion of the Australian Restructuring Insolvency and Turnaround Association (ARITA) Advanced Certification which is delivered by ARITA in partnership with the University of Technology, Sydney. However it is desired that other tertiary institutions will develop comparable programs over time which could either be built into undergraduate (although the units themselves would need to be at a postgraduate standard), masters or other postgraduate programs.
- has completed 4000 hours of 'relevant employment' at a senior level. 4000 hours is equivalent to three years of full-time employment engaged in external administration at a senior level.
  - The term 'relevant employment' is defined under subsection 20-1(3) to allow for a divergence in breadth of employment for those applying for unconditional registration.
- has demonstrated the ability to actually perform the functions and duties of an external administrator satisfactorily.
- is able to comply with any conditions that may be imposed as part of the registration. Such conditions could include those stipulated under section 20-35 of Schedule 2 of the Act or section 20-5 of the Instrument.

While not exhaustive, it is expected that an individual's relevant employment will be considered to be at a 'senior level' if the individual reported directly to the relevant external administrator or trustee, and:

- formed opinions and made recommendations to the external administrator or trustee about the financial and potential legal position of the body corporate or debtor

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- was directly involved in planning and managing on behalf of the external administrator or trustee the conduct of the external administration or bankruptcy

- prepared draft reports to creditors on behalf of the external administrator or trustee

- instructed solicitors and evaluated legal advice as directed by the external administrator or trustee, or

- supervised staff that reported through the individual to the external administrator or trustee and had responsibility for allocating other resources.

Section 20-5

Section 20-5 sets down conditions which will apply to all trustees.

- Subsections 20-5(2) and (3) require a trustee to complete 10 hours of continuing professional education (CPE) able to be objectively verified with a further 30 hours of CPE that does not need to be verifiable. Continuing professional education is aimed at ensuring that practitioners maintain a current knowledge of the industry. This level of CPE reflects the level required of practitioners that are members of accounting or legal professional bodies.

- Subsection 20-5(4) requires a practitioner that has been suspended to maintain adequate and appropriate insurance against the liabilities that the practitioner may incur as a result of work carried out before the suspension.

Section 20-10

Section 20-10 provides that the prescribed amount of notified estate charges is $500 in relation to the provisions of Schedule 2 to the Act as listed. These provisions provide for conditions on the renewal, suspension, cancellation and disciplinary action in relation to a trustee's registration.

Where a trustee owes more than this prescribed amount in notified estate charges, there may be negative consequences e.g. the Inspector-General may give a show-cause notice under section 40-40 of Schedule 2 to the Act.

Division 35 – Notice requirements

Section 35-1

Section 35-1 of Schedule 2 of the Act requires all trustees to notify the Inspector-General if a range of events occur, including if a statement made by the trustee in a regulatory return is or becomes inaccurate. Paragraph 35-1(1)(b) provides that further events could be set out in the Rules.

Section 35-1 of the Instrument provides that if a practitioner ceases to practice, changes his or her name, changes firm or the address of any place where the practitioner practices, then the trustee must notify the Inspector-General.

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Division 40 – Disciplinary and other action

Section 40-1

Subdivision 40G of Schedule 2 to the Act seeks to provide a framework to allow industry bodies to provide more information to the relevant regulator in order to improve the timeliness of regulator action on poor conduct. In order to facilitate that information flow, section 40-105 provides protection from adverse consequences for the industry body where that information is provided in good faith.

Section 40-100 of Schedule 2 of the Act allows prescribed industry bodies to lodge with the Inspector-General a notice of possible grounds for disciplinary action against one of its members. Section 40-1 of the Instrument prescribes insolvency and accounting and legal professional bodies, statutory boards and committees.

Division 42 – Standards for registered trustees

Subsections 42-1 and 42-4

Subsection 40-40(4) of Schedule 2 to the Act allows the rules to prescribe standards applicable to registered trustees in the administration of a personal insolvency. This section replaces subsection 155(H) of the Act, which has been repealed. Where a trustee fails to comply with these prescribed standards, the Inspector-General may give a show-cause notice as per paragraph 40-40(1)(p) of Schedule 2 to the Act.

Division 42 is made for the purposes of subsection 40-40(4) of Schedule 2 to the Act. This Division of the Instrument carries over elements of the professional standards from Schedule 4A of the Bankruptcy Regulations (which has been repealed).

There are no mirror provisions in the Corporations Instrument and the Insolvency Practice Schedule (Corporations) in the Amending Act does not provide the same power to prescribe standards.

The rationale for this divergence is due to the differing regulatory requirements for personal insolvency practitioners and corporate insolvency practitioners. The minimum performance standards for trustees (including controlling trustees) will assist those practitioners who perform the role infrequently to understand what is expected of them.

The divergence also reflects the fact that regulated debtors and creditors in a personal insolvency may be less sophisticated than those involved in a corporate insolvency. As such, the expectations and standards placed on personal insolvency practitioners warrant greater transparency, certainty and consistency.

Ordinarily, failure to act in accordance with a performance standard will not automatically lead to disciplinary action. However, repeated breaches or more serious breaches may give rise to disciplinary action. A Part 2 committee can take breaches into consideration when taking disciplinary action such as placing conditions on, cancelling or suspending a trustee's registration.

Subdivision 42A – Standards for registered trustees generally

Subdivision 42A prescribes general standards for trustees in the exercise of powers or the carrying out of duties. These standards extend to the conduct of a trustee's employees. These standards include requirements to:

- keep proper records of work done and of transactions relating to administrations

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- only incur necessary and reasonable costs, and
- set appropriate payment rates for trustee's staff.

Specifically, section 42-30 provides for preliminary inquiries and actions a trustee is expected to undertake at the start of each administration. This section goes into detail in relation to how a trustee should commence administration of a personal insolvency to ensure a trustee takes a proactive and considered approach and also to provide transparency and consistency in relation to the high standard of professionalism expected of a regulated trustee.

Subdivision 42B – Standards for trustees other than controlling trustees

Subdivision 42B provides for standards relating to provable debts in a joint administration and other standards in relation to the distribution of dividends.

Subdivision 42C – Standards for bankrupt estates

Subdivision 42C provides for standards around identifying and protecting assets. Section 42-185 only applies to bankrupt estates and not to deceased estates as income and contribution assessments do not apply to estates of that kind. The section requires trustees to consider whether payment of income contributions will cause hardship and to consider providing an extension of time for payment.

Subdivision 42D – Standards for controlling trustees

Subdivision 42D applies to administration of a debtor's property under Division 2 of Part X of the Act (i.e. personal insolvency agreements) by a controlling trustee (a registered trustee, the Official Trustee or an eligible solicitor). It creates standards around the investigation of a debtor's property and income and provides content requirements for reports to creditor's prepared under section 189A of the Act.

Division 50 – Part 2 committees

A decision as to whether a person will be registered as a practitioner, or have their registration taken away, is made by a committee of three persons (known as a Part 2 committee).

The three-person committee will be formed at the point at which a matter is referred by the Inspector-General. The committee must consist of an industry representative, a representative of the regulator and an appointee of the Minister.

Section 50-5

Under section 50-5, a Part 2 committee may determine its own procedures provided those procedures are in accordance with the requirements of Schedule 2 of the Act and the rest of the requirements in the Instrument.

Sections 50-10; 50-15

Under section 50-10, the industry representative must be a registered practitioner appointed by the peak insolvency representative body, ARITA. Section 50-15 requires that the industry representative must also have at least five years' experience as a practitioner. This reflects the current situation in personal bankruptcy.

Section 50-20

Section 50-20 of the Instrument provides that the Chair of the committee must be the Inspector-General or the Inspector General's delegate.

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Section 50-25

Under section 50-25, a committee member may resign and if he or she does so, the resignation must be provided in writing to the Chair. The resignation may either be immediate or on a day specified in the resignation notice.

Sections 50-30; 50-35

Under section 50-30, an industry member of a committee may be involuntarily removed from a committee in a range of circumstances, and a mechanism is provided to inform ARITA of that fact in order to prompt the appointment of a replacement member by ARITA. It is anticipated that the notice under subsection 50-30(2) would be provided to the CEO of ARITA; however this will be a matter for the committee to determine as part of its processes.

Under subsection 50-35(1), a member of a Part 2 committee appointed by the Minister may be involuntarily removed by the Minister in a range of circumstances.

Section 50-40

If a person appointed by ARITA to a Part 2 committee is removed under subsection 50-30(1), subsection 50-40(1) requires that ARITA appoint a replacement in accordance with section 50-5(2) of Schedule 2 of the Act.

If a person appointed by the Minister is removed, the Minister may choose a replacement under section 50-40(2).

Section 50-40(3) requires that notice must be provided to the trustee for whom the Part 2 committee has been convened.

Section 50-45

Section 50-45 provides that a registration or disciplinary matter can be transferred from one committee to another where the Chair is satisfied that the consideration of the matter by an established committee should be terminated due to efficiency or fairness considerations.

Section 50-50

Under section 50-50(1), all members of a committee must disclose to the Chair any material personal interest that relates to a matter which the person is considering. Under 50-50(2), that disclosure must be made as soon as practicable after the member becomes aware of the interest.

Section 50-55

Section 50-55(1) requires that a committee:

- must observe natural justice, and
- is not bound by any rules of evidence but may inform itself on any matter it sees fit.

The requirement to observe natural justice brings with it an obligation for the committee to provide a practitioner with procedural fairness and that the decision must be made free from actual or apprehended bias. While it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to

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afford natural justice, there are a range of procedural factors which it is expected that a committee will ensure are present in considering a matter, such as:

- adequate disclosure to the practitioner so effective representations may be made
- reasonable opportunity (or real chance) to present the person's case to the decision-maker, and the requirement to consider the case or the representations, and
- opportunity for a hearing where the practitioner can be legally represented, if they so wish.

While not exhaustive of all circumstances which would represent a breach of natural justice, it will not be acceptable for a member of the committee to play multiple roles of accuser, witness or prosecutor and decision-maker. For that reason the delegate of the regulator would be expected to not have played a role in the investigation of the practitioner or the preparation of the case being considered.

Under section 50-55(2), committee proceedings will be inquisitorial proceedings where members are not restrained by judicial rules of evidence. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not.

Section 50-60

Under subsection 50-60(1), a committee will be able to make a decision in a meeting where each member is either present physically or taking part in the meeting through electronic means. This would, for example, allow a member to be present via telephone, video-conferencing and internet based communications.

Under subsection 50-60(3), the decisions of a committee must be made on the basis of a majority of the votes of the members.

Under subsection 50-60(4), the committee must keep minutes of its proceedings at meetings. Those minutes may be kept electronically under subsection 50-60(5).

Section 50-65

Under subsection 50-65, the members of the committee will be able to make a decision in relation to a matter on the papers without holding a physical meeting.

Section 50-70

Under section 50-70, a committee must keep a written record of its decisions.

Section 50-75

Under section 50-75, the committee is also not limited to considering just the information provided by the trustee or the regulator; the committee can consider any information and make reasonable inquiries of any person in order to form its own view in the matter.

It is expected that the committee would provide advice on the information it will rely upon to the practitioner and allow a reasonable time for the practitioner to respond before making its decision.

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Section 50-80

Under subsection 50-65(2), if a committee is required to interview a person who is applying:

- for registration as a practitioner
- to vary a condition on registration, or
- to lift or shorten a suspension,

the Chair of the committee must determine the date, time and manner of the interview and communicate those details to the applicant and the other members of the committee. Participation in the interview by the applicant or committee members may be through electronic means.

Schedule 2 of the Act allows the committee to waive the requirement for an interview where the applicant agrees (paragraph 20-20(2)(b); subsection 20-55(2); subsection 40-85(2)).

While it is not made explicit that an interview forms part of a disciplinary proceeding, the requirement for natural justice to be observed means that the opportunity for a hearing would be expected in all disciplinary matters.

Section 50-85

Under section 50-85, if a committee is formed to consider a disciplinary matter relating to a practitioner, the Chair of the committee must determine the date, time and manner of the interview and communicate those details to the applicant and the other members of the committee.

While this section requires that a time and date for an interview must be determined, it does not invalidate any decision of a committee formed after a practitioner has failed to appear at an interview. In such circumstances, while the committee must continue to afford the practitioner natural justice, they are not prevented from making a decision on the basis that the practitioner has failed to appear before a properly convened interview without providing a reasonable excuse.

Section 50-90

Under section 50-90, a committee must use its best endeavours to decide all disciplinary matters within 60 days. However where this does not occur, the decision will not be invalidated because it was not made within that timeframe.

Section 50-95

Sections 20-25, 20-60, 40-60 and 40-90 of Schedule 2 to the Act require that a report be prepared regarding a decision of a committee. Section 50-95 of the Instrument provides that the report must be prepared in writing and signed by all members of the committee. Any statement of reasons must include the reasons of a dissenting member, if there is one.

Section 50-100

Subparagraph 50-35(2)(b)(iv) of Schedule 2 to the Act provides that committee members may disclose information or a document disclosed as part of a registration or

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disciplinary committee to certain prescribed bodies to enable or assist such a body to perform its disciplinary function in relation to its members.

Section 50-100 prescribes insolvency and accounting professional bodies, and legal professional bodies, statutory boards and committees that may receive information under subparagraph 50-35(2)(b)(iv).

Part 3 – General rules relating to external administrations

Division 60 – Remuneration and other benefits received by trustee

Section 60-5

Section 60-11 of Schedule 2 to the Act provides that the Inspector-General may, in prescribed circumstances, make a determination specifying a trustee's remuneration. Section 60-5 outlines the prescribed circumstances, which largely replicates regulation 8.09 of the Bankruptcy Regulations. The Instrument provides further rules around the conduct of a review by the Inspector-General in Subdivision B of Division 90.

The trustee may apply for remuneration to be determined by the Inspector-General where the creditors or the committee of inspection (if applicable) have rejected or failed to vote on a remuneration proposal. This right to determination by the Inspector-General ensures there is a mechanism to fulfil the trustee's entitlement to remuneration for necessary work properly performed in relation to the administration of the estate.

The Inspector-General may also determine remuneration where it is not cost effective to seek a determination by the creditors or the committee of inspection (if applicable).

For example, it may not be cost effective to seek the approval of creditors if the value of the assets in the estate is so small that the expense of holding a creditors' meeting or sending a notice to creditors cannot be justified.

The Inspector-General may also determine remuneration where it is not practicable to seek a determination by the creditors or the committee of inspection (if applicable).

For example, it may not be practicable to seek the approval of creditors if the bankruptcy is annulled and there are no longer any creditors to vote on a remuneration proposal. It may also not be practicable to seek the approval of creditors if a meeting is cancelled because of a lack of quorum.

Section 60-10

Section 60-10 outlines the information to be included in an application for the Inspector-General to determine remuneration. The section largely replicates regulation 8.10 of the Bankruptcy Regulations.

The Inspector-General requires the information specified in this section in order to determine whether the trustee has adequate reason to seek determination by the Inspector-General and also so the Inspector-General has sufficient information to determine the trustee's remuneration.

Section 60-15

Section 60-15 outlines the factors which the Inspector-General may take into consideration in determining remuneration. The section largely replicates regulation 8.11 of the Bankruptcy Regulations.

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Section 60-20

Section 60-12 of Schedule 2 to the Act gives trustees discretion to specify remuneration as a fixed amount or by some other method of calculation or a combination of both. Specifically subsection 60-12(3) provides that calculation on a percentage basis must not exceed the prescribed percentage.

Section 60-20 of the Instrument provides for the prescribed percentages based amount of money received. These percentages were previously provided for in regulation 8.07 of the Bankruptcy Regulations.

Each of the percentages was increased by 10% based on stakeholder feedback that the percentages in regulation 8.07 were not sufficient for remuneration.

Section 60-25

Section 60-20 of Schedule 2 to the Act provides that a practitioner must not directly or indirectly derive any profit or advantage from the administration of a company or bankruptcy. Subsection 60-20(5) provides that this prohibition does not apply where the profit or advantage was gained from a payment that is made to the practitioner by or on behalf of the Commonwealth or an agency or authority of the Commonwealth and is of a kind prescribed.

Subsection 60-25 (2) of the Instrument prescribes for situations where payments received by the external administrator will be explicitly carved out from the prohibition in section 60-20 in order to avoid any doubt as to the propriety of receipt.

- Where the payment is received from the Department of Employment and the payment is made for the purposes of administering claims for financial assistance from the Commonwealth in relation to unpaid employment entitlements, whether that is through the Fair Entitlements Guarantee or any previous or future program with a similar function.

The Corporations Instrument prescribe an additional carve out for payment from ASIC out of the Assetless Administration Fund, this has not been replicated in the Instrument as there is no equivalent fund in personal insolvency.

Division 65 – Funds handling

Section 65-1

Section 65-10 of Schedule 2 to the Act provides that an administration account must be maintained in relation to the regulated debtor's estate and that requirements can be prescribed.

Section 65-1 of the Instrument provides that an administration account must be held with an ADI (authorised deposit-taking institution) in an interest-bearing account. Section 65-31 of Schedule 2 to the Act provides that interest accumulated (minus any bank fees or charges) forms part of the relevant bankrupt estate.

Section 65-5

Subsection 65-25(1) of Schedule 2 to the Act provides that money must not be paid out of the administration account other than for the administration of the estate, or in accordance with the Act or a direction of the Court.

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Paragraph 65-50(a) of Schedule 2 to the Act provides that, where a trustee fails to comply with Division 65 of Schedule 2, the trustee must pay penalty interest at a rate and for a period as prescribed.

Section 65-5 of the Instrument provides that the penalty interest rate is 20% per annum for an amount exceeding $50. The period of interest accrual is from the date of the contravention (of subsection 65-25(1) of Schedule 2) until the contravention has been remedied.

The Trustee may not be liable to pay penalty interest where there was a reasonable excuse for the contravention.

Section 65-20

Section 65-46 of Schedule 2 to the Act provides that the Instrument may provide for the Inspector-General to review third party bills of costs for services in relation to the administration of an estate. The Instrument provides further rules around the conduct of a review by the Inspector-General in Subdivision B of Division 90.

Section 65-20 of the Instrument specifies the application requirements for review by the Inspector-General. For example, the application must be made within 20 business days of receipt of the bill but before the bill of costs is paid. This time limit for applying may be extended by the Inspector-General in certain circumstances. An Inspector-General's decision to refuse or grant an extension of time is reviewable by the Administrative Appeals Tribunal.

Division 70 – Information

Section 70-1

Section 70-50 of Schedule 2 to the Act provides that the Instrument may specify the timeframes for the production of information requested of a practitioner.

If a practitioner receives a request for information, a report or document which is not considered to be unreasonable, the practitioner must comply with the request within five business days or longer as agreed with the creditor. An external administrator will be taken to have complied with the timeframe if they send the information, report or document to the maker of the request within five business days. The information, report or document does not need to have been received by the creditor within five business days.

If the practitioner is reasonably satisfied that provision of the information with that timeframe is not possible (for example, because a document needs to be created by the external administrator before it is provided to the creditor), then the external administrator may extend the period for compliance. If the practitioner does so, he or she must provide the person who made the request with a written response regarding when the request will be complied with and why the extension in time was reasonable and necessary.

Subsection 70-5

If a practitioner receives a request for information, a report or document which is considered to be unreasonable, the practitioner must provide the person who made the request with a written response as to why the request was unreasonable. A note must also be made on the files of the administration as to why the request was unreasonable.

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It should be noted that where compliance with a request for information would be illegal (e.g. in breach of confidentiality requirements) that request, or part of that request, would be considered unreasonable.

Subsections 70-10; 70-15; 70-17

Sections 70-40, 70-45 and 70-56 of Schedule 2 to the Act require an external administrator to comply with a request from creditors, an individual creditor or regulated debtor for information, a report or document in an external administration, unless an exception applies.

Subsections 70-10(2), 70-15(2) and 70-17(2) of the Instrument provides that a request from a creditor will be considered unreasonable, and an external administrator will not be obligated to comply, where:

- the request substantially prejudices the interests of a creditor, group of creditors or a third party, and that prejudice outweighs the benefits of complying with the request
- the information, report or document requested is privileged on the basis of legal professional privilege
- providing the information would be a breach of confidence
- there is insufficient available property to comply with the request, unless the request is made in a member's voluntary winding up
- the information has already been provided
- the information will be included in a statutory disclosure within the next 20 business days, or
- the request is vexatious.

Subsections 70-10(3), 70-15(3) and 70-17(3) of the Instrument provide that a practitioner will be able to rely on a request being considered vexatious if was made within 20 business days of a similar request being made. This timeframe does not mean that a request may not be vexatious if made outside that timeframe. For example, if a creditor on multiple occasions asks for the same information 21 business days after receiving the answer to their last request.

Subsections 70-10(5), 70-15(5) and 70-17(5) of the Instrument provide that a request that would be considered unreasonable due to

- there being insufficient available property to comply with the request
- the information having already been provided, or
- the information being included in a statutory disclosure within the next 20 business days,

must be complied with if the creditor or creditors agree to bear the cost of the practitioner complying with the request.

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A key impact of these new rules is that external administrators will be required to provide a creditor list to creditors when requested. There has been some concern from industry participants that the operation of the *Privacy Act 1988* may prohibit the publication or provision of creditor lists to creditors. The ability of creditors to have an awareness of who other creditors are, and how much they are owed, is critical to the operation of creditor empowerment as a 'creditor rights' to monitor and influence the conduct of an administration are often linked to the number and/or value of creditors supporting a request.

It is not necessary to explicitly state in the Instrument that the provision of a creditor list will always be an authorised purpose under the Privacy Act as such a disclosure:

- is already clearly authorised under an Australian Law for the purpose of Australian Privacy Principle (APP) 6.2(b) of the Privacy Act, and

would be a permitted general situation for the purpose of APP 6.2(c) of the Privacy Act.

Section 70-30

Under subsection 70-30(2) an external administrator will be required to notify as many of the creditors of a company in external administration as reasonably practicable upon the commencement of their appointment.

The notification must also inform the creditors of their rights including

- request information, reports and documents from the external administrator
- direct that the external administrator convene and hold a meeting of creditors
- give directions to the external administrator, and
- remove and replace the external administrator.

Under subsection 70-30(3) the trustee must also give the creditors a declaration about any relevant relationships between the trustee (and, if the trustee operates within a firm, the trustee's partners or corporate entity) and the debtor or former trustee. This is to ensure creditors are provided the opportunity to consider any possible conflicts of interest the trustee may have.

Under subsection 70-30(4), the information and declaration must be provided in writing and at the point in which the trustee first communicates with the creditors. This could be when the trustee provides his or her initial remuneration notice under section 70-35 of the Instrument.

Section 70-35

At the same time as the external administrator sends the information under section 70-30 to the creditors, he or she must also send basic information under section 70-35(2) regarding the method and rate of the remuneration that he or she is intending on seeking for the work to be undertaken in the administration. The contents of the *initial remuneration notice* substantively reflect the current requirements for such notices in personal bankruptcy.

While the practitioner may take the opportunity to seek approval of his or her remuneration at this point, it is not necessary.

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Under subsection 70-35(5) the initial remuneration notice should be provided:

- within 20 business days of receiving the regulated debtor's statement of affairs, or
- within 20 business days after the execution of a personal insolvency agreement (as per section 216 of the Act), or
- where no statement of affairs is provided within 60 days after the bankruptcy date, within 7 days of the expiration of that period.

Section 70-45

Under section 70-45, an external administrator will also be required to report to creditors and/or the committee of inspection before a remuneration determination is made.

The report must include sufficient detail to enable to creditors and/or the committee of inspection to make an informed assessment as to the reasonableness of the proposed remuneration. The report must also set out the right of the regulated debtor and creditors to elect to receive a remuneration claim notice under section 70-47 of the Instrument. This election must be made within 20 business days of receiving the report (see subsection 70-47(2) of the Instrument).

The report should be provided to each of the creditors or committee members (whichever is applicable) and the regulated debtor at the time of notice of the relevant creditors or committee meeting, or at the time of notice of the proposal for proposals without a meeting.

Section 70-47

A regulated debtor or creditor would have received notice of their right to receive a remuneration claim notice in the report provided by the trustee under section 70-45. An election to receive the notice must be made within 20 business days after receiving the section 70-45 report.

The trustee must give this notice to those who have elected to receive it if the trustee's remuneration is greater than the maximum default amount under section 60-15 of Schedule 2 to the Act ($5,000 at the time of writing).

The notice specifies details about the trustee's remuneration, including:

- the total amount of remuneration claimed
- details of work performed and disbursements, and
- details of the methods of calculating remuneration and disbursements.

The notice must also set out variations between the 70-45 report and the notice in remuneration.

A remuneration claim notice can be reviewed by the Inspector-General. Applications for review must be made within 20 business days after receiving the notice.

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Section 70-51

Section 70-51 provides that where a declaration of relevant relationships becomes out of date or contains an error, the trustee must provide a replacement to creditors as soon as practicable.

This section has not been replicated in the Corporations Instrument as other parts of Corporations Law already provide for this requirement.

Section 70-55

Subsection 70-55(3) of Schedule 2 to the Act requires external administrators to comply with a request for information by the Commonwealth. Subsection 70-55(3) provides that the Insolvency Practice Rules can provide for who would pay for compliance with this obligation.

Under section 70-55(2), if there is insufficient property available to comply with the request for information, report or document, the Commonwealth must bear the reasonable cost of complying with the request.

Division 75 – Meetings

Division 75 of the Instrument sets out the requirements for convening and holding meetings during an external administration. The relevant meeting provisions in the Bankruptcy Regulations and the Act have been repealed and (where appropriate) replaced by the rules in Division 75. The various schedules to the Bankruptcy Regulations that purport to modify those provisions have also been incorporated into the rules, where appropriate.

The consolidation of meeting requirements into one division of the Instrument and one division of Schedule 2 to the Act seeks to simplify compliance with the requirements for practitioners.

Subdivision 75B – Convening meetings

Sections 75-5 and 75-10

Section 75-5 provides that a meeting convened under section 75-15 of Schedule 2 to the Act (i.e. upon the direction of creditor/s or the committee of inspection) must be held as soon as reasonably practicable. If the direction to convene a meeting is not reasonable, the trustee need not comply with the direction.

Under section 75-10, a meeting must be convened by providing written notice (including electronically) to as many creditors the trustee is aware of and is able to contact (whether by business, residential or email address).

Sections 75-15; 75-25

Under section 75-15 and paragraph 75-25(1)(a), the notice to convene a meeting must be sent in the form approved by the regulator and must include:

- the date, time and place of the meeting
- the purpose of the meeting
- the entitlement of a creditor to vote at a meeting of creditors, and
- a form for use in appointing a proxy.

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Under paragraphs 75-25(1)(a) to (c), the proxy form must also be in the approved form and must:

- ensure that it is not pre-filled, and
- provide information regarding a creditors' right to be represented at the meeting by an attorney.

Section 75-20

Under section 75-20, a notice to convene a meeting must be given at least 10 business days before the meeting.

Section 75-27

Section 188 of the Act relates to personal insolvency agreements, which provide an alternative to bankruptcy. Section 75-27 of the Instrument provides for additional meeting rules that apply to such agreements.

A meeting called under a section 188 authority must be held not more than 20 business days after the relevant consent or approval was given. When notice of the meeting is given, the following documents must also be provided to the creditors:

- the debtor's statement of affairs
- a report (summarising information about the debtor's affairs and advising whether bankruptcy or a personal insolvency agreement would better serve the creditors) under section 189A of the Act
- a declaration of relevant relationships under section 189A of the Act, and
- the statement prepared by the trustee under section 189B of the Act.

This section ensures timely consideration by creditors of the debtor's authorisation, statement of affairs and the relevant report, declaration and statement required by the Act.

Section 75-30

Under section 75-30(1), any meeting held during an external administration must be convened for a time and place convenient to the majority of potential attendees.

Under section 75-30(2), a meeting may be held in more than one location provided appropriate electronic facilities are provided by the practitioner for the participation of all attendees. This rule allows for simultaneous physical meeting places connected by, for example, a mutual live video link.

Sections 75-35

While section 75-30 provides for a meeting to be convened in more than one location, an external administrator may alternatively provide arrangements for the remote participation of attendees without choosing to convene a meeting in multiple locations under section 75-35.

This provides for attendee participation in situations where there may be small numbers of creditors based disparately such that convening in a central location (or multiple locations) is not reasonable, the practitioner may provide alternative electronic facilities which a creditor can access in order to participate in the meeting.

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This may be, but is not limited to, a teleconference number which the creditor can dial-in.

Where such electronic facilities are made available, the notice of meeting sent out to attendees must set out how to access the facilities and indicate that an attendee wishing to attend remotely must inform the practitioner in writing of that fact at least two working days before the meeting is held.

Section 75-40

Under section 75-40, the trustee must be lodge notice of a meeting called under section 73 (compositions and arrangements) or Part X (personal insolvency agreements) of the Act with the Inspector-General at least 10 business days before the meeting is held.

The notice of these meetings must be published on a website maintained by the Inspector-General (i.e. the Australian Financial Security Authority's website).

Subdivision 75C – Procedures at meetings

Section 75-50

Section 75-50 of the Instrument and section 75-25 of Schedule 2 to the Act provide that a trustee or their representative must preside at a meeting.

Previously, the Act allowed other persons to preside at a meeting where elected (see regulation 64P of the Bankruptcy Regulations, now repealed). After consultation with industry and the regulator, it was determined that only the trustee or the trustee's representative should preside at a meeting. This section reflects this change.

Section 75-55

Under section 75-55, an agenda for creditors' meetings must include details on the proposed conduct of the meeting. The agenda provides guidance on how a meeting may be conducted.

The Corporations Instrument does not contain an equivalent to section 75-55. This divergence reflects the fact that regulated debtors and creditors in a personal insolvency may require greater guidance and transparency in the meeting process.

The agenda allows for 'other business' to be raised. This can include the tabling of certain documents such as a proposal under section 73 of the Act or documents required for meetings called under section 188 of the Act.

Section 75-60

Section 75-60 specifies the kinds of documents that should be tabled at a creditors' meeting in relation to section 73 (composition or arrangement) or section 188 (personal insolvency agreement) of the Act.

If a creditor requests a copy of these documents, the trustee is required to provide a copy as soon as reasonably practicable.

Section 75-65

Section 75-65 specifies requirements of a trustee (or their representative) in the conduct of a creditors' meeting. Subsection 75-65(5) provides that attendees can ask questions of the trustee and the regulated debtor (if present).

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The Corporations Instrument does not contain an equivalent to section 75-65. This divergence reflects the fact that regulated debtors and creditors in a personal insolvency may require greater guidance and transparency in the meeting process.

Section 75-70

Under section 75-70, both the external administrator and the attendees entitled to vote at a meeting may propose a resolution at a meeting. The person presiding at a meeting must inform the attendees of their right to propose a resolution. On this basis attendees may move amendments to resolutions, such as proposing a different basis on which a trustee should be remunerated as per the now repealed subsection 64U(7) of the Act.

Under subsections 75-70(4)-(5), the trustee must allow a reasonable time for debate of any proposed resolution or amendment to a resolution before putting the proposed resolution or proposed amendments to the resolution to a vote. If the proposed amendments are passed, the amended resolution must then be put to vote.

Section 75-75

Under section 75-75, the trustee must take all reasonable steps to ensure that the facilities are operating throughout the meeting. Provided the facilities are operating, it is the responsibility of the attendee to access the meeting.

Where a creditor validly appoints a proxy or attorney, and the proxy or attorney has notified the convenor of the meeting that they will be attending by electronic facilities, the proxy or attorney will be taken to be attending the meeting personally. This will result in a creditor, proxy or attorney attending a meeting by electronic facilities being considered to be present for the purposes of forming a quorum under subsection 75-105(3) or casting a vote under section 75-110.

Section 75-80

Where a meeting of creditors is convened, each creditor must give a written statement to the trustee setting out the amount of the debt, the consideration paid for assigned debts, whether the creditor is a related entity of the debtor.

There are additional requirements for the first meeting of the creditors to include in the written statement:

- whether any security is held against the debt and the estimated value of such security, and
- particulars of the transaction and circumstances that gave rise to the debt.

Section 75-85

Under subsections 75-85(1)-(2), only a creditor, a creditor's proxy or a creditor's attorney may vote at a meeting of creditors. Each creditor will ordinarily have one vote although the entitlement of a creditor to vote may be impacted on by the remainder of section 75-85.

Where a creditor is a secured creditor, they are not entitled to vote unless the debt owed exceeds the estimated value of the security.

Where any question arises as to the entitlement of a person to vote, the practitioner may determine the creditor's entitlement. If the practitioner needs to adjourn a

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meeting to determine such a question, he or she may do so until such time as resolved by the meeting (but not later than 10 business days).

Section 75-90

Under section 75-90, an external administrator is obligated to ensure that each creditor's claim or proof debt is marked as to:

- its admission or rejection
- the reason for its admission or rejection, and
- the amount for which the claim or proof of debt has been admitted.

This obligation has previously only applied to registered trustees under regulation 3.4 of Schedule 4A to the Bankruptcy Regulations.

Section 75-95

Under section 75-95, if an external administrator is uncertain about a debt claimed by a creditor, he or she must ask the creditor to give evidence in writing in order to establish the liability of the company for the debt. The administrator must have regard to the cost of seeking such evidence from the creditor.

This obligation has previously only applied to registered trustees under regulation 3.5 of Schedule 4A to the Bankruptcy Regulations.

Section 75-100

Under subsections 75-94(1)-(2), an external administrator must have regard to the merits of a creditors claim when deciding whether a creditor is entitled to vote at a meeting of creditors. At all times, the external administrator must act impartially and independently in relation to such claims.

Under subsections 75-100(3)-(4), an external administrator may adjourn a meeting for up to 10 business days if he or she needs a period of time to determine the entitlement of a person to vote. The time, date and place of the meeting must be agreed to by the creditors.

This obligation has previously only applied to registered trustees under regulation 3.5 of Schedule 4A to the Bankruptcy Regulations.

Section 75-105

Section 75-105 provides that a quorum must consist of at least two people.

Where a meeting is adjourned due to an ability to obtain a quorum, notice of that fact must be given to as many creditors as reasonably practicable by the end of the next business day. This may mean that only those creditors that have provided the external administrator with their email details will be notified in accordance with this requirement.

Section 75-110

A resolution put to a vote at a meeting may be decided on the voices unless a poll is requested. If a poll is requested it must be taken immediately and in a manner determined by the trustee.

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For the purposes of determining the value of a vote where a creditor has been assigned a debt, the value is to be the value of consideration given for the assignment of debt.

Section 75-115

An ordinary resolution is passed where there is a majority of votes and a majority in value voting in favour of the resolution.

Where there is a deadlock for any ordinary resolution, other than in relation to the trustee's remuneration or the trustee's removal, the trustee may cast a deciding vote. For a deadlocked ordinary resolution on trustee's removal, the trustee may only cast a deciding vote in favour of his or her removal.

Where there is a deadlock, the trustee must inform the meeting of his or her reasons for casting or not casting a vote and those reasons must be minuted.

Sections 75-130 and 75-137

Section 75-40 of Schedule 2 to the Act provides that proposals can be put to creditors or contributories without a meeting. Section 75-40 provides that the Rules may provide for and relation to such proposals.

Sections 75-130 and 70-137 of the Instrument provide that (ordinary and special) resolutions may be passed without a meeting unless at least 25% in value of responding creditors object within 15 business days to the proposal being resolved without a meeting.

An ordinary resolution without a meeting will otherwise be passed if a majority in number and value of responding creditors vote in favour of the proposal.

A special resolution will otherwise be passed if a majority in number and 75% in value of responding creditors vote in favour of the proposal.

For both ordinary and special resolutions, responding creditors will only be counted where particulars of a debt or claim have been provided to the trustee prior to the vote and the trustee has admitted the proof.

For both ordinary and special resolutions, the trustee must include a written record of the outcome of the proposal in books required to be kept under section 70-10 of Schedule 2 to the Act.

Section 75-132

A special resolution is passed where a majority in number and a 75% in value must vote in favour of the proposed resolution. In any other case, the special resolution is not passed.

Paragraph 75-132(1)(c) and paragraph 75-137(2)(d)

For a special resolution in relation to a paragraph 109(1)(j) resolution (i.e. in relation to preferential payments) the meeting notice must contain a copy of this specific proposed resolution to successfully pass.

For a special resolution in relation to a paragraph 109(1)(j) resolution (i.e. in relation to preferential payments) without a meeting the notice must contain a copy of this specific proposed resolution to successfully pass.

The ordinary requirement for a special resolution also applies. That is, a majority in number and a 75% in value must vote in favour of the proposed resolution.

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Section 75-140

A meeting may be adjourned by resolution or by the trustee but must not be adjourned to a day more than 15 business days after the original meeting date. Unless resolved otherwise, the adjourned meeting must be held at the same place as the original meeting.

Where a meeting is adjourned the trustee must provide notice to other creditors by the end of the next business day.

If the meeting is adjourned for more than 6 business days the trustee must give notice of where and when the adjourned meeting is being held at least 5 business days in advance.

Section 75-145

Within 10 business days after the end of a meeting, the trustee must draw up, record and sign minutes of the meeting. The minutes should include an attendance list and these records should be available for inspection at the trustee's principal place of practice.

If the trustee is unable to sign the minutes (due to death or is otherwise incapable) a creditor who attended the meeting may sign the minutes in accordance with the requirement above.

Subdivision 75D – Rules about proxies and attorneys

75-150

A person may appoint an individual (other than the regulated debtor) as their proxy through an approved form and the proxy has the same rights to speak and vote at the meeting as if they were the appointer.

A proxy only has effect if the instrument of appointment has been given to the trustee or another named person.

Where an instrument appoints the regulated debtor as proxy, that appointment has no effect. However, if the instrument appoints another person as a proxy, that person may act as proxy as if the instrument did not purport to appoint the regulated debtor.

75-155

A person may also attend and vote via that person's attorney. The attorney may only attend and vote if the instrument appointing the attorney has been produced to the trustee and the trustee is satisfied that the attorney is authorised and is the person identified as an attorney.

75-160

For remuneration proposals, a specific instrument appointing a proxy or attorney is required to enable that individual to vote.

Subdivision 75E – Additional rules for particular kinds of estates

Section 75-170

For creditors' meetings in joint bankruptcies (as listed in paragraphs (a) to (d) of 75-170(1)) the trustee must explain to creditors and their representatives the likely effect of section 110 of the Act on the distribution of dividends. Section 110 relates to how payments will be applied to joint and separate estates.

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Subsection 75-170(2) provides that, where applicable, the trustee must also explain the likely effect of section 141 of the Act on the distribution of dividends. Section 141 provides that a creditor indebted jointly with more than one partner of a firm will not receive a dividend out of a bankrupt's separate property until all the separate creditors have received the full amount of their respective debts.

Section 75-175

Where a debtor lodges a proposal under subsection 73(1) of the Act, the trustee must call a meeting and send a copy of the proposal and a report on the proposal (required by section 73 of the Act) at least 5 business days before the meeting. If at the meeting, the proposal is accepted by special resolution, the trustee must make the composition or scheme of arrangement available for inspection by the creditors.

The trustee may refuse to call a meeting if the proposal does not adequately account for the trustee's approved fees as accrued at the time the proposal is lodged and where those fees cannot be taken out of the debtor's estate.

Subdivision 75F - Other rules about meetings

Section 75-250

Creditors can direct that a practitioner convene a meeting under section 75-15 of the Amending Act. Where the creditors meet the thresholds listed in section 75-15, the practitioner must comply with the request unless it is unreasonable.

Under subsection 75-250(2), such directions will be considered unreasonable where the practitioner is of the opinion that one of the following applies:

- Where complying with the request would substantially prejudice the interests of a creditor, group of creditors or a third party, and that prejudice outweighs the benefits of complying with the request.
- Where there is insufficient available property to comply with the request.
- Where a meeting on the same matters has already been held or will be held shortly.
- Where the request is vexatious.

If a practitioner rejects a request for a meeting to be held, he or she must do so acting in good faith.

While a request will be deemed to be vexatious where a similar direction has been given within the past four weeks, this does not seek to limit the definition of the term 'vexatious'.

Under subsection 75-250 (5), if the creditors are willing to bear the cost of calling and holding a meeting, an external administrator must comply with a direction to convene a meeting even if there would otherwise have been insufficient property to comply, a meeting has been held considering the matter or a meeting will shortly be held to consider the matter.

Section 75-255

Under section 75-255, if a practitioner receives a request for information, a report or document which is considered to be unreasonable, the practitioner must provide the

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person who made the request with a written response as to why the request was unreasonable. A note must also be made on the files of the administration as to why the request was unreasonable.

Section 75-260

Under section 75-260, the trustee has certain duties when presiding at a creditors' meeting. This includes ensuring the meeting requirements in the Act, the Bankruptcy Regulations and the Instrument are complied with. Further, it requires that the trustee ensure persons attending the meeting are provided with adequate opportunity to ask questions of the trustee and the debtor.

Section 75-265

Section 90-35 of Schedule 2 to the Act provides that the creditors can remove a practitioner and appoint another person in their place by passing a resolution.

Under subsections 75-265(2)-(5), the incoming administrator must also provide the following documents to the incumbent administrator for distribution to creditors as part of the notice of meeting, as well as being tabled at the meeting.

- A written consent to act as administrator signed by the incoming administrator, and
- A declaration of any relevant relationships, indemnities or other potential issues that could impact on their independence or otherwise represents a conflict of interest or duty.

Under subsection 75-265(5), where a meeting is convened to consider the replacement of an external administrator, both the outgoing and incoming administrators have a right to speak.

Section 75-270

Under section 75-270, strict compliance with the rules for convening and holding a meeting will not be required in order for a meeting to be validly held. Substantial compliance will be sufficient.

Division 80 – committees of inspection

Section 80-5

A COI can consist of creditors, attorneys of creditors and/or persons authorised by a creditor to be a member of the committee. The Department of Employment (or any other Commonwealth department or agency which may be responsible for the Fair Entitlements Guarantee (FEG) or equivalent program in the future) may also be appointed if a claim has been made under FEG or an equivalent program, or the Department considers that such a claim will be made in the future.

A meeting of a COI may be convened by either the external administrator or a member of the COI.

A COI may only act if there is a majority of the members of the COI present.

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Section 80-10

The position of a member of a COI will be vacated if:

- The member resigns in writing.
- The member becomes insolvent.
- The member is absent from five consecutive meetings of the committee without the leave of the remainder of the COI.
- The creditors resolve that the member be removed.

A vacancy may be filled by a person appointed at a meeting of creditors. If a vacancy is not filled by the creditors as a whole, the remaining COI members may fill the vacancy.

A COI will remain in existence provided there are at least two validly appointed members of the committee.

Sections 80-15

Subsection 80-40(2) of Schedule 2 of the Act provides that an external administrator must comply with a request for information, provide a report or produce a document to a COI in an external administration if requested. An external administrator need not comply with such a request if it is not reasonable.

Under subsection 80-15(2), a request will be deemed unreasonable in the following situations.

- Where the request substantially prejudices the interests of a creditor, group of creditors or a third party, and that prejudice outweighs the benefits of complying with the request.
- Where the information, report or document requested is privileged on the basis of legal professional privilege.
- Where providing the information would be a breach of confidence.
- Where there is insufficient available property to comply with the request.
- Where the information has already been provided.
- Where the information will be included in a statutory disclosure within the next 20 business days.
- Where the request is vexatious.

If a practitioner rejects a request for a meeting to be held, he or she must do so acting in good faith.

Under subsection 80-15(3), while a request will be deemed to be vexatious where a similar direction has been given within the past four weeks, this does not seek to limit the definition of the term ‘vexatious’.

Under subsection 80-15(5), if the creditors are willing to bear the cost of calling and holding a meeting, an external administrator must comply with a direction to convene

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a meeting even if there would otherwise have been insufficient property to comply, a meeting has been held considering the matter or a meeting will shortly be held to consider the matter.

Section 80-20

Under subsection 80-20, within five business days of receiving a request for information, or longer period agreed with the COI, an external administrator must respond to a request from a COI made under section 80-40. In responding the external administrator, must:

- provide the information requested, or
- inform the COI that compliance with the request will take a period longer than five business days due to the nature of the request, specify when the information will be provided and why the extension in time is necessary.

Section 80-25

Under section 80-25, if a request is made by a COI to an external administrator for the provision of information that is considered to be unreasonable, the external administrator must notify the COI that the request is unreasonable, the reasons why it is unreasonable and keep a record of that fact.

Division 90 – Review of the administration of a regulated debtor's estate

Subdivision C of Division 90 of Schedule 2 to the Act allows the Inspector-General to review trustee remuneration on application by a creditor or the regulated debtor or on his or her own initiative.

Section 90-5

Under section 90-5, an application for review by the Inspector-General must be written and made within certain time limits. Prior to the expiration of the time limit, the Inspector-General may extend the time limit, if appropriate. The Inspector-General's decision is subject to review by the Administrative Appeals Tribunal.

Section 90-10

Applications for review by the Inspector-General must meet certain threshold criteria.

The Inspector-General must refuse an application to review unless at least one of the grounds listed in paragraph 90-10(2)(a) are met. The Inspector-General must also refuse an application if he or she is satisfied that:

- the applicant does not have an interest in the outcome (for example, the application for review was made solely for the purposes of delaying proper administration of the bankruptcy), or
- the applicant has not adequately particularised the issue giving rise to the review, or
- the application is frivolous or vexatious.

Notwithstanding the above, the Inspector-General has discretion to accept the application in exceptional circumstances.

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An application for review by the Inspector-General should occur only after other avenues of dispute resolution have been attempted. Where an applicant fails to do so without reasonable explanation, the Inspector-General may refuse the application under subsection 90-10(4).

Where the Inspector-General refuses to accept an application, the applicant must be given notice within 10 business days and notice must include reasons for the refusal.

Sections 90-50 and 90-55

Subdivision B of Division 90 of the Instrument applies to reviews by the Inspector-General of payments to third party and trustee remuneration.

Section 90-55 provides the Inspector-General with flexibility and discretion in the conduct of such reviews.

Ordinary requirements for procedural fairness apply to the Inspector-General in the conduct of reviews.

Section 90-60

The Inspector-General has the power to direct the production of information and documents in the conduct of a review under section 90-55.

Section 90-60 empowers the Inspector-General to make orders to remove entitlements to remuneration, dividends and payments where such a direction has not been complied with.

Section 90-65

The Inspector-General must make a decision on the review within 60 days of accepting or initiating the review. The Inspector-General must prepare a written statement which includes the decision, reasons for the decision, any findings of fact and the material on which those findings are based.

The statement must also refer to subsection 90-21(3) of the Insolvency Practice Schedule (Bankruptcy), which allows for an application to the Court in relation to the Inspector-General's decision.

The statement must be given to each party to the review within 10 business days of making the decision.

Section 90-80

Section 90-80 provides a 60-day time limit for applications to the Court in relation to an act, omission or decision of the trustee. This time limit does not apply to an application made by the Inspector-General, as the Inspector-General requires further flexibility in the enforcement and regulation of trustees.

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ATTACHMENT B

Regulation Impact Statement

Executive Summary

1. The insolvency system has a significant effect on both the level and nature of business activity taking place within an economy. An efficient insolvency system is a strong determinant of the accessibility and cost of credit in an economy; and minimises the effect of business failure of stakeholders, such as creditors and employees. It plays a key role in the efficient reallocation of resources and the minimisation of market distortions arising from business failure.

2. The insolvency system also plays an important role in detecting criminal activity that may lead to a business winding up and in so doing provides "a credible threat of detection of wrongdoing that is important to the overall confidence of creditors"[1].

3. The *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001* and the *Bankruptcy Act 1966* as well as associated regulations govern the regulation of the insolvency system.

4. This Regulation Impact Statement (RIS) seeks to quantify the costs and benefits of regulatory amendments to the personal insolvency and corporate insolvency laws. Those amendments seek to address a wide range of issues that negatively affect the efficiency and effectiveness of the insolvency system in providing for the fair allocation of resources where a company or individual is unable to meet their debts.

Why is action necessary?

5. The RIS identifies that there are currently a range of regulatory failures in the regulation, registration and remuneration of insolvency practitioners that are adversely affecting the efficiency and effectiveness of Australia's corporate and personal insolvency systems.

6. These problems have been identified in numerous Parliamentary and Government inquiries, most notably in the Senate Economics References Committee 2010 report, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework.*

7. There are also a number of market failures that arise in the setting of practitioner remuneration for both personal and corporate insolvency services. These failures are driven by such features as the asymmetries in technical knowledge, skill and information between practitioners and creditors; the highly heterogeneous nature of the services provided; and the fractured nature of decision making by the clients.

What is the best way forward and what will this achieve?

8. This RIS recommends the:

[1] Productivity Commission, *Draft Report, Business set-up, transfer and closure*, 2015 (PC 2015)

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- Alignment of registration and discipline processes between corporate and personal insolvency.
  - This will provide greater flexibility for appropriately qualified candidates to enter into the market for insolvency services, while maintaining high standards. It will also improve confidence in the system as a whole by providing a more streamlined and cost effective process for the consideration of the discipline or deregistration of practitioners that are not meeting the standards expected under the law.
- Better align procedural rules between corporate and personal insolvency. This will balance the desire to reduce the costs incurred by practitioners, and consequently administrations, in complying with multiple funds handling rules, while still promoting good governance in insolvency administrations and ensuring that administration funds are appropriately expended.
- Increase the severity of penalties for acting without adequate and appropriate insurance in order to provide a better deterrent.
- Improve the availability of information for creditors in both corporate insolvency and bankruptcy. This will better allow creditors to obtain the information that they actually need, when they actually need it, allow creditors to better monitor an insolvency and thereby protect their interests. This can occur while reducing the overall regulatory burden through the removal of default reporting and meeting obligations.
- Better empower creditors to replace poorly performing practitioners in order to give creditors the freedom to choose the service provider who they believe will provide them with the best value for money. This change has the potential to improve competition in the market for insolvency services.
- Better align obligations on practitioner remuneration in order to reduce unnecessary costs for the approval of remuneration in low-asset insolvencies and assist creditors in both personal and corporate insolvencies to better understand when a practitioner can confer benefits on related parties. This will also assist in providing creditors with the information that they need in order to be able to meaningfully exercise other rights, such as the right to replace a practitioner.
- Increase the penalty level for failure to provide the report as to affairs (RATA) in order to better deter directors from non-compliance.

9. The *Insolvency Law Reform Act 2016* received Royal Assent on 28 February 2016. The Act has partially implemented the recommendations of this RIS. Legislative instruments should be made which implement the remainder of the recommended options in the RIS. In particular, the legislative instruments should:

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- provide a range of circumstances where it would be inherently unreasonable for an insolvency practitioner to comply with a request for information or a meeting;
- substantively align the rules regarding the holding of creditor meetings;
- mandate the provision of an initial statement which includes information regarding the fee structure of the external administrator and their firm, and a three-monthly report to creditors in all insolvencies;
- stipulate changes to the entrance requirements for new insolvency practitioners; and
- partially delay the commencement of the Act to allow for IT systems changes to be made.

10. The partial delay of commencement of the Insolvency Law Reform Act is recommended in light of industry feedback on the length of time necessary for developing insolvency accounting software packages that are adopted across the industry. The development of this software requires confidence in the final form of the legislation (including regulatory references).

11. Public consultation on draft legislative instruments implementing the remainder of the recommendations of this RIS raised a range of miscellaneous technical fixes required to maintain the workability of the provisions, as well as re-prosecuting industry concerns with new rules for engaging related parties and providing information to Commonwealth creditors legislated in the Act.

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What is the problem to solve?

12. Various Parliamentary and Government inquiries have criticised the insolvency system and found changes are necessary to:

- improve the effectiveness of the regulation of Australia's insolvency profession;
- improve the effectiveness and efficiency of the regulation of Australia's insolvency laws; and
- address a range of current regulatory and market failures in the operation of the insolvency system.

The effectiveness of the regulation of Australia's insolvency profession

13. Under Australia's insolvency law framework, a corporate insolvency practitioner is registered by the Australian Securities and Investments Commission (ASIC) to undertake the winding up of insolvency corporations (corporate insolvency administration), as well as the voluntary administration and receivership of corporations. A personal insolvency practitioner is registered by the Australian Financial Security Authority (AFSA) to administer the estate of an insolvent individual or regulated debtor (personal insolvency administration).

Table 1: Overview of insolvency services market

	Corporate	Personal
Number of practitioners	707 registered liquidators; 621 official liquidators (as at Sept 2016)	212[2] (as at 30 June 2015)
Average annual number of new entrants	35 (last 5 years)	8 (last 3 financial years)
Complaints made to regulator about alleged misconduct of registered liquidators	364 (in 2015)	226 (in 2014/2015)
Insolvency appointments	13,853 (as at Oct 2016)	57,177 on hand (13,563 completed by registered trustees)
Number of firms	227 (current)	98 (current)

[2] There are 69 debt agreement administrators – the proposed reforms are not intended to affect these practitioners.

14. Australia has always had separate personal and corporate insolvency systems. This includes separate laws[3], regulators[4], agencies responsible for policy development[5], and ministerial responsibility[6]. This formal division mirrored the separation of corporate and personal insolvency laws in the United Kingdom prior to the Cork Report[7] and subsequent reforms in the mid-1980s.

15. It is common throughout comparable economies for there to be unified regulation of personal and corporate insolvency, with countries including UK, the United States, Canada and Singapore applying a single regulatory framework to all insolvency practitioners.

16. A recommendation that the two systems be brought into one, including that the regulation be administered by a single regulator, was rejected by the Government in 2011 on the basis that:

- there would be major upfront costs of merging the regulators, which would not necessarily be offset by long-term savings;
- separate policy considerations apply to many aspects of personal and corporate insolvencies and there was not sufficient evidence that a one-size-fits-all approach would necessarily optimise outcomes for stakeholders; and
- the regulation of corporate insolvency has important links with other parts of the corporate regulatory framework, in particular the regulation of officer and corporate misconduct in the lead up to or during an insolvency event and so there benefits in having the corporate regulator administer both aspects of the law.

17. The current framework for the regulation of corporate insolvency practitioners has been subject to consistent criticism since the commencement of a Senate Economics References Committee (the Senate Committee) inquiry into corporate insolvency practitioners and administrators in 2009 (the 2010 Senate Inquiry).[8]

18. The 2010 Senate Inquiry considered the practices of corporate insolvency practitioners in conducting external administrations, as well as the role of ASIC

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[3] The laws relating to corporate insolvency are contained in the *Corporations Act 2001*, the Corporations Regulations 2001 and the *Australian Securities and Investments Commission Act 2001*, while the laws relating to personal insolvency are fully contained in the *Bankruptcy Act 1966* and the Bankruptcy Regulations 1996.

[4] ASIC is the corporate insolvency regulator, while AFSA is the personal insolvency regulator.

[5] The Treasury has responsibility for corporate insolvency policy. The Attorney-General's Department has responsibility for personal insolvency policy.

[6] The Minister for Revenue and Financial Services has responsibility for corporate insolvency. The Attorney-General has responsibility for personal insolvency.

[7] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558; *Insolvency Act 1986* (UK). There is now a single regulatory framework applying to both corporate and personal insolvency in the United Kingdom.

[8] Because of the low level of statistical data previously obtained in relation to the corporate insolvency industry, as critically commented on by the 2009 Senate Inquiry and the 2014 Senate Inquiry into the Performance of the Australian Securities and Investments Commission, the ability to quantify these problems is limited. See chapter 9 of the 2014 Senate Committee Report.

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in overseeing the corporate insolvency profession. The 2010 Senate Inquiry gave voice to creditor discontent following high profile cases of fraud and negligence by members of the corporate insolvency industry.

19. Submissions to the 2010 Senate Inquiry identified a wide range of regulatory failures in relation to the regulation of corporate insolvency practitioners, and in particular expressed concerns regarding:

- the process for the registration of new corporate insolvency practitioners;
- the process for the discipline and deregistration of insolvency practitioners who had engaged in misconduct; and
- the regulatory tools available to ASIC.

20. In *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework* (the 2010 Senate Report) the Senate Committee criticised the current regulatory framework for the regulation of the insolvency profession, ASIC's performance in the regulatory oversight of registered corporate insolvency practitioners and the effectiveness of the current insurance obligations and remuneration of registered corporate insolvency practitioners.

21. Submissions to consultation papers released by the Australian Government in 2011, as well as subsequent consultation with industry participants and other stakeholders in 2012 and 2014[9] further reflected concerns with the current corporate regulation in these areas.

22. ASIC has increased its focus on the insolvency industry since the 2010 Senate Inquiry. From 2011 ASIC has formalised a proactive corporate insolvency practitioner practice review program while continuing to review particular transactions prompted by third party complaint or internal intelligence gathering.

Table 2: Proactive practice reviews undertaken by ASIC

	2011	**2012**	**2013**	**2014**	**2015**
Reviews open at 1 January	19	20	10	7	7
Reviews commenced during the year	13	11	11	6	1
Reviews finalised during the year	(12)	(21)	(14)	(6)	(6)
Reviews open at 31 December	20	10	7	7	2

[9] Options Paper, *A Modernisation and Harmonisation of the Regulatory Framework applying to Insolvency Practitioners in Australia,* June 2011 (2011 Options Paper); Proposals Paper, *A Modernisation and Harmonisation of the Regulatory Framework applying to Insolvency Practitioners in Australia,* December 2011 (2011 Proposals Paper); draft *Insolvency Law Reform Bill 2012* (draft 2012 Bill); draft Insolvency Law Reform Bill 2014 (draft 2014 Bill).

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Source: ASIC regulation of registered corporate insolvency practitioners: January to December 2015; ASIC regulation of registered corporate insolvency practitioners: January to December 2012

23. When undertaking a transaction review, ASIC examines the whole of the transaction in question to ensure the registered corporate insolvency practitioner has adequately and properly performed their duties and functions—complying with the *Corporations Act 2001* (Corporations Act) and the Corporations Regulations 2001 (Corporations Regulations), and the professional standards relevant to that transaction.

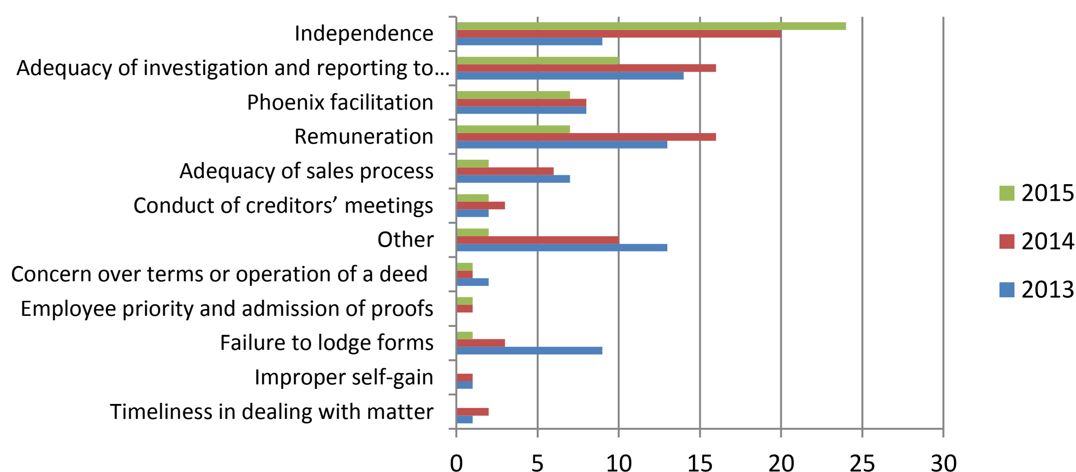
Table 3: Transaction reviews undertaken by ASIC

	2011	2012	2013	2014	2015
Reviews open at 1 January	44	24	25	31	19
Reviews commenced during the year	65	96	85	75	67
Reviews finalised during the year	(85)	(95)	(79)	(87)	(57)
Reviews open at 31 December	24	25	31	19	29

Source: ASIC regulation of registered corporate insolvency practitioners: January to December 2015; ASIC regulation of registered corporate insolvency practitioners: January to December 2012

24. ASIC figures show that the adequacy of investigation and reporting to creditors, remuneration and practitioner independence remain key areas of concern with the industry.

Diagram 1: Areas of concern in finalised corporate insolvency practitioner transaction reviews undertaken by ASIC (2013-2015)



Source: ASIC regulation of registered corporate insolvency practitioners: January to December 2015

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25. ASIC's increased surveillance of the insolvency profession has resulted in greater levels of formal investigation and enforcement action, as shown in Table 4.

Table 4: Registered corporate insolvency practitioners subject to formal investigation or enforcement action (2012–15)

	2012	2013	2014	2015
Open matters at 1 January	10	21	19	22
Formal investigations or enforcement actions commenced during the year	13	11	14	5
Formal investigations or enforcement actions finalised during the year	(2)	(13)	(11)	(9)
Open matters at 31 December	21	19	22	18

Source: ASIC regulation of registered corporate insolvency practitioners: January to December 2015

26. Despite the increased activity by ASIC in relation to its oversight of the corporate insolvency industry, insolvency practitioners received the lowest rating for perceived integrity in a 2013 survey of ASIC's stakeholders. The survey noted that small businesses 'were particularly negative about the integrity of insolvency practitioners'.

27. The negative perception of insolvency practitioners also continues to be borne out in the level of inquiries and reports of alleged misconduct received by ASIC with 364 such reports made to ASIC in 2015, although it is noted that this is down from 384 in 2014 and 446 in 2013.[10]

28. The Senate Economics References Committee, as part of the 2014 report for its inquiry into ASIC's performance, noted that:

> "Clearly, the conduct of liquidations in Australia is still subject to strident criticism and the source of much dissatisfaction."[11]

The effectiveness of the regulation of Australia's insolvency laws

29. The Productivity Commission (the Commission) has found that the "different regulatory treatment of the administration of personal insolvency and corporate insolvency imposes an unnecessary regulatory burden on insolvency practitioners and is impeding the efficient conduct of the insolvency regime."[12] In 2010 the Commission identified that there is clear scope for harmonisation or alignment of provisions to reduce the burden on practitioners, and commented that there was a case for harmonised or aligned provisions in relation to

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[10] Report 479 - ASIC regulation of registered corporate insolvency practitioners: January to December 2015, June 2016.

[11] Page 449.

[12] Annual Review of Regulatory Burdens: Business and Consumer Services – Research Report, 2010, Productivity Commission.

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procedural matters such as hiring and firing practitioners, setting and reviewing remuneration, record keeping and reporting, and the holding of meetings.[13]

30. World Bank research has shown that if creditors are not protected or allowed to participate in insolvency proceedings, they will have less incentive to lend in the future, with flow on effects to the development of a jurisdiction's credit market.[14]

31. The Commission has commented that Australia's insolvency regime is costly and slow to get started but that, as indicated in Table 5, it is comparable with other countries (including the United States) in terms of time taken, the proportion of funds recovered, creditor participation and management of debtor assets.[15]

32. The vast majority of companies being wound up in Australia (around 80 per cent) are small (those with fewer than 20 employees), and many of those have no assets to distribute.[16] There is a need to ensure that the regulatory framework provides for the most efficient means of winding up such companies by ensuring that the administrative processes that are required under the law during the winding up process are necessary and appropriate to maintain confidence in the system.

Diagram 2: Time taken to finalise the deregistration of a company following an insolvency event

[13] Annual Review of Regulatory Burdens: Business and Consumer Services – Research Report, 2010, Productivity Commission. These concerns continue to be raised including by the peak insolvency body during the 2014 Senate inquiry into ASIC performance.

[14] Claessens, Stijn, and Leora Klapper. 2003. "Bankruptcy around the World: Explanations of Its Relative Use." Policy Research Working Paper 2865, World Bank, Washington, DC.

[15] "For example, the recovery rate in Australian insolvencies is around 82 per cent of secured debt, compared with 80 per cent in the United States and 89 per cent in the United Kingdom." Productivity Commission, 2015, Business set-up, transfer and closure.

[16] Productivity Commission, 2015, Draft Report: Business set-up, transfer and closure.

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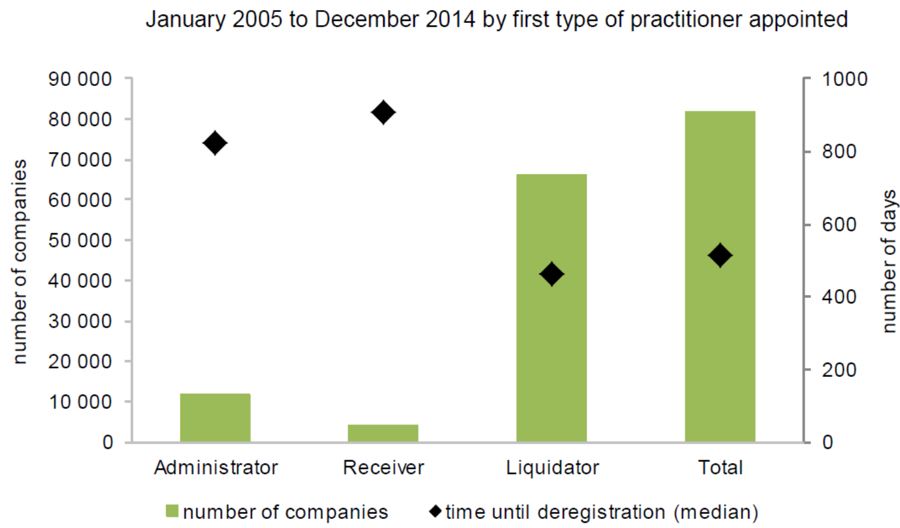

Source: Productivity Commission, 2015

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Table 5: Comparison of international insolvency regimes

	Overall 'Resolving Insolvency' rank	*Cost (% of estate)*	*Recovery rate (cents in the dollar – secured debt)*	*Reorganisation proceedings index (0-3)*	*Creditor participation index (0-4)*	*Strength of insolvency framework index (0-16)*
Australia	14	8.0	81.9	0.5	3	12
Canada	6	7.0	87.3	2	3	13.5
New Zealand	28	3.5	83.6	0.5	2	8.5
United Kingdom	13	6	88.6	1	2	11
United States	4	8.2	80.4	3	3	15

[a] Selected economies and metrics drawn from the World Bank's 'Resolving insolvency' survey, a subset of the 'Doing Business' project to compare business regulation across 189 economies.

Source: World Bank Group (2015a)

Source: Productivity Commission, 2015

Current regulatory and market failures

Registration processes

33. A number of submissions to the 2010 Senate Inquiry, and the Senate Committee itself[17], raised concerns with the application process for registered corporate insolvency practitioners. Currently the application is considered 'on the papers' and applicants are not required to demonstrate their understanding of the legislation, or demonstrate that they are 'fit and proper' through practical scenarios.

34. Once a corporate insolvency practitioner is registered, ASIC has limited powers to remove or review the practitioner's registration.

High and inflexible entry standards limit competition within the market

35. A number of submissions to the 2010 Senate Inquiry remarked on the high level of fees charged by corporate insolvency practitioners. The Senate Committee itself noted that while these charges may be justified in complex cases, overcharging and over servicing was evident in the industry.[18]

36. The Senate Committee noted that the market for corporate insolvency practitioners is distorted due to the lack of adequate incentives for practitioners to offer fees that are genuinely commensurate with the efficient and effective performance of their duties.[19]

37. One reason for the lack of competition on price may be the barriers to entry into the market for insolvency services arising from the current registration requirements. Those requirements necessarily limit the ability of competent people to be appointed as a liquidator in an administration until they have can satisfy the statutory experience requirement of five years. There is no scope

[17] Institute of Chartered Accountants, Submission to the Senate Committee Inquiry (Submission 66); Senate Committee Report, paragraph 11.35.

[18] Senate Committee Report, paragraph 11.47.

[19] Senate Committee Report, paragraph 11.51.

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within the current regulatory framework for an applicant who is capable of providing insolvency services obtaining registration unless they meet the high experience and academic study requirements.

38. Furthermore, the current distinction between official corporate insolvency practitioners[20] and registered corporate insolvency practitioners imposes an additional regulatory burden on corporate insolvency practitioners given the need to comply with the administrative requirement to be appointed as an official corporate insolvency practitioner. There is no corresponding tiered arrangement in the personal insolvency framework.

39. According to a 2011 survey of official liquidators, "the majority of official liquidators (84%) were of the view that the tasks undertaken in their capacity as official liquidators were the same as the tasks undertaken in their capacity as a voluntary liquidator"[21].

Practitioner discipline

40. The potential for the removal of poorly performing registered corporate insolvency practitioners is important in maintaining the integrity and credibility of the system. As noted above, ASIC surveys as well as completed and ongoing parliamentary inquiries into the insolvency industry indicate that there is a lack of confidence in the profession.

41. The current systems for the cancellation or suspension of registration and discipline of registered corporate insolvency practitioners and registered trustees diverge significantly. The maintenance of two divergent regimes creates additional complexity for practitioners brought before the disciplinary process and may therefore create additional costs.

42. The discipline of registered corporate insolvency practitioners through the Companies Auditors and Corporate insolvency practitioners Disciplinary Board (CALDB) has previously been perceived by stakeholders to be a slow and expensive process. In particular, the level of procedural complexity in disciplinary processes has been criticised for being inconsistent with the obligation under the Corporations Act for CALDB to be fast and efficient.[22] Cost effectiveness is also affected where respondents choose to use Senior Counsel at hearings, and ASIC consequently considers there is a need for it to be likewise represented. While the speed of disciplinary matters progressing through CALDB has improved significantly since 2010, the time taken for CALDB to finalise matters remains more than twice as long as matters finalised under the personal insolvency system.

43. The potential for the removal of poorly performing registered liquidators is important in maintaining the integrity and credibility of the system. A lack of

[20] If a corporate insolvency practitioner wishes to accept appointments to a liquidation commenced in a Court, provisional liquidations or certain cross-border insolvency matters, the corporate insolvency practitioner must apply to ASIC to be registered as an 'official corporate insolvency practitioner'.

[21] Phillips, A, *An analysis of official liquidations in Australia*, February 2013, http://www.arita.com.au/docs/events-documents/2012-tts-report---final-version-(2).pdf?sfvrsn=0

[22] See Senate Committee Report, page 76; Mr Geoff Slater, Committee Hansard, 13 April 2010, p. 47; Mr Vanda Gould, Committee Hansard, 13 April 2010, p. 20.

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confidence in the profession could result in a rise in the cost of obtaining credit as financiers impose increased protections for potential default.

Procedural rules

44. The corporate and personal insolvency regulatory frameworks currently provide procedural rules regarding: the treatment of estate monies; the obligation on registered corporate insolvency practitioners and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and AFSA respectively; and the keeping of books including the period of time for which those books must be retained.

45. The current divergence in rules and requirements for personal and corporate insolvency creates unnecessary complexity and costs for creditors and insolvency practitioners, making it difficult for creditors of individuals as well as companies to understand how the different regimes apply without an in-depth knowledge of both frameworks. This lack of knowledge and expertise is not something that creditors can easily address and it imposes both financial and time costs on creditors to obtain the information they need to protect their interests in a corporate or personal insolvency.

46. The divergence also limits the ability for practitioners to easily move between corporate and personal insolvencies as the different approaches to account and record keeping increases costs and the administrative burden on practitioners. Similar but different rules may contribute to error by practitioners through the application of the wrong set of rules in an administration.[23]

Insurance requirements

47. A registered corporate insolvency practitioner is required to maintain adequate and appropriate professional indemnity insurance and fidelity insurance to cover claims that may be made against him or her.[24] An action may be brought by the company, its creditors, a bankrupt's creditors or other affected stakeholders for losses suffered because of an act or omission of the registered corporate insolvency practitioner or registered trustee. The insurance requirements attempt to ensure that funds are available to compensate claimants for loss suffered.

48. If the practitioner has acted illegally, for example by committing fraud or intentionally breaching their duties, an insurance company is likely to refuse to cover the breach which will impact on the amount a claimant will be able to recover. Likewise, if the practitioner does not hold insurance, the recovery of any losses suffered due to the breach may be reduced.

49. Insurance cover may also be ineffective if the insured party ceased paying premiums prior to a claim being made or where they have otherwise breached the contract, such as through inadequate disclosures. In either case, claimants may have to rely merely on the practitioner's individual resources, as claims against the insurance will not be met because of the void or non-existent status of the policy.

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[23] *Annual Review of Regulatory Burdens: Business and Consumer Services – Research Report*, 2010, Productivity Commission, page 172.

[24] Section 1284 of the Corporations Act.

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50. Concerns were raised during the 2010 Senate Committee Inquiry regarding the current difficulties regulators face in gaining awareness of when the insurance policies of practitioners lapse, while industry has raised concerns that insurers will not offer run-off cover for insolvency practitioners[25].

51. It is not expected that there is a large number of practitioners that operate without insurance at any time, however there is history of this occurring[26]. For example, ASIC regulatory reports show that insurance has presented as an issue in only five transaction reviews from 2011-2013. Operating without insurance can however have serious impacts on innocent third parties where it does occur.

Creditor engagement

52. Information asymmetries exist between debtors, directors, insolvency practitioners, creditors and members. For example, at the commencement of an insolvency administration, the insolvency practitioner may have little information about the financial affairs of the debtor. The debtor (or in the case of a company, its directors) may be uncooperative in completing and lodging a Report as to Affairs (RATA) or Statement of Affairs (in personal insolvencies) which is required to be provided by the debtor at commencement of the administration.

53. Furthermore, insolvency administration services may involve a high level of technical complexity. Creditors, particularly small business creditors and non-business creditors, may lack the knowledge and skills to properly understand the full nature of the 'product' that is being offered. It may therefore be difficult for clients to determine what a reasonable and appropriate fee is for such services and then to be able to determine that they are getting what they have 'purchased'.

54. As a result, personal and corporate insolvency laws contain a number of mechanisms designed to ensure that stakeholders are appropriately informed of debtors' affairs and the process of insolvency administrations. These mechanisms impose obligations upon practitioners to provide specified types of information and rights for stakeholders to make ad hoc requests for information.

55. There are limited opportunities for creditors in an external administration to access the information necessary to determine whether this is actually occurring. The potential inability of creditors to access information about the conduct of the external administration negatively impacts on the ability of creditors to monitor the external administration.

56. The difficulty for creditors to monitor their own interests in an external administration may result in the regulator being drawn into disputes that are fundamentally commercial in nature — about whether a service provider is providing value for money, rather than concerning alleged misconduct.

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[25] Ms Denise North, Senate Economics References Committee Hansard, Reference: Liquidators and administrators, Canberra, 12 March 2010, page 51.

26 See the testimony of then ASIC Chairman, Mr Michael D'Aloisio, and Insolvency Practitioners Association CEO, Denise North, to the Senate Committee on 12 March 2010; Geoff Slater on 9 April 2010; Mr Bill Doherty on 14 April 2010

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57. In the 2010 Senate Report, the Senate Committee found that while creditors in corporate insolvency may have a right to call a meeting where creditors representing 10 per cent in value agree, the cost of calling and holding the meeting acts as an effective deterrent to creditors doing so.

58. Industry concerns have been raised regarding the need for corporate insolvency practitioners to report to creditors annually, or hold meetings, about the state of an ongoing liquidation, and the requirement for a final meeting of creditors under an external administration. These concerns relate to the low level of interest by creditors in these reporting mechanisms that lead to a compliance-based approach to the completion of these processes. The costs of these regulatory requirements are borne by the estate as a whole.

59. Creditors and members in a corporate insolvency currently possess limited opportunities to remove a corporate insolvency practitioner or administrator once they are appointed, regardless of poor performance or misconduct. Aside from the costs involved for members or creditors of seeking to remove a registered corporate insolvency practitioner, there is a high potential for the corporate insolvency practitioner's costs of defending an action (even unsuccessfully) to be borne by the liquidation or administration. Court-based remedies are also associated with significant delay, during which the incumbent practitioner will likely continue to act.

Practitioner remuneration

60. Concern with the level and method of remuneration charged by insolvency practitioners, particularly the proportionality of remuneration claimed on a 'time-charging' basis to assets available in the liquidation, remains a perennial issue.[27] Anecdotally, there appears to be little indication of active price-based competition occurring between insolvency practitioners.

61. Complaints regarding remuneration issues, including excessive fees and poor disclosure of remuneration, constituted eight per cent of all insolvency related complaints to ASIC from 2006–2010. A further 12 per cent of complaints were in relation to criticism of insolvency practitioners failing to act in a timely manner which results in practitioners receiving a greater remuneration outcome than ought to have been required for the proper conduct of the administration.[28]

62. While the law currently provides mechanisms for the review of practitioner remuneration, these mechanisms are mostly court-based and are therefore costly and only likely to be undertaken where the insolvency is of a substantial size.

63. The market failures which make the setting of remuneration difficult are set out in the box below.

Cross-subsidisation

64. Because practitioner remuneration is paid from assets, practitioners are often not remunerated in full, or at all, because no assets remain. It has been asserted that

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[27] For example, see Remuneration and the importance of proportionality, HWL Ebsworth Lawyers, 27 April 2015; *In the matter of AAA Financial Intelligence Ltd (In Liquidation)* [2014] NSWSC 1270; *In the matter of On Q Group Limited (In Liquidation)(Subject to Deed of Company Arrangement)* [2014] NSWSC 1428 *Australian Securities and Investments Commission v Letten* (No 23) [2014] FCA 985.

[28] ASIC submission to the 2010 Senate Inquiry

this may lead to overcharging for services where there will be money available, as a recoupment action. This is less of a problem in personal insolvencies as assetless administrations are largely dealt with by the Official Trustee rather than private practitioners. However, under-remuneration remains an issue.

65. The unrecovered costs borne by practitioners in assetless administrations, or administrations with insufficient assets to meet remuneration and disbursements incurred may be seen as being borne by other administrations through the charging of these risk premiums. It has been estimated that "insolvency practitioners are required to personally fund disbursements of $1.4 million and remuneration of $47.3 million in the conduct of their roles as Official Liquidators annually".[29] Concerns persist both within and outside the industry about the effects of this cross-subsidisation.

Expensive options for obtaining remuneration approval

66. The law currently provides a mechanism in corporate insolvency for deeming the approval of remuneration up to $5,000 in a court ordered liquidation where a practitioner convenes a meeting but is unable to obtain a quorum.

67. In a 2011 survey of official liquidations it was found that of the 31 insolvencies surveyed, corporate insolvency practitioners used this mechanism on two occasions only. The value of remuneration drawn in those matters was $1,307 and $1,049. The limited use of the mechanism reflects commercial decisions made by practitioners of expected returns given that the costs of convening a creditors meeting ordinarily ranges from $3,000 to $4,000.

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[29] Phillips, A, *An analysis of official liquidations in Australia,* February 2013, http://www.arita.com.au/docs/events-documents/2012-tts-report---final-version-(2).pdf?sfvrsn=0

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Market failures arising in the setting of practitioner remuneration

Scoping of work forms part of the service

- Unlike in most service provider/client relationships, the scope of work to be performed is uncertain at the time of engagement of the service provider. It is part of the role of an insolvency practitioner to determine what work should be performed and to determine the work to be performed without needing to obtain the approval of their clients.
- The inability of clients to make their own cost/benefit analyses of proposed courses of action and to choose which actions should be undertaken reduces their ability to control costs and reduces their bargaining power with the insolvency practitioner.

The prevalence of time-based charging

- One of the major problems with time-based charges relates to the complexity of insolvencies. It is difficult to ascertain how complex an insolvency will be at the outset of an appointment.
- Time-based charging:
  - incentivises assigning more highly qualified people than necessary to work on a particular insolvency because of their higher charge out rates where assets are available in the administration
  - reduces the ability of clients to assess the reasonableness of the remuneration and to compare services between practitioners, as there is little indication of the total cost; and
  - does not effectively transfer the risks of cost blowouts to those best able to manage them.

Fractured decision making by clients

- Whereas fees are normally negotiated with service providers by individual clients, the fee setting body in an insolvency administration (that is, generally the creditors as a whole) is a group of individuals or organisations. This may have an adverse effect on the ability of fee setters to organise and cooperate in the assessment, negotiation and setting of fees.
- The collective nature of the fee setting body may increase monitoring and transaction costs associated with the governance of insolvency administrations.

The conflict between independence, duty and flexibility in fee setting

- Fee approvals have the potential to have a coercive effect on the conduct of practitioners and could potentially infringe on their independence and the performance of their legal and fiduciary duties.

Highly heterogeneous service

- Insolvency practitioners ordinarily provide a highly heterogeneous service. Assessments of the services to be provided, for the purpose of setting appropriate fees, must be made on a case-by-case basis.
- The proper and efficient administration of 'similar' insolvencies may involve significantly different costs. This may occur due to the potential for qualitative factors to have a high impact on costs. Qualitative factors are notoriously difficult to assess. Less information is generally available regarding qualitative factors, which makes accurate assessment difficult. Fee setters are in a poor position to assess appropriate fee levels in administrations where such factors are prevalent.

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Obtaining the RATA and books of the company

68. RATAs are documents that must be completed and provided by debtors or directors at the commencement of an insolvency administration. They are a means of ensuring that practitioners are provided with information necessary to facilitate efficient administration. The provision of this information is also essential in ensuring that practitioners can provide an appropriate level of information to stakeholders regarding the affairs of the debtor; the likely outcomes of the administration; and the tasks that may need to be performed by the practitioner.

69. Where a director fails to provide a corporate insolvency practitioner with the RATA and the company's books and records there is a negative impact on the practitioner's ability to properly conduct the administration. A refusal to provide a completed RATA or to provide books may be motivated by a wish to conceal corporate misconduct in the lead up to insolvency.

70. A perennial issue has been directors not providing RATAs. According to lodged initial external administrators' reports from 1 July 2013 to 30 June 2014, there were:

- 1,018 reported breaches of a director's obligation to provide a RATA; and
- 869 reported breaches of a director's obligation to provide the company's books.[30]

71. It is not possible to state in which situations the RATA and books are least likely to be provided as the statistics are not broken down by administration type. It is, however, assumed that it would most likely be in relation to Court-ordered windings up (as the directors are engaged in the process for commencing the external administration in a voluntary administration or a creditors' voluntary winding up).

72. According to a 2012 survey of official corporate insolvency practitioners, a RATA was received in 72 per cent of official liquidations, while ASIC's assistance to obtain a RATA was requested in 20 per cent of cases[31].

73. Currently ASIC may assign such a referral to its Liquidator Assistance Program, which seeks provision of the completed form or books, and commence prosecutions against non-compliant directors.

[30] ASIC Report 412, *Insolvency statistics: External administrators' reports (July 2013 to June 2014)*, September 2014, page 26.

[31] Phillips, A, *An analysis of official liquidations in Australia,* February 2013, http://www.arita.com.au/docs/events-documents/2012-tts-report---final-version-(2).pdf?sfvrsn=0

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Table 6: Corporate insolvency practitioner Assistance Program outcomes – 2009-2014

Year	Corporate insolvency practitioner requests	Compliance rate	Directors prosecuted	Offences prosecuted	Fines
2009-10	1563	33%	554	1010	$813,768
2010-11	1386	40%	425	761	$873,562
2011-12	1410	44%	402	817	$1.05 m
2012-13	1484	45%	528	966	$1.15 m
2013-14	1559	39%	314	609	$768,000
2014-15	1417		355	680	$914,675

Source: ASIC

Regulator monitoring, oversight and intervention

74. The divergent powers of ASIC and AFSA in relation to surveillance also affect the approaches that the respective regulators take to communicating with creditors. As part of its complaints handling processes, AFSA may examine the file relating to an allegation and report the findings to the person who made the allegation. ASIC is constrained in the extent of any information that it might otherwise similarly provide.

75. Similarly, the current wording of some of the statutory powers to conduct investigations and to communicate the outcomes of those investigations under the ASIC Act is more restrictive than the commensurate powers for AFSA under the Bankruptcy Act and the Bankruptcy Regulations 1996. For example, while some of ASIC's powers are exercisable only where it suspects that there has been a contravention of the law, the Inspector-General is not similarly constrained.

76. In the 2010 Senate Inquiry, the committee stated that the reactive approach to monitoring registered corporate insolvency practitioners taken by ASIC at that point in time was inadequate and expressed concern that a complaints system alone cannot deter all misconduct. Since 2010 ASIC has commenced a small proactive surveillance program however the limitations on ASIC powers continue to make that program less efficient and effective than is possible under the personal insolvency system.

77. Given the significant information, technical knowledge and technical skill asymmetries present in most insolvencies, creditors may not know when misconduct is occurring within an administration or may think it is occurring when it is not.

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Why is government action needed?

Why should the Government intervene?

78. While the returns in corporate insolvency in Australia are comparable to other overseas jurisdictions, there remains clear dissatisfaction with the regulation of the corporate insolvency profession and opportunities for improving the efficiency of Australia's insolvency system.

79. The insolvency system has a significant effect on both the level and nature of business activity taking place within an economy. An efficient insolvency system is a strong determinant of the accessibility and cost of credit in an economy; and minimises the impact of business failure of stakeholders, such as creditors and employees. It plays a key role in the efficient reallocation of resources and the minimisation of market distortions arising from business failure.

80. It is difficult for the market in specialist insolvency services to operate efficiently. This is largely because of asymmetries in technical knowledge, skill and information between practitioners and creditors; the highly heterogeneous nature of the services provided; and the fractured nature of decision making by the 'client'.[32]

81. These market failures adversely affect efficient price setting of insolvency services; the ability of stakeholders to conduct effective reviews of claims for remuneration; and the ability of stakeholders to monitor the progress of an administration in which they have a financial interest.

82. For over 100 years, Governments have taken a role in regulating the provision of insolvency administration services, as well as the practitioners who provide those services.

Are there alternatives to government action?

83. As at November 2013, 80 per cent of registered corporate insolvency practitioners and 93 per cent of registered trustees were members of the Australian Restructuring, Insolvency and Turnaround Association (ARITA).

84. ARITA members are subject to the ARITA Code of Professional Practice which acts as the standard for professional conduct in the insolvency profession. According to ARITA, the Code aims to:

- set standards of conduct for insolvency professionals;
- inform and educate ARITA members as to the standards of conduct required of them in the discharge of their professional responsibilities; and
- provide a reference for stakeholders and disciplinary bodies against which they can gauge the conduct of ARITA members.

[32] The 'client' in an insolvency administration is ordinarily the creditors as a whole (which is potentially a diffuse group of individuals or organisations).

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85. As an industry code of conduct, the Code remains subject to the law as well as the views of the courts, which may decide not to accept or follow particular requirements or guidance in the Code. The Code has been updated twice since 2010.

86. ARITA has disciplinary processes in place to deal with breaches of the Code, however the most serious penalty available is to strip a practitioner of their ARITA membership. Such an action may have a commercial impact on the practitioner, but does not prevent the practitioner from continuing to operate in the market.

Objectives, outcomes, goals and target of government action

87. The Government is seeking to:

- improve the effectiveness of the regulation of Australia's insolvency profession to restore confidence in the insolvency services industry, including through providing insolvency regulators with the powers they need to efficiently and effectively oversight the industry;
- improve the efficiency and effectiveness of the regulation of Australia's insolvency laws by aligning Australia's personal and corporate insolvency laws; and
- address current regulatory and market failures by:
  - enhancing competition within the market for insolvency services; and
  - empowering stakeholders with an interest in the conduct of an insolvency administration to better protect their own interests.

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Options considered as part of this RIS

88. The RIS considers a range of options to address the problems identified above.

88.1 Options for improving the effectiveness of the regulation of Australia's insolvency profession through changes to the law regarding:

(i) the registration, discipline and regulator oversight of insolvency practitioners (Options 1.1 to 1.5); and

(ii) practitioner insurance (Options 3.1 to 3.3).

88.2 Options to improve the efficiency and effectiveness of the regulation of Australia's insolvency laws and better address the current regulatory and market failures are considered. Options are therefore considered with respect to:

(i) the procedural rules relating to external administrations (Options 2.1 to 2.3);

(ii) better facilitating creditor involvement in an insolvency (Options 4.1 to 4.3);

(iii) remuneration for providing insolvency services (Options 5.1 to 5.3); and

(iv) improving information for corporate insolvency practitioners during an insolvency (Options 6.1 to 6.5).

89. The options considered in relation to the registration, discipline and regulator oversight of insolvency practitioners will address issues in relation to the remuneration for insolvency services through enhancing competition in the insolvency services market. Similarly the other options may have benefits that address the other objectives the Government is seeking to achieve in these reforms.

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1. Registration, discipline and regulation of insolvency practitioners

90. Five options have been identified to address the problems associated with the registration, discipline and regulation of insolvency practitioners.

Option 1.1 – status quo

Practitioner registration

91. The current frameworks for the regulation of registered corporate insolvency practitioners and external administrations, as set out in the Corporations Act, and for registered trustees and personal bankruptcies, as set out in the Bankruptcy Act, could be maintained.

92. The high entry standards for registration as a corporate insolvency practitioner set out under section 1282 of the Corporations Act would be maintained. Corporate insolvency practitioners seeking to be appointed to Court-appointed windings up continue to be required to seek further registration as official corporate insolvency practitioners with ASIC.

93. The consideration of applications for registration as a corporate insolvency practitioner are completed "on the papers". Once registered a corporate insolvency practitioner remains registered until deregistered voluntarily or involuntarily.

Practitioner deregistration or discipline

94. Where ASIC determines that a corporate insolvency practitioner should be deregistered or disciplined, ASIC would either refer the matter to CALDB or the Court. Alternatively, where AFSA determines that a personal insolvency practitioner should be deregistered or disciplined, AFSA would convene a three-person committee to determine the matter or refer the matter to the Court. Any person, regardless of whether the person has a financial interest in an external administration, is able to commence proceedings in relation to a practitioner's conduct of an administration.

Regulators' powers

95. ASIC is able to provide information to AFSA where the information will enable or assist it to perform a function or exercise a power, and vice versa. This power is at the discretion of the regulators. There is no obligation on either regulator to seek or provide information in relation to dually registered practitioners.

    95.1 ASIC is also able to provide information to enable or assist the accounting bodies CPA Australia and Chartered Accountants Australia & New Zealand to perform one of their functions, but not ARITA. AFSA is able to provide a copy of any report resulting from its inquiries and investigations into the conduct of a personal insolvency practitioner or a bankruptcy administration to any person.

    95.2 Where a stakeholder's attempt to obtain information from a practitioner is improperly obstructed by an insolvency practitioner, the stakeholder can go to Court to get an order to obtain access to the information.

96. ASIC is empowered to investigate the files of a corporate insolvency practitioner where it has reason to suspect that the corporate insolvency practitioner has contravened the Corporations Act; or has not, or may not have,

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faithfully performed his or her duties. The requirement for ASIC to have reason to suspect a contravention before commencing an investigation may inhibit the ability of ASIC to undertake a surveillance program on a proactive basis.

97. Where a creditor requests that an insolvency practitioner hold a meeting and that request is ignored or unreasonably rejected, the creditor maintains a right to apply to Court for an order requiring a meeting to be held.

Option 1.2 – alignment between corporate and personal insolvency frameworks

98. The current registration, deregistration, disciplinary and maintenance of registration mechanisms in the Corporations Act and Bankruptcy Act would be replaced[33] with a new regime, based on the current Bankruptcy Act provisions. This regime would introduce a common set of provisions, with minor tailoring to the needs of each system.

99. The registration and disciplinary frameworks for personal insolvency practitioners which are currently provided for under the Bankruptcy Act were clearly favoured by industry stakeholders, and ultimately by the Senate Economics References Committee, during its 2010 inquiry into the regulation of corporate insolvency.

Practitioner registration

Registration of insolvency practitioners

100. A new aligned registration process based upon the existing Bankruptcy Act provisions would be introduced replacing the current systems for registration of corporate insolvency practitioners and registered trustees. There would be a single class of practitioner in corporate insolvency (although registrations may be conditional or restricted to some kinds of administration). The separate class of official corporate insolvency practitioner, as well as debtor company specific registration, would be removed. Registered corporate insolvency practitioners would be able to perform all functions currently restricted to official corporate insolvency practitioners.

101. Applicants would be required to meet a set of minimum initial and ongoing standards for registration as an insolvency practitioner. These requirements would be relevant not only to initial registration, but also to subsequent disciplinary processes.

102. An individual would be able to be registered where they do not meet the prescribed academic requirements, provided that a committee convened to consider the application is otherwise satisfied that the individual would be able to satisfactorily perform the duties of a registered corporate insolvency practitioner or registered trustee.

    102.1 The mandatory experience requirements for registration would be lowered in corporate insolvency from five years to three years, with a new obligation to complete formal tertiary qualifications in insolvency added to the current requirements for legal and accounting qualifications.

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[33] These amendments would not affect the regulatory framework for the registration and deregistration of debt agreement administrators under the Bankruptcy Act.

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102.2 A committee would consist of a member of the relevant regulator, a representative of ARITA, and a representative of the relevant Minister. A committee would be convened on an ad hoc basis to consider applications for registration as well as disciplinary matters (see below).

103. The current residency requirement (that exists in corporate insolvency) would be removed. However, the regulator would be empowered to impose conditions to address non-residency.

104. Under an aligned registration system, the regulators would be responsible for: accepting initial applications; determining that they are complete and accompanied by the relevant fee (the 'application fee') (currently expected to be set at $2,200); and referring them to a committee convened to determine whether the applicant should be registered. The current requirements for how an application is considered in personal insolvency would substantively be adopted under both regimes.

105. The procedures of a committee would be based upon current personal insolvency committees. A committee would also be entitled to dispense with a hearing and determine a matter on the papers with the consent of the practitioner.

106. If a committee determines that a person should be registered, the regulator must register them subject to their taking out insurance and paying a registration fee (currently expected to be set at $1,300) which would be imposed as a tax. This registration fee is in addition to the application fee.

Conditions on registration

107. Practitioners would be obliged to comply with any conditions on their registration, whether they are industry wide conditions, or specific conditions imposed on the practitioner by a committee or by agreement with the regulator.

108. The Rules will set out certain industry wide conditions in relation to specific areas such as continuing professional education.

109. A committee would also be empowered to impose conditions upon specific practitioners.

110. A person would be able to apply for restricted registration. This will provide flexibility in the system to increase the number of participants in limited sections of the market. For example, an applicant may seek registration as a corporate insolvency practitioner restricted to performing receiverships only.

Renewal of registration

111. Registration would be for a three-year period. A practitioner would be required to apply to the respective regulator for renewal of their registration. A fee would be payable (currently expected to be set at $1,700).

112. Renewal would be granted where the applicant has provided proof of insurance and has no outstanding administration-related taxes or fees in excess of a certain amount and has complied with any continuing professional education obligations.

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Involuntary deregistration and disciplinary processes

113. A new aligned deregistration and disciplinary process based upon the existing Bankruptcy Act provisions would be introduced replacing the current systems for deregistration and discipline of corporate insolvency practitioners and registered trustees. The system would be modelled on the current system for registered trustees.

An aligned committee system

114. Where a regulator believes that a practitioner has breached their duties or obligations under the respective statute, the regulator will be empowered to issue a 'show cause' notice to the practitioner and, if not satisfied with the response, refer the matter to a committee convened by the regulator for that purpose (on an ad hoc basis) to determine the matter. A committee so convened would again consist of three members, being a delegate of the regulator, a representative of ARITA, and a third member selected by the Minister. The procedures for the committee would be the same as for a committee established for registration of a practitioner.

115. The regulator would also be required to issue a show cause notice and make a referral where, in the opinion of the regulator, a practitioner no longer meets the ongoing requirements to maintain registration or is no longer actively practising as an insolvency practitioner.

116. A committee would be empowered to grant a wide range of remedies, including: deregistration; suspension; suspension of the person's ability to accept new appointments; imposition of conditions; admonishment or reprimand; and removal of a practitioner from a specified administration.

117. The relevant regulators would be bound to give effect to the decision of a committee. The regulator would also be empowered to publicise or require publication of, as it sees fit, the decision and reasons for the exercises of its powers.

Regulator disciplinary powers

118. In parallel to being able to refer a matter to a committee, the regulator would be empowered to impose a restricted class of remedy (deregister or suspend only) on a restricted set of grounds without referral to a committee.

119. The regulators would also be empowered to:

- suspend a practitioner's ability to accept new appointments, without requiring a reference to a committee, if the practitioner fails to comply with a notice directing them to lodge an outstanding annual administration or practitioner return;
- direct that a practitioner corrects an inaccurate return previously lodged; and
- appoint replacement practitioners upon a vacancy arising following suspension or deregistration of a practitioner.

120. The regulator must afford natural justice to the practitioner prior to determining whether to exercise this power.

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Court control over practitioners

121. The power of persons to seek a review of a corporate insolvency practitioner's conduct in various kinds of insolvency administration would be aligned and consolidated. In particular, there would be alignment of the persons who have standing to seek court reviews of practitioners' conduct. A person would be required to have a financial interest in an administration in order to seek a review in relation to the administration.

122. A Court would be empowered, when considering whether to remove a person from a particular administration, to take into account public interest considerations (such as maintaining confidence in the insolvency system as a whole) that may override the individual interests of the practitioner, creditors and members in a particular administration.

Option 1.3 – co-regulation

123. A co-regulation model could be adopted whereby the insolvency industry develops and administers its own arrangements, but Parliament provides legislative backing to enable the arrangements to be enforced.

124. Under this option, the regulators would work with the corporate and personal insolvency industries to develop and implement a scheme for the registration, discipline and deregistration of practitioners which would consist of the following:

- a statutory board, in which all powers and functions for the registration and regulation of insolvency practitioners would be vested. The board would be empowered to vest powers and functions to professional associations; and
- professional associations which would then be responsible for the registration and regulation of their members.[34]

125. The statutory board would be responsible for:

- determining appropriate standards for the registration of practitioners;
- surveillance of practitioners;
- acting upon complaints received against insolvency practitioners; and
- delegating responsibility for functions to appropriate professional associations.

126. The statutory board would consist of: representatives of major industry representative bodies such as ARITA, the Chartered Accountants Australia & New Zealand, CPA Australia and the Law Council of Australia; appointees of the Attorney-General and the Treasurer; and two lay persons. The board would initially be funded jointly by industry (for example, through contributions by industry representative bodies) and the Government.

127. A professional body or bodies would exercise powers delegated by the statutory board, including:

[34] This scheme is based on recommendations made in the Harmer Report.

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- administering the registration system for insolvency practitioners;
- undertaking surveillance of practitioners; and
- conducting investigations into complaints concerning insolvency practitioners.

128. This option would not affect the current rules with which corporate insolvency practitioners and registered trustees must obey in carrying out an external administration or personal bankruptcy, such as the procedural rules, practitioners' obligations to communicate with stakeholders or the ability to remove and replace a practitioner.

Case study: Regulation of insolvency practitioners in United Kingdom

129. Insolvency practitioners in Great Britain are subject to a dual regulatory approach, combining self-regulation and independent oversight regulation by the Government.

130. Self-regulation is carried out by seven Recognised Practitioner Boards (RPBs) that authorise insolvency practitioners.

131. In carrying out their duties, insolvency practitioners must comply with statutory requirements, including under insolvency and related legislation. They must also comply with professional standards, which include non-statutory statements of insolvency practice, rules set by the RPBs, a joint code of ethics and guidance notes.

132. Each RPB must have rules for ensuring that the practitioners which it authorises are acting properly. Each RPB has committed to having proper procedures in place to ensure that complaints against those IPs it authorises are investigated. Complaints procedures are designed to deal with matters such as unprofessional, improper and unethical behaviour, not commercial disputes.

Option 1.4 – interim suspension orders

133. The regulators could be empowered to prohibit a practitioner from acting on a particular administration for a limited period if the regulator believes serious misconduct occurred on the part of the practitioner and that it is in the best interests of creditors.

134. The order would be for a short period of time pending a full hearing about whether the order should be made permanent.

135. The stop-order power could be valuable where there is:

- systemic non-compliance by an insolvency practitioner with their duties and obligations or suspected fraud identified by the regulator during its surveillance activities or as a result of investigating a report of alleged misconduct received by the regulator;
- cause to intervene to prevent the sale or transfer of assets by an insolvency practitioner to a related party in furtherance of suspected illegal phoenix activity

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or where the practitioner's conduct otherwise facilitates the promotion of interests other than those of creditors; and

- an obvious conflict of interest and where the practitioner refuses to step aside.

Option 1.5 – improve regulator powers

Increased regulator powers

136. In order to ensure that both regulators have the powers necessary to conduct proactive practice reviews and reviews of individual administrations, both regulators would be empowered to attend premises at which the practitioner is carrying out administrations or keeps books; to inspect books; to require reasonable assistance; and to utilise copying facilities. Suspicion of a breach would not be required for these powers to be exercised.

137. Both regulators would be given a broad power to share:

- regulatory information regarding persons with dual registration with the other regulator (or persons seeking dual registration, or in respect of events/actions taking place at a time when they held dual registration);

- information with ARITA and other relevant professional bodies; and

- information with the Department of Employment in relation to practitioners' conduct regarding the General Employee Entitlements and Redundancy Scheme.

138. Both regulators would be empowered to give written directions to insolvency practitioners to answer questions in respect of an administration or their conduct as a registered practitioner.

139. Both regulators would have discretionary powers to provide or make available to stakeholders (including creditors, members, directors, employees, the bankrupt) any information or material relating to an insolvency administration that would fall within the authority of the practitioner to provide on their own initiative. However, the regulator would not be able to provide or make available information to which legal professional privilege applies.

  139.1 Both regulators would also be authorised to direct practitioners to provide information to stakeholders directly.

  139.2 Each regulator would need to give the practitioner responsible for an administration notice of its intention to disclose the information.

  139.3 Where the cost of providing the information sought may impose a significant burden upon an administration, the regulator may require the person seeking access to recompense the administration by an amount determined by the regulator as being reasonable as a precondition of it exercising this power.

140. Both regulators would be empowered to share information in such circumstances to enable the adoption of a 'one stop shop' approach for creditors and other stakeholders with an interest in interconnected personal and corporate small business insolvencies.

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Power to direct that a meeting of creditors be called

141. Both regulators would be given broad powers to direct that a meeting of creditors be called. Regulators would also be empowered to require the inclusion of certain material in convening documents; and attend and participate at meetings of creditors and committees of inspection (COIs) (AFSA currently has this power in relation to meetings of creditors in personal insolvency).

What is the likely net benefit of each option?

Option 1.1 – status quo

142. A 'do nothing' option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by existing legislative requirements, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 1.2 – alignment between corporate and personal insolvency frameworks

Aligning registration

Registration of insolvency practitioners

143. Unregistered individuals working in the corporate insolvency industry wishing to be registered as corporate insolvency practitioners will be able to seek registration earlier than under the status quo. Reducing the registration requirements may facilitate the entry of more practitioners into the insolvency industry thus increasing market competition for insolvency services.

144. The Option will facilitate the timelier introduction of new practitioners into the industry by allowing appropriately qualified individuals to register as practitioners up to two years earlier.

145. However to ensure standards new practitioners will be required to have undertaken insolvency specific tertiary studies, requiring new practitioners to attend an interview (and potentially sit an exam) rather than merely lodge a written application and new and increased fees.

146. Members from the peak insolvency industry body that choose to sit on committees established to consider registration applications will face new costs, which will not be wholly compensated through sitting fees paid by the regulators.

147. There will be transitional and minimal increased ongoing cost to ASIC due to the requirement for committee consideration of a new practitioner, the interview of applicants and amendments to renewal process to accept proof of insurance.

148. The removal of a separate official corporate insolvency practitioner status will remove the current obligation on these practitioners to consent to act in a court ordered winding up solely because the company has no assets to cover the anticipated professional costs of the liquidation. This change will assist in addressing the current cross-subsidisation occurring within the industry where the costs incurred in assetless administrations are recouped through higher remuneration costs in larger administrations.

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149. This current obligation is a result of an undertaking made to ASIC that an official corporate insolvency practitioner will not refuse consent to act as a corporate insolvency practitioner in a court winding up.

150. As a result of the change, where a person is petitioning the court to wind up a company the person will likely have to provide a guarantee of a minimum amount to the corporate insolvency practitioner in order for the corporate insolvency practitioner to agree to the appointment. This may mean a reduction in the number of assetless companies liquidated as corporate insolvency practitioners would not be expected to commence such administrations without some form of guarantee or where they do not believe they are likely to be remunerated.

151. The recommended option will result in a reduction in the barriers to entry into the market for the provision of insolvency services through a reduction in experience requirements, some of these benefits will be offset through the introduction of interview as part of the process for registration. This should increase competition over the medium-term, absent other regulatory or market changes. It is expected that the recommended option will have a minor positive impact on the cost of corporate insolvency services over the medium-term.

Conditions on registration

152. By improving the ability for the regulators to register practitioners with conditions, the regulators will have more flexibility to allow more new participants, which may not previously have been registered because the system did not allow conditions to be utilised to address potential weaknesses in the applicant.

153. Allowing conditions to apply to the registration of practitioners through Ministerial Rules provides flexibility for ongoing requirements to be placed on practitioners in response to emerging issues within the sector. Currently it is expected that conditions would be made requiring practitioners to comply with industry standard continuing professional education requirements, whether they are members of industry bodies or not.

153.1 Given the current requirement for practitioners to keep up to date with the state of the law in order to maintain the capacity to undertake administrations, it is not expected that this requirement would have a significant impact on the sector[35] . The cost of that impact is estimated at $463,000 across both corporate and personal insolvency sectors representing the time taken and cost of attending three four-hour industry sessions a year.

Renewal of practitioner registration

154. The introduction of a renewal process on practitioner registration for corporate practitioners will add new compliance costs for current practitioners, as well as new entrants. Based on industry feedback, the renewal process is not expected to increase compliance costs, as the information will be provided at the time of the annual return.

[35] Around 10 per cent of practitioners. This represents the number who are not members of a professional body.

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155. The actual renewal charge ($1700 every three years), while clearly a cost for business, will not be included in the formal RBM because the fee is classified as a direct financial cost under the RBM framework.

Aligning deregistration and discipline

An aligned committee system

156. The Senate Economics References Committee inquiry into corporate insolvency practitioners and administrators in 2010 heard a significant amount of criticism of CALDB for its slowness and the lack of matters put before it. Since the 2010 Senate Inquiry the timeliness of CALDB decision making has significantly improved.

157. CALDB has revised its operating procedures twice since 2010 significantly simplifying its proceedings and improving the efficiency and effectiveness of CALDB hearings. The changes in procedures, as well as ASIC's increased focus on the insolvency profession since that time, has resulted in a greater number of referrals to CALDB. The average time taken to hear the six matters heard by CALDB between 2012 and 2014 has halved from 19 months to 9½ months, compared to the period 2006 and 2010.

158. While CALDB has improved the efficiency of its hearing processes, it remains high compared to the average time taken to hear matters through an AFSA disciplinary committee (the average time taken to hear the past six matters was 4.4 months, with five of those six matters being dealt with within three months). The movement to the personal insolvency framework for disciplinary matters aims for a more timely consideration of corporate insolvency practitioner disciplinary matters.

159. It is expected that the change to a committee structure will increase the speed and the informality of a disciplinary proceeding, reducing the costs borne by a practitioner through a more limited need for the engagement of senior barristers or at least reducing the length of their engagement.

160. The movement to a disciplinary committee approach, and away from a Tribunal, may continue to see ASIC taking the most complex matters directly to Court. However, this may see the committee dealing with a more refined set of simpler cases allowing it to develop the expertise to be a more streamlined process than currently possible through the Tribunal structure.

Regulator disciplinary powers

161. This option would increase the number of types of matters that the regulators would be able to deal with directly without recourse to either a disciplinary committee or the Court. This change will improve the speed at which certain breaches can be dealt with.

162. This will better enable timely and appropriate disciplinary action to be taken when misconduct occurs. In order to ensure that practitioners are treated fairly, only objectively assessable breaches should be able to be dealt with by ASIC.

Court control over practitioners

163. The alignment of the Court's powers for the discipline of practitioners will aid practitioner and stakeholders understanding of those powers, which will make

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the system both fairer and more efficient as costs previously wasted on understanding the various systems are avoided.

Table 7: Cost/ savings estimates

Arising from	Cost/ saving
Changing experience and education requirements – corporate	$150,000 saving
Changing experience requirements – personal	$75,000 cost
Requiring notice of specified events to regulators	$25,000 cost
New conditions on practitioners	$465,000 cost
Changing regulators disciplinary power – corporate	$510,000 saving
Total	**$94,000 saving**

Source: ASIC, AFSA, Treasury assumptions, ARITA

Option 1.3 – co-regulation

Industry

164. This option would transfer the cost of determining market entrants from the Government (through the regulators) onto private professional bodies. It would also transfer the cost of disciplining practitioners onto these bodies.

165. Currently, there is no professional body or industry association that is resourced or structured to undertake this type of a role across the whole insolvency industry. The professional body or industry association willing to undertake these obligations would need to be substantially reformed. Up-front and ongoing funding for this reform would need to be obtained from industry members. Given the small size of the industry (685 registered corporate insolvency practitioners and 208 registered trustees), the cost per industry participant of maintaining the infrastructure needed for effective co-regulation (including ongoing surveillance, dispute resolution, and continuing professional education etcetera) may be prohibitive.

166. Once established however, self-regulatory schemes tend to be more flexible and impose lower compliance costs on industry participants than direct government regulation[36].

167. It has been recognised that industry members can be harder on 'erring colleagues than generalist tribunals' because of the appreciation of the damage that reports of errors or neglect can have on the reputation of the professional as

[36] Page 3 *Industry Self-regulation in Consumer Markets* prepared by the Taskforce on Industry Self-regulation; "*Bankruptcy and Insolvency: Change, policy and the vital role of integrity and probity*", the Hon. Michael Kirby, address to IPA National Conference, 19 May 2010, page 25.

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a whole. Industry members would be expected to be able to quickly perceive where unprofessional errors have occurred[37].

168. By providing more power to industry bodies, there is an increased potential for new entrants to be effectively prevented from entering the market as it is in the interests of the current members to restrict the number of entrants to the market.

169. It is assumed that transferring responsibility onto industry bodies would have ongoing costs commensurate with the cost incurred by Registered Practitioner Boards in the United Kingdom. the regulation of the insolvency profession would cost

169.1 The Insolvency Practitioners Association in the UK is a Registered Practitioner Board able to register and discipline insolvency practitioners. It has 591 members and recouped £1,109,464[38] (A$1,891,904) from its insolvency practitioners members in 2015. This is taken as an appropriate proxy for costs to a comparable body to undertake these functions in Australia (albeit with an increased number of members as there are currently around 700 practitioners in Australia).

170. It is not possible to provide a reasonable estimate of the difference on regulatory burden on insolvency practitioners between a government regulator and an industry regulator. The cost would be dependent on the decisions made by the industry regulator regarding registration procedures, disciplinary procedures, and inspection frequency, duration and intensity.

Consumers

171. Granting professional bodies these responsibilities would provide an opportunity for anti-competitive behaviour where it is in the interests of the bodies' members to restrict the number of entrants to the market. The limiting of competition for insolvency services is likely to result in an increase in the cost of these services.

172. Given the highly complex nature of corporate insolvency, and the presence of significant and entrenched information asymmetry between practitioners and creditors, there is a significant risk of consumers being harmed where a practitioner knowingly, or unwittingly, breaches their duties and obligations.

173. As well, community cynicism regarding industry regulating itself may lead to a distrust of self-regulatory schemes. Professionals, as decision makers, can occasionally be incapable of seeing or reluctant to see the perspective of stakeholders and may be overly attentive to the burdens on fellow professionals[39].

Government

174. Any movement toward further co-regulation will encompass transition costs for the Government in the immediate term. However, following the initial transitory period, the cost to Government (in particular, the cost to ASIC and AFSA) of co-regulation should be reduced compared to a purely regulatory system.

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[37] the Hon. Michael Kirby, as above, page 23.

[38] Annual financial statements for the Insolvency Practitioners Association in 2015.

[39] the Hon. Michael Kirby, as above, page 24.

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175. The Court would retain its powers to censure or deregister practitioners. The cost borne by Courts in dealing with applications for investigation or deregistration would not be effected.

176. ASIC incurs costs in undertaking oversight of the professional body. This function was estimated to cost the UK agency with responsibility for that role £740,000 ($AUD 1,261,880) in 2013. That cost is not included in the estimate provided at Table 8, as regulator costs are not included in compliance cost estimates under the Regulatory Burden Measurement Framework.

Table 8: Cost/ savings estimates

Arising from	Cost/ saving
Cost to professional body of regulating insolvency profession	$2.3 million cost
Total	**$2.3 million cost**

Source: Treasury assumptions

Option 1.4 – interim suspension orders

177. While it is desirable for regulators to be able to act quickly to protect the public in situations where it perceives that a corporate insolvency practitioner is breaching his or her obligations in a manner that is detrimental to the interests of creditors, the flow-on impacts of this option outweigh the potential benefits of that prompt action. Particularly in situations where the regulator does not subsequently take further formal disciplinary action and the creditors have potentially unnecessarily borne the costs of the disruption.

178. There are currently a range of other professions where a member of the profession can be stood down on an interim basis for acting within their field of employment. However, the suspension of an insolvency practitioner would be expected to have a detrimental impact on third parties (in particular, on the creditors of the company and potentially any employees impacted by a disruption to a company being traded on in a voluntary administration or winding-up due to the removal of the controller of the company). This type of impact distinguishes itself from the other professional areas where these powers are available, such as the legal or medical professions.

179. The standard approach in the Corporations Act is that a licence or registration can be cancelled or suspended without a hearing on objective grounds, such as the bankruptcy of the person, but a hearing is required for grounds that involve elements of subjective judgment (such as not being a fit and proper person). This approach assures that an individual is afforded procedural fairness before their livelihood is detrimentally affected.

180. While a hearing prior to administrative action is the norm, as noted above there is precedent in the Corporations Act for ASIC to take administrative action that detrimentally affects the rights of individuals or companies for a short period in order to protect the public interest.

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181. Such a power would cause significant reputational damage to the practitioner involved. It would also have a significant negative impact on the efficient administration of the company to which the stop order applies as the administration would have to halt during the period or a replacement practitioner be found to continue the work during the stop order period.

182. This option would result in opportunity costs for practitioners affected by the utilisation of this power. Given the extent of the impact of the power it is not expected that it would be utilised often – likely less than twice per annum. The impact would be to bring forward the costs incurred on a practitioner's livelihood as a result of future disciplinary action to the point at which the interim suspension order is served on a practitioner. This could be between four and nine months earlier[40], as well as having an unquantifiable impact on the value of the practitioner's firm and on external administrations that the practitioner was responsible for.

Table 9: Cost/ savings estimates

Arising from	Cost/ saving
Interim suspension orders	No regulatory cost or saving
Total	**No regulatory cost or saving**

Option 1.5 – increased regulator powers

Increased regulator powers

183. An effective proactive surveillance regime is necessary to provide confidence to the market about the conduct of corporate insolvency practitioners, however such a regime must be implemented as efficiently as possible in order to minimise the regulatory burden on practitioners themselves.

184. This option would better align the powers available to ASIC in undertaking its proactive surveillance with those available to AFSA removing potential constraints around the exercise of its powers where a suspicion of contravention is not present.

Power to direct that a meeting of creditors be called

185. Irrespective of the rights that exist for a stakeholder to obtain information, there may be cases where an insolvency practitioner may improperly obstruct these rights. In such situations empowering the regulatory to intervene to facilitate the provision of information can provide a lower cost alternative to Court intervention. This option would provide for the same powers currently available to the Inspector-General under the personal insolvency framework to be made available to ASIC in relation to corporate external administrations.

186. Empowering the regulator to force access to information by stakeholders may decrease monitoring costs and effectiveness for stakeholders and promote confidence through increased transparency. Improving the potential for information to become available may also have a deterrence effect on

[40] Opportunity costs are not required to be costed under the Regulatory Burden Management Framework.

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misconduct. Administrations and practitioners may also avoid ongoing costs where any decisions not to release information are then 'confirmed' by a similar refusal by the regulator to provide access.

187. There are a number of consequences that flow from empowering the regulator to force access to information which need to be balanced against any gains. Disclosure may result in costs to administrations (such as losses from disclosing commercially sensitive information) that are not justified in light of the benefits of disclosure. Disclosure may also result in costs that are more direct to an administration, in the form of remuneration and disbursements incurred in providing the information.

188. Providing regulators with the power to disclose information may also result in their being exposed to increased workloads. There is also a risk that any such power may result in the regulator second guessing a practitioner on decisions to provide information that are essentially business judgements best left to the practitioner. These disadvantages can however be mitigated through imposing appropriate restraints on any rights by the regulator to provide access.

189. Empowering a regulator to call a meeting of creditors ought to address concerns that an external administrator (or registered trustee) facing removal or questions regarding their conduct may delay the calling of a meeting of creditors or interfere with meeting processes for the purposes of avoiding questions on their conduct or consideration of their removal. Additionally, if the registered corporate insolvency practitioner is dishonest, the practitioner, as chair of the meeting, would remain in a position to breach further requirements for the fair conduct of a creditors' meeting to prevent them from being removed.

190. The addition of these powers to the regulatory toolbox to ASIC is expected to result in increased efficiency in its efforts to regulate the corporate insolvency sector, by being able to request information earlier and assist creditors to look after their own interests through attending, and participating, in creditor meetings. As many of the proposed changes are aligning with powers already available to the Inspector-General, it is not expected that there would be significant efficiencies for AFSA.

Table 10: Cost/ savings estimates

Arising from	Cost/ saving
Give regulator right to require creditor meeting and request information – corporate	$50,000 cost
Give regulator right to require creditor meeting and request information – personal	$30,000 cost
Give Commonwealth right to request information where Fair Entitlements Guarantee payments	$10,000 cost
Total	**$88,000 cost**

Source: Source: ASIC, Treasury assumptions, ARITA

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Recommended option

191. The combined implementation of Option 1.2 and Option 1.5 is recommended.

192. Option 1.2 will significantly align the systems for corporate and personal insolvency. It provides better flexibility for appropriately qualified candidates to enter into the market for insolvency services, while maintaining high standards through the requirement for a face-to-face interview.

193. The changes to the registration process have been subject to significant consultation. While concerns have been raised by some in the industry that the changes to reduce the experience required for registration will lead to insufficiently experienced individuals entering the market, these risks are mitigated through the introduction of an interview of the applicant, which will include industry and regulator representatives.

194. Concerns have continued to be raised that allowing restricted registration will provide for entry by persons with lower requirements than an unrestricted registration. The only difference for restricted registrations will be the expected scope of experience undertaken by the applicant during the three years. For unrestricted registrations, the experience will need to include all forms of external administration; for restricted registrations, the experience will need to include only that form of external administration which the applicant is seeking to be able to perform.

195. The Option will also improve confidence in the system as a whole by providing a more streamlined and cost effective process for the consideration of the discipline or deregistration of practitioners that are not meeting the standards expected under the law.

196. Some industry stakeholders have continued to raise concerns regarding the committee approach to disciplinary matters. They contend that the committee process is not suitable for complex corporate proceedings, and have concerns on the proposed governance and independence of the committee.

197. However the disciplinary committee has now been operational within the personal insolvency sphere for over 20 years, without any substantive concern being raised regarding the independence of those committees from AFSA. Legislative provisions to ensure that the decision making of a committee adequately takes into account natural justice considerations will be made as part of rules made under the Insolvency Law Reform Act 2016 (the Act), while administrative processes within ASIC will similarly address these concerns in the same way as they are satisfied with respect to registered trustees.

198. Option 1.5 will further improve confidence in the insolvency system by providing ASIC with the powers needed to ensure that their proactive surveillance program is operating efficiently and effectively, to assist stakeholders with an interest in an administration to obtain information from recalcitrant corporate insolvency practitioners or organise for the convening of meetings of creditors.

199. There has been limited public comment made in relation to the proposed amendments to changes to regulators powers, although it has been commented

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that ASIC's additional powers should only be used where there is clear evidence of a practitioner's obstructive behaviour.

200. It is necessary that the powers to request and provide information regarding an external administration to a creditor, or call and attend a creditors meeting or COI, are not fettered. It is likely however, that given the need for ASIC to expend resources where it believes it will receive the best regulatory return, it is unlikely that this power would be exercised in situations where a practitioner is not obstructive.

201. The framework for the regulation of insolvency practitioners already contains strong elements of co-regulation. Co-regulation can reduce the regulatory burden where stakeholders have confidence that the profession will effectively regulate their members, not protect them either explicitly or implicitly. Given the current deficiency in confidence in the insolvency industry, allowing practitioner registration and discipline decisions to be the exclusive purview of the industry would be unlikely to receive the support necessary from other stakeholders. Option 1.3 is therefore not supported.

202. Option 1.4 would provide ASIC with an important tool to address potential problems arising in relation to an external administration quickly, which may have positive flow-on effects for confidence in the market. Based on current evidence, this option does not however strike an appropriate balance between the efficiency of removing poorly performing practitioners and respect for the commercial realities of disciplinary conduct on corporate insolvency practitioners' reputations and could potentially penalise creditors of an administration if a practitioner is removed but later cleared of any misconduct.

203. Option 1.5 was implemented through the Insolvency Law Reform Act.

204. Option 1.2 was partially implemented through the Insolvency Law Reform Act. It is recommended that changes to open the industry up to greater competition should be implemented through the Insolvency Practice Rules.

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2. Procedural rules

205. Three options have been identified to address the problems associated with the procedural rules relating to insolvency in order to reduce complexity for insolvency practitioners and other stakeholders involved in both corporate and personal insolvency. While some of the other reforms will assist in restoring confidence in the honesty of the insolvency profession.

Option 2.1 – Status quo

206. The current rules regarding: the treatment of estate monies; the obligation on registered corporate insolvency practitioners and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and AFSA respectively; the keeping of books and the period of time for which those books must be retained remain divergent between the corporate and personal insolvency systems. Registered trustees are required to keep the original administration books for six or fifteen years.

Option 2.2 – remove statutory procedural rules

207. This options removes the rules regarding: the treatment of estate monies; the obligation on registered corporate insolvency practitioners and registered trustees to lodge, and have audited, a range of reports and documents with ASIC and AFSA respectively; the keeping of books and the period of time for which those books must be retained.

Option 2.3 – alignment of procedural rules

208. This option aligns the rules regarding funds handling, record keeping and audit requirements between corporate and personal insolvency.

209. The requirements on corporate insolvency practitioners and registered trustees to handle estate funds under all administrations would be aligned with minor enhancements, although this would not extend to rules regarding the investment of estate funds. Strict liability offences will apply to late-banked monies, monies withdrawn from accounts without authority or where a practitioner fails to bank funds into the correct account. The penalties for these offences will be increased to provide a genuine deterrent.

210. Where an insolvency practitioner is replaced, possession of both debtor and administration records would now pass to the newly appointed practitioner; with rights for former practitioners to inspect and obtain copies. The regulators would also be empowered to take possession of, and transfer, administration and debtor records to new practitioners. This would include any circumstance where there is a temporary vacancy.

211. Corporate insolvency record destruction rules will be reproduced in personal insolvency law, but with record destruction dates aligned with trustee release timeframes seven years rather than with the current five-year timeframe in corporate insolvency. The regulators will be empowered to allow electronic copies to be preserved in substitution of hard copies of documents. The unauthorised destruction of records or failing to keep records will be an offence.

212. Rules regarding the audit of insolvency administration accounts will be aligned, with audits being able to be initiated by court order as well as at the regulator's

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initiative. A decision by the regulator to initiate an audit would be reviewable by the AAT.

What is the likely net benefit of each option?

Option 2.1 – status quo

213. A ‘do nothing’ option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by existing legislative requirements, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 2.2 – remove all procedural rules

214. The option would reduce costs for practitioners by allowing each individual to determine the optimal manner for handling estate funds;.

215. By removing the statutory requirements for these procedural rules, it is expected that the Court would exercise its ability to oversee corporate insolvency practitioners as officers of the Court. In so doing, practitioners would likely remain subject to general trust law in relation to the holding of trust monies. More broadly, practitioners would likely continue to act in accordance with current legislative obligations, such as keeping proper accounts, books, records and separate bank accounts for each administration[41].

216. It is expected that the removal of procedural rules would result in savings from:

216.1 not retaining books of the company and administration for five years after date of deregistration for a corporate insolvency; 7 years for a personal insolvency;

216.2 not placing administration funds in an interest bearing account in personal insolvency; and

216.3 not lodge account showing receipts and payments every six months.

217. While removing these requirements would have a regulatory saving, it would also have a negative impact on creditor confidence in the insolvency system. As it would make the handling of funds less transparent, it would make the detection of inappropriate handling of funds by practitioners more difficult for both creditors and regulators reducing the scope for appropriate oversight of practitioner conduct.

[41] These costs are therefore not treated as regulatory savings for the purposes of the Regulatory Burden Measurement Framework.

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Table 11: Cost/ Savings estimates

Arising from	Saving/ cost
Retention and destruction of books	$4.4 million saving[42]
Bank accounts – interest bearing accounts	$1.0 million saving
6-monthly receipts and payments	$150,000 saving
Total	**$5.55 million saving**

Source: AFSA, ARITA, Treasury

Option 2.3 – alignment of requirements, with modifications

218. Inconsistent rules make it difficult for creditors of individuals as well as companies to understand how the different regimes apply without an in-depth knowledge of both frameworks (something which creditors are unlikely to have). This lack of knowledge and expertise is not something that creditors themselves can easily address and it may impose both financial and time costs on creditors who wish to obtain information necessary to protect their own interests.

219. Aligning the disparate and slightly differing formulation of rules regarding the handling of funds will result in minimal costs for practitioners in order to educate themselves of the changes, but should have small long-term savings in internal practice costs for practitioners operating in both personal and corporate insolvency by aligning rules across the different forms of external administration. Alignment should also make it easier for creditors to understand their rights.

220. Increasing the level of penalties for breaches of these obligations will provide an appropriate disincentive to insolvency practitioners from either falsifying or failing to keep a proper record of the liquidation. Ensuring the integrity of the books of a liquidation or bankruptcy is paramount to providing creditors and regulators with the ability to monitor the progress of an external administration.

221. Clarifying the rules for the transfer of documents between incoming and outgoing practitioners will reduce legal uncertainty for the practitioners themselves (with flow-on savings from legal advice), and improve the efficiency of the process (with flow-on time savings for the respective administrations).

222. Providing the Regulator with the ability to take possession of books reduces legal uncertainty in situations where an administration or a number of

[42] All costings from this point onwards are a 10 year average taking into account a half-year of operation in the first year due to the recommended delay to the commencement of changes to the regulation of external administrations.

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administrations are vacated by a practitioner (for example, due to illness, death or for disciplinary reasons). Providing this power allows an independent party to take possession of the books while new practitioners are found to take on the files.

Table 12: Cost/ Savings estimates

Arising from	Saving/ cost
Retention and destruction of books - personal	$500,000 saving[43]
Total	**$500,000 saving**

Source: AFSA, ARITA

[43] All costings from this point onwards are a 10 year average taking into account a half-year of operation in the first year due to the recommended delay to the commencement of changes to the regulation of external administrations.

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Recommended option

223. The current divergence in rules and requirements for personal and corporate insolvency creates unnecessary complexity and costs for creditors and insolvency practitioners.

224. Aligning the procedural rules between corporate and personal insolvency appropriately balances the desire to reduce the costs incurred by practitioners, and consequently administrations, in complying with multiple funds handling rules, while still promoting good governance in insolvency administrations and ensuring that administration funds are appropriately expended.

225. These procedural requirements are necessary for the continued confidence of creditors and regulators in the performance of individual practitioners and the integrity of the overall system for insolvency services. Option 2.2 is therefore not supported.

226. Industry feedback during the various consultation processes on the package has been supportive of Option 2.3. Consultation on the draft provisions implementing Option 2.3 in 2014 raised a number of concerns that have been addressed in the final form of the legislation.

227. The Act makes it clear that an administration can have more than one bank account without requiring a Court order. This change allows administrators to continue operating trading accounts that the company had in place before the administration commences.

228. Requirements for practitioners to provide receipts for payments into and out of the administration account have also been removed as significant concerns were raised that the provisions were not workable in practice and would be unenforceable.

229. Amendments to the time period for destroying or allowing for the destruction of the books of a liquidation or bankruptcy seeks to reduce limit unnecessary compliance costs for insolvency practitioners. These benefits however need to balance the need for appropriate oversight of practitioners by both the regulator and the market. Enabling destruction of books at any time after the finalisation of an administration would inhibit the ability of creditors, regulators or other third parties to determine what has occurred in a given administration.

230. Option 2.3 has been implemented through the Insolvency Law Reform Act.

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Insurance

231. Three options have been identified to address the problems associated with practitioner insurance in order to assist in restoring confidence in the insolvency profession.

Option 3.1 – status quo

232. Currently, a registered corporate insolvency practitioner is required to maintain adequate and appropriate professional indemnity (PI) insurance and fidelity insurance to cover claims that may be made against him or her[44].

233. In corporate insolvency, a breach of these requirements is an offence of strict liability and the penalty is five penalty units. If ASIC becomes aware that a corporate insolvency practitioner has contravened these requirements, they have the option of cancelling a corporate insolvency practitioner's registration.

234. In personal insolvency, a breach of the insurance requirements is not an offence but the Inspector-General may ask a personal insolvency practitioner to provide a written explanation why they should continue to be registered.

Option 3.2 – increase severity of penalties for failing to maintain insurance

235. The penalties for failing to hold insurance could be increased from 5 penalty units to 1000 penalty units to better reflect the seriousness of the breach and to provide a stronger deterrent effect.

Option 3.3 – require notification of lapsed insurance policies

236. The Government could adopt part of the recommendation of the Senate Committee's Inquiry that the insurance industry be required to notify the regulator if a practitioner's insurance lapses or expires, as this would aid the detection of breaches of the insurance requirements.

What is the likely net benefit of each option?

Option 3.1 – status quo

237. A 'do nothing' option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by the absence of market mechanisms to effectively deter the breach of practitioner's holding insurance, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 3.2 – increase severity of penalties for failing to maintain insurance

238. It is important to ensure that there is a significant incentive for practitioners to maintain their insurances. The current criminal penalties for non-compliance with insurance requirements do not provide that incentive.

239. The penalty for a registered corporate insolvency practitioner who intentionally or recklessly fails to meet their obligation to maintain insurance coverage and who exposes third parties to potential resulting loss should be severe in order to

[44] Section 1284 of the Corporations Act.

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deter this behaviour (including cancellation or suspension of their registration as an insolvency practitioner).

240. There will be no additional regulatory burden because of increasing the penalties, as the conduct is already means for deregistration.

Table 13: Cost/ savings estimates

Arising from	Cost/ saving
Increase penalties for not holding insurance	No cost or saving
Total	**No cost or saving**

Option 3.3 – require insurers to give notification of lapsed insurance policies

241. Insurers would be required to amend their systems in order to cater for the provision of notices to regulators, as well as to accurately identify all insolvency practitioners. Industry feedback has been that an insurer's systems would generally code full service accounting firms with insolvency as one service among many as "accountants" not "corporate insolvency practitioners". These system changes would have a cost to the insurers, which may result in insurance providers opting not to offer insurance to the limited size of the insolvency practitioner population.

241.1 There are currently only a small number of providers of PI insurance for liquidators. It is estimated that the implementation of this option would result in one-off costs of $3,000,000 per insurance provider to implement IT changes to automate the provision of notices to ASIC, and to change the coding of insolvency practitioners within their systems[45].

242. Such a notification process would also be expected to lead to a number of 'false positives' as insurers may not be expected to be aware of whether the reason for the lapse in insurance was as a result of the practitioner transferring to another insurer. This would result in costs for the regulator.

Table 14: Cost/ savings estimates

Arising from	Cost/ saving
IT amendments to facilitate notification of lapsed policies – cost to insurance providers	$1.5 million cost
Total	**$1.5 million cost**

Source: Treasury assumptions

[45] Insurance policies by five providers were found. The costing provided at Table 14 represents one-off cost across the insurance industry divided over 10 years to provide an annual cost of $1.5 million.

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Recommended option

243. The recommended option is Option 3.2.

244. Where a practitioner is wilfully or recklessly continuing to operate without insurance because of not being able to obtain insurance, the potential for the practitioner to lose their registration does not operate as an effective threat to ceasing to operate in the market. Given the potential for significant losses able to be borne by creditors in a situation where a practitioner continues to operate without insurance, there must be a credible deterrent outside a stripping of registration.

245. For this reason the recommended option is to increase significantly the penalties for both operating recklessly without insurance, and acting without insurance where that breach is honest.

246. As practitioners already have an obligation to maintain insurance it is not expected that there would be a substantive regulatory cost for practitioners to comply with these new obligations.

247. Option 3.2 was implemented through the Insolvency Law Reform Act.

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4. Improving creditor oversight and engagement

248. Three options have been identified to address the problems associated with creditor oversight and engagement with corporate insolvencies.

Option 4.1 – status quo

249. Under this option, the current ability of creditors to obtain information and influence the direction of an insolvency would be maintained

250. Creditors and COIs would continue to be able to request information regarding an external administration, however the practitioner is not obligated to provide the information unless they are a registered trustee. Creditors of a company in external administration wishing to call a meeting are required to pay the costs of calling and holding the meeting, regardless of the number or percentage of debt held by the creditors in the company.

251. Corporate insolvency practitioners would also continue to hold annual and final creditors meetings, as well as send out hard copies of biannual reports to creditors, regardless of the interest of the creditors for whose benefit the meetings are held.

252. If the creditors of a company in external administration believe that the corporate insolvency practitioner appointed is not providing value for money, or otherwise should be removed, the creditors would petition the Court for the corporate insolvency practitioners' removal. However, creditors in a bankruptcy are able to remove a personal insolvency practitioner through a creditor resolution.

    252.1 Upon removal of a practitioner (whether it be a corporate insolvency practitioner, administrator or registered trustee) from a matter, the administration documents (as opposed to the books of the company itself) likely remain the property of the outgoing practitioner, subject to an express order of the Court.

Option 4.2 – Improving information available to creditors in an aligned manner

253. Under this option, amendments would be made to encourage the utilisation of COIs, remove default meeting and reporting requirements, and provide stakeholders with more powers to obtain information when they want it.

Align and consolidate rules for committees of inspection

254. The current divergent rules governing COIs in liquidations, voluntary administrations, deeds of company arrangement, bankruptcies, controlling trusteeships and personal insolvency agreements would be aligned. The rules for convening a COI would be common in all administrations, unless there are substantive reasons for divergence.

255. COIs would be convened without the involvement of a company's members.[46] Rules made under the Act will allow members to be involved where there is a reasonable prospect of them having a financial return because of the conduct of the administration.

[46] A member of a company is commonly called a shareholder.

256. Eligibility for membership of a COI would mirror the current non-pooling corporate and the personal insolvency provisions.

257. In order to assist a COI monitor the administration, the COI may be able to obtain specialist advice or assistance, with the expenses taken to be an expense of the administration.

258. Members of a COI would be banned from receiving benefits or purchasing assets from the administration without the approval of the Court or the general body of creditors.

Reporting to stakeholders generally

259. The current mandatory reporting requirements (including annual and final reporting to creditors) will be removed.

260. All insolvency practitioners would be required to inform creditors of the commencement of an external administration. As part of this disclosure, practitioners would be required to alert creditors to their rights to request information and resolve to remove the practitioner. Practitioners would also likely use this opportunity to request approval for the engagement of any related parties.

261. The obligations on all insolvency practitioners to comply with reasonable requests for information from creditors and members/debtors in liquidations, voluntary administrations, DOCAs, bankruptcies, controlling trusteeships and personal insolvency agreements would be aligned. An insolvency practitioner would be required to give, or make available, information about the administration of the estate to a creditor who reasonably requests it, as is currently the case under the Bankruptcy Act.

  261.1. Provision should be made to facilitate the provision of information within reasonable timeframes to balance the benefits of better communication between creditors and liquidators, with the potential costs to the administration of responding to such requests.

262. This ability to request information would be extended to the Department of Employment where the company's employees will be calling on the Fair Entitlements Guarantee as a result of the company's liquidation.

263. Creditors (and COIs, if delegated by creditors) would be empowered to pass resolutions imposing reasonable reporting requirements regarding the debtors affairs and administrations.

264. Rules would be made under the Act to outline when a request will not be reasonable. This would include where there are insufficient funds to pay for the preparation and dissemination of the reporting requirements.

  264.1 Reflecting the concerns of insolvency practitioners that obligating a practitioner to respond to a request for information would be abused, the final legislative instruments should provide greater clarity around when a practitioner can decline a request for information. For example, where there is insufficient funds to pay for the provision of information, the request is vexatious or the information has been or will be provided shortly.

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265. The current anomalous requirement for notice of a Court decision to wind up a company to be placed in a newspaper would be replaced with the need for the notice to be published on ASIC's Public Notices Website like all other external administration public notices.

Meetings of creditors

266. The current mandatory reporting requirements (including annual and final reporting to creditors, and annual and final meetings requirements in corporate insolvency) will be removed, as will the initial creditors' meeting in a voluntary winding up.

266.1 In order to ensure that creditors in a creditors' voluntary liquidation are able to have an opportunity to replace the corporate insolvency practitioner early in the liquidation, the threshold for holding a creditors meeting would be lowered to five per cent by value for replacement resolutions requests made in the two weeks following notification of the commencement of an administration.

266.2 A practitioner in any form of administration would be required to convene a meeting of creditors whenever: the creditors so direct by resolution (at meeting or postal vote); the COI so directs; it is so requested in writing by at least 25 per cent by value of creditors; or it is so requested in writing by less than the specified threshold of the creditors, being a creditor, or creditors who together, represent 10 per cent by value AND who have lodged with the practitioner sufficient security for the cost of holding the meeting.

266.3 Given the short timeframes involved in voluntary administrations, which reduces the practicality of relying on requests to call meetings, initial meetings in this form of administration would be retained.

267. During an administration, a resolution of any form would be able to be passed through a postal vote.

Rules regarding meetings

268. In response to the concerns of the profession and regulators during and following consultation on the proposals paper on the rules, the rules regarding the processes for calling and holding meetings of creditors should be aligned. This would impact on the rules for:

268.1 convening meetings, including the general information required to be provided in the notice sent to creditors, the rights of creditors to participate electronically.

268.2 procedures at meetings, including who must chair the meeting, adjourning meetings and what will constitute a quorum for a meeting.

269. Furthermore, feedback on consultation on the rules called for greater alignment of the rules regarding the obligations on practitioners around the admission of proofs of debt in order to ensure that practitioners are satisfying themselves of that such claims are bona fide.

269.1 One submission was made on the draft legislative instruments regarding the desirability of greater changes to the rules for proofs of debt, timing of lodgements and reviewing of proofs. These concerns should not be addressed

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as part of the legislative instruments to be made before the Act commences, but rather further consideration given. Seeking to address the concerns raised at this time would be jeopardise the making of the legislative instruments in time to facilitate the delayed commencement of parts of the package, and represent a high chance for unintended consequences due to the inherent complexity in changing these provisions.

Annual returns

270. For every estate that an insolvency practitioner administers during a year, the practitioner would be required, within a specified period after the end of that year, to give the respective regulator a return, in the approved form, in relation to the administration of that estate. This would align the laws to the current personal insolvency requirements. The current offence under the Bankruptcy Act would however be removed. Instead, the practitioner would be liable to personally pay a default late lodgement fee (the fee would be imposed as a tax).

271. This new obligation in corporate insolvency would be offset by the removal of the requirement to lodge six-monthly copies of receipts and payments with ASIC.

Option 4.3 – Better empower creditors to replace poorly performing practitioners

272. Creditors (and members in a members' voluntary winding up) in all forms of administration would be empowered to remove a practitioner through an ordinary resolution. Currently, creditors in a personal bankruptcy are able to remove a corporate insolvency practitioner without obtaining a Court-order.

273. In order to protect against abuses of process, insolvency practitioners would retain a right to apply to Court to prevent removal in restricted circumstances. The Court would not, however, be empowered to conduct a merits review of the collective decision of members/creditors to remove a practitioner.

274. Insolvency practitioners would be obligated to provide, in the initial notifications to creditors in all administrations, information on creditors' rights to remove and replace practitioners.

What is the likely net benefit of each option?

Option 4.1 – status quo

275. A 'do nothing' option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by existing legislative requirements, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 4.2 – Improving information available to creditors in an aligned manner

Align and consolidate rules for committees of inspection

276. A COI can also play a valuable role where there are contentious or substantial issues in the external administration or bankruptcy requiring the advice (particularly on industry issues), consent or ratification of a workable representative group of creditors or contributories.

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277. The provisions setting out the rights and rules for committees are spread throughout Chapter 5 of the Corporations Act. This may not facilitate their easy use and understanding by creditors. There is also significant divergence between personal and corporate insolvency rules, both in respect of key powers and obligations and in respect of procedural matters.

278. Aligning the disparate and slightly differing formulation of rules regarding the formation and conduct of committees of inspection will result in minimal education costs for practitioners, but should have small long-term savings in legal/ time costs for practitioners and creditors. Alignment is also expected to make it easier for creditors to understand their rights[47].

279. COIs provide an important means for the efficient oversight of insolvency practitioners by creditors, as well as a means for efficiently making decisions on behalf of creditors (for example, approval of remuneration). Improving the rights of COIs to obtain information from the practitioner and engage specialist advice will allow them to more effectively monitor the administration of a liquidation.

280. Under this option, a COI would be able to incur expenses obtaining specialist advice where the committee obtains external administrator or Court approval for incurring expenses. These expenses would then be taken to be incurred by a person as a member of the committee, make the expense an administration expense. It is expected that this power would be used rarely, and only where the size, expense and complexity of the administration warrants it[48]. The need for court or practitioner approval will also assist in limiting the potential for unnecessary costs being incurred by the COI.

281. Removing the statutory right of contributories to membership of a COI will reduce the compliance costs for practitioners by clearly removing the requirement for a meeting of contributories to be called. While industry practice has been to form COIs without considering contributories for some time, a recent West Australian Supreme Court decision[49] highlighted the fact that "a failure by a corporate insolvency practitioner to hold separate meetings of the creditors and contributories to determine if a COI should be established, and its membership, constitutes a contravention of s 548(1) of the [Corporations Act]".

282. While current industry practice is not to hold these meetings, the 2015 decision in *ex parte Woodings* to alter industry practice such that regulatory savings are expected from the measure due to:

- providing legal certainty to COIs already established in ongoing administrations by removing the potential for legal challenge to COI decisions or the need for Court orders to be obtained to validate the formation of established COIs; and

[47] Education expenses and ongoing savings resulting from all recommended options has been estimated as an aggregate figures. It is estimated that there will be costs of $50,000 per practitioner operating in the corporate insolvency market; and $5,000 per firm operating plus $2,000 per practitioner.

[48] It is estimated that this new power will result in additional compliance costs for practitioners and creditors by extension, of an average $500,000 per year. This figure is based on an assume cost of $100,000 per request, with the power being exercised in five large administrations per year. This cost will not be included in the formal RBM because it is classified as a cost that arises indirectly from the impact of the regulatory change (indirect cost) under the RBM framework, which is excluded from the RBM.

[49] *Re The Bell Group Ltd (in liquidation); ex parte Woodings [2015] WASC 88*

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- avoiding the need to attempt to hold meetings of contributories into the future.

Table 15: Cost/ savings estimate

Arising from	Saving/ cost
Removing requirement for meeting of contributories when forming a COI	$4 million saving
Total	**$4 million saving**

Source: ASIC, Treasury assumptions, ARITA

Reporting to stakeholders generally

283. Removing the current mandatory reporting requirements in corporate insolvency, including annual and final reporting to creditors will mean that insolvency administrations will no longer be required to incur costs for annual and final reporting to creditors where creditors are not interested in the contents.

283.1 It is expected that this amendment will save the costs associated with the development of statutory reports, as well as postage and handling costs, in creditors' voluntary winding ups where these reports would otherwise have been provided.

284. These savings would be offset by new costs resulting from a requirement for practitioners to inform creditors of the commencement of an external administration, and to report to creditors on the likelihood of a dividend within the first 3 months.

284.1 In order for creditors to take an active role in an external administration, they must be aware that the administration is underway. An initial communication outlining the basic rights of creditors provides an opportunity for greater engagement by creditors.

284.2 Aligning the requirement for the provision of a report within 3 months on the likelihood of a dividend across all forms of insolvency will encourage better understanding and engagement with creditors[50].

285. To ensure that creditors are able to obtain this information when they desire it, creditors will be able to resolve their own information requirements of practitioners. Removing any ability for creditors to obtain meaningful information regarding the administration would severely restrict their ability to monitor the administration, the conduct of the practitioner or protect their interests during the administration.

285.1 The savings from removing the reporting obligations will be offset by an expectation that creditors would exercise their new right to request reasonable reporting requirements in order to continue to require an annual report in 20 percent of administrations.

[50] These obligations already apply in relation to personal bankruptcies.

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286. Requiring an insolvency practitioner to give, or make available, information about the administration of the estate to a creditor who reasonably requests it will make practitioners more responsive to creditors, and facilitate creditors obtaining the information that they need to satisfy themselves regarding whether the provision of services by the practitioner is good value for money.

286.1 Ministerial Rules will provide for when such requests are reasonable and unreasonable in order to avoid vexatious and unnecessary requests being made which frustrate the administration or waste resources.

286.2 A rule that practitioners will be able to reject a request for the provision of information where the practitioner has otherwise made the information available to creditors, will encourage the utilisation of the practitioners' website as a means of providing information to creditors in an efficient manner.

287. Aligning the rules for calling and holding creditors is expected to result in only minimal regulatory impost for the sector given the current similarity in the regulation of meetings and the presence of industry codes of conduct which advocate similar approaches. Any cost is minimal, unquantifiable and would be offset by savings from increasing alignment and ease of understanding of these rules for liquidators and creditors.

288. Extending the ability to request information to the Department of Employment where the company's employees will be calling on the Fair Entitlements Guarantee provides the Government with the same rights that an employee would have had were the FEG scheme not in place. This change is expected to result in new costs of around $12,000 per annum. Where the Department has a right to request information that a creditor would not ordinarily be able to receive, the cost of complying with the request should sit with the Department.

289. Allowing for notices of successful applications to the Court for the winding up of a company will save practitioners the difference between the current cost of placing a notice in a national newspaper (which is estimated at $2000) and the lodgement fee for publication on the Public Notices Website (which is estimated at $153).

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Table 16: Cost/ savings estimates

Arising from	Saving/ cost
Removing annual report obligations - corporate	$5.2 million saving
Providing creditors with initial statement– corporate	$1.3 million cost
Providing creditors with rights to require reporting – corporate	$2.1 million cost
Requiring provision of 3 monthly report to creditors in all insolvencies	$12.9 million cost
Providing creditors with rights to request reasonable information	$3.9 million cost
Electronic communication[51]	$1.7 million saving
Requiring publication of certain notices on ASIC website[52]	$8.3million saving
Total	**$5.0 million cost**

Source: ASIC, Treasury assumptions, ARITA

Meetings of creditors

290. The removal of the current mandatory including initial and annual meetings in a creditors voluntary winding up, and final meetings in all forms of corporate insolvency will mean that insolvency administrations will no longer be required to incur costs for meetings of creditors where creditors are not interested.

290.1 It is expected that this amendment will save the costs associated with the holding of meetings in corporate insolvencies where these meetings would otherwise have been held in order to determine matters arising during the administration.

291. To ensure that creditors are able to call meetings when they desire it, 25 percent of creditors by value will be able to call meetings and have the cost treated as an administration cost. Removing any ability for creditors to call meetings would limit their ability to monitor the administration through face-to-face questioning of the practitioner, or to effectively and efficiently make decisions as a whole.

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[51] This figure has been updated since the Early Assessment RIS developed for the introduction of the Insolvency Practice Rules. The change reflects updated assumptions on the printing and postage saved from avoiding a mail-out. It is assumed that the report will be sent to an average of 90 creditors at a printing and postage cost of $4 per report.

[52] This figure has been updated since the Early Assessment RIS developed for the introduction of the Insolvency Practice Rules. The change reflects that the assumed cost of advertising through newspapers has been updated.

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291.1 The savings from removing the meeting requirements will be offset by an expectation that creditors would continue to call an initial meeting on 20 percent of occasions, and require an annual and final meeting in 20 percent of administrations.

292. Facilitating postal voting will provide a more efficient means for obtaining creditor resolutions on decisions needed for the smooth operation of the administration. Allowing creditors to object to a resolution being determined through a postal vote will limit the potential for practitioners utilising the mechanism as a means of avoiding appropriate scrutiny of decisions.

292.1 The costs of preparing the resolution materials, printing and postage would continue to be incurred unless the corporate insolvency practitioner has the consent of creditors to provide materials electronically. The potential for further savings by deeming consent of creditors to the electronic provision of documents could be considered as part of the Government's broader consideration of technology neutrality in the provision of meeting materials.

Better alignment of the rules regarding the calling and holding of creditor meetings will provide greater consistency for creditors involved in both corporate and personal insolvencies. In so doing, it will be easier for creditors to understand and exercise their rights and reduce the chance of unwittingly being prevented from voting due to procedural issues.

Table 17: Cost/ savings estimates

Arising from	Saving/ cost
Removing statutory meetings - corporate	$38.2 million saving
Providing creditors with rights to call meetings - corporate	$4.8 million cost
Circular resolutions	$7.8 million saving
Total	**$41.2 million saving**

Source: ASIC, Treasury assumptions, ARITA

Annual returns

293. The current obligation for corporate insolvency practitioners and receivers to lodge 6-monthly copies of receipts and payments with ASIC is an important means of accountability. However the provision of this lodgement is through providing a pdf scan of the receipts and payments. This limits both the ability of ASIC to utilise the information provided in the receipts and payments, as the information is not provided in a manipulable format, and to determine whether other information may be of interest to creditors.

294. In contrast the current annual returns completed by registered trustees in relation to all bankruptcies allows for relevant information about an administration to be provided to the regulator in a format which can be manipulated for the regulators purposes, for example to determine the practitioners' asset realisation charge or to determine industry statistics.

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294.1 It is expected that this amendment will not result in substantial savings as the same sort of information is likely to be expected, although there will be some savings from practitioners only being required to lodge information once a year instead of twice. However the final regulatory cost or saving for this reform will not be able to be determined until the form is developed by ASIC. The regulatory costs of the final form will be determined by ASIC as part of its implementation of this measure.

Option 4.3 – Better empower creditors to replace poorly performing practitioners

295. This option would provide creditors with greater control in an administration or liquidation.

296. The barriers to removal from appointment means that there is less incentive for a corporate insolvency practitioner, once appointed, to attempt to minimise the cost of the liquidation or to improve the quality of their outputs. Allowing creditors the power to remove a corporate insolvency practitioner for market-related reasons, not only where gross negligence or impropriety is present, may result in more competitive pricing of services. These impacts on pricing may influence not only the initial cost estimates quoted in order to obtain the work, but on an ongoing basis throughout the administration or liquidation (for example, if creditors feel that they are not getting value for money).

297. Breaking down the barriers to removal could also be expected to result in better communication between the corporate insolvency practitioner and creditors during the liquidation as the corporate insolvency practitioner seeks to ensure that the creditors are satisfied with the propriety of costs and appreciate the work being performed on their behalf.

298. Offsetting these benefits is the risk that creditors may however choose to unwisely replace an insolvency practitioner. Their assessments of the practitioner may be incorrect or they may misjudge the benefits of replacement compared with the costs and disruption involved in changing the practitioner.

299. There may also be circumstances where a change of practitioner is sought to obstruct the proper operation of the insolvency regime. For example, creditors being pursued for preferences may seek a change of practitioner to disrupt litigation in progress. Industry submissions to various Government consultation processes have raised concerns that a corporate insolvency practitioner's investigation and recovery efforts will be compromised with cost consequences to creditors generally, if creditors are able to remove a practitioner without Court involvement. This risk will be mitigated by allowing the Court to prevent removal where the removal is for an improper purpose.

Table 18: Cost/ Savings estimates

Arising from	Saving/ cost
Removal of practitioner via creditor resolution	$570,000 saving
Total	**$570,000 saving**

Source: ASIC, Treasury assumptions, ARITA

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Recommended option

Our recommended option is the combined implementation of Option 4.2 and 4.3.

The current framework for facilitating the provision of information to creditors during insolvencies is unnecessarily burdensome, and does not allow creditors to get the information that they desire when they need it. A clear opportunity exists to remove default reporting and meeting requirements during insolvencies where creditors are not benefiting from these obligations.

While there are significant regulatory savings involved with removing these obligations, the potential cost reductions must be balanced with the need for creditors to feel that they can actually remain aware of what is happening in a matter for which they are a beneficiary. For that reason, the Insolvency Practice Rules should require that an external administrator provide creditors with an initial statement outlining the creditors' rights and a 3-monthly statement that outlines the likelihood of a dividend in each administration.

Furthermore mandating that a resolution of creditors can only be passed through a meeting of creditors' locks in a high-cost method of communication, with no consideration of the complexity of issues to be resolved. The current regulatory saving for allowing circular resolutions of $8.12 million is based on a mailed resolution. Opportunity exists for further potential regulatory savings if the electronic provision of this information can be better provided for and this should be consulted on as part of the Government's broader consideration of technology neutrality in the provision of meeting materials.

Further alignment of broader rules regarding meetings held in external administrations will make it easier for creditors to understand their rights regardless of whether the bankrupt party is an individual or a company. It also provides an opportunity for the removal of some unnecessary prescription currently present in both the Corporations Regulations and the Bankruptcy Act.

COIs provide an efficient means for both seeking creditor advice in relation to an administration, but also as a means for approving matters on behalf of the creditors as a whole.

A consistent criticism during debates regarding the regulation of corporate insolvencies in recent years has been that there poor statistics available to inform the various options being considered. Requiring practitioners to lodge annual administrations returns in corporate insolvency, as well as in personal insolvency, will provide an efficient means for creditors to obtain high-level information about the progression of an insolvency while also facilitating the development of industry statistics.

Better facilitating creditors obtaining the information that they actually need, when they actually need it, can allow creditors to better monitor an insolvency and thereby protect their interests. However in order for creditors to actually be able to influence the actions of a practitioner there needs to be a credible threat that creditors can use the information that they have obtained under option 4.2 in order to remove a poorly performing corporate insolvency practitioner. Creditors should have the freedom to choose the service provider who they believe will provide them with the best value for money.

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Likewise, by making it easier for creditors to remove practitioners Option 4.3 will allow creditors to remove a practitioner where it is not actually in their best interests to do so. That is why creditors need to also be able to more easily obtain information regarding the conduct of the administration under Option 4.2 before exercising this expanded ability to remove the practitioner.

The current powers available to creditors to remove a corporate insolvency practitioner place too high a barrier to removal. While industry opinion on the desirability of the change is split, the experience in personal bankruptcy is that this power is seldom used. Concerns voiced by some industry players that creditors will attempt to use the power for illegitimate purposes are founded. These concerns can be mitigated largely by providing the Court with the ability to block a removal where it amounts to an abuse of the process.

Given the potential for Option 4.3 to positively change the competitiveness of the provision of insolvency services and that measures can be put in place to address potential abuse, the Option is supported.

Option 4.3, as well as changes to facilitate electronic communication and requiring publication of certain notices on ASIC's notices website, was implemented through the Insolvency Law Reform Act. It is recommended that the remainder of Option 4.2 be implemented through the Insolvency Practice Rules.

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5. Practitioner remuneration

300. Three options have been identified to address the problems associated with practitioner remuneration.

Option 5.1 – status quo

301. Under this option, provided a practitioner obtains the approval of the creditors for his or her remuneration, the form of the approval will continue to generally remain up to the practitioner subject to any requirements imposed by the practitioner's professional body. A corporate insolvency practitioner will continue to have a casting vote on a resolution for the approval of their own remuneration where the vote is deadlocked.

302. Where the company has few assets, and the expected remuneration of the corporate insolvency practitioner is $5,000 or below, the corporate insolvency practitioner will continue to be able to convene and hold a meeting to consider the remuneration resolution. If the meeting is held, and a quorum is not reached, the creditors will be taken to have approved $5,000 in remuneration for the corporate insolvency practitioner.

Option 5.2 – align obligations on practitioner remuneration

303. Under this option, the rules regarding the ability of a practitioner to obtain approval of fees, the duties of the practitioner with respect to remuneration and the ability of creditors to obtain a cost assessment, will be aligned between the corporate and personal insolvency regimes.

Obtaining approval of fees

304. When requesting approval for his or her remuneration from creditors of an administration, an insolvency practitioner would only be able to seek prospective approval based on a capped fee. The fee would need to be set through a resolution, including a written resolution, of the whole body of creditors or a resolution of a COI where one has been established. Once the initial fee cap is set, that amount may be revised later by a creditor resolution, COI resolution or by the Court.

305. A corporate insolvency practitioner would also be prevented from using a casting vote as chair of a creditors' meeting, where the resolution is one for the approval of the remuneration of the practitioner in any external administration. Where there is a conflict between a resolution by number and value, the motion would be defeated.

306. A practitioner would however, be empowered to claim a maximum fee of $5,500 without being required to attempt to hold a meeting to approve fees that failed due to lacking a quorum. Registered trustees currently have this power.

Remuneration duties

307. A practitioner would be prevented, without approval, from: directly or indirectly deriving a profit or advantage from a transaction, sale or purchase for or on account of the estate; or conferring upon a related party a profit or advantage from a transaction, sale or purchase for or on account of the estate.

308. Personal and corporate insolvency rules would also be aligned in relation to the ability of practitioners to accept gifts and benefits, provide a benefit to another

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person in order to obtain a job, and acquire property from the insolvency administration.

Cost assessment

309. ASIC, the Court or the company's creditors would be empowered to appoint a cost assessor to review and report on the reasonableness of the remuneration and costs incurred in all or part of an administration.

310. A cost assessor would be given rights to access administration records, and to require records of the corporate insolvency practitioner's firm relating to the administration (for example, time sheets or diaries) in order to complete a cost assessment. A cost assessor would be under a duty to act independently; in the interests of creditors as a whole; and avoid actual and apparent conflicts of interest. Cost assessors would only be able to report on their findings to creditors as a whole, the COI, the regulators and the court. Costs, as approved by the initiating body, are borne by the administration. The Court would have a power to set, vary or review costs.

311. The court would also be given broad powers to intervene in (for example, prevent or vary the terms of a review; remove and replace the reviewer) or to assist a review.

312. AFSA would be allowed to initiate a review of a trustee's remuneration by the Inspector-General in Bankruptcy on its own initiative, without a referral from a bankrupt or creditor.

Option 5.3 – rely on industry codes of conduct

313. Under this option the Government could request that the peak insolvency body and the professional accounting bodies consider strengthening their industry guidance to:

- provide for fee caps for prospective approval of remuneration;
- restricting the use of casting votes by a practitioner on their remuneration; and
- to allow cost assessors to review a practitioners' work.

What is the likely net benefit of each option?

Option 5.1 – status quo

314. A 'do nothing' option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by existing legislative requirements and the information asymmetry inherent in the relationship between insolvency practitioners and creditors, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 5.2 – align obligations on practitioner remuneration

315. Under this option the rules regarding the approval of remuneration and the duties of corporate insolvency practitioners with respect to remuneration will be aligned with those currently in place for personal insolvency practitioners.

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Obtaining approval of fees

316. Requiring pre-approval of a cap on fees by creditors, in conjunction with increased powers for creditors to remove a corporate insolvency practitioner, may better allow competitive forces to impact on the level of remuneration claimed by insolvency practitioners.

317. However, it would be unreasonable for practitioners to be bound by an estimate of cost or time made prior to appointment (at least unless they voluntarily agree to be so bound in a particular matter). This risk can be mitigated by allowing practitioners to seek remuneration above the initial cap through a new creditor resolution or resolution of a COI.

318. The proposal will encourage increased clarity of understanding about the expected level of remuneration between the approving creditors and the practitioner. It is expected that there would be a negligible regulatory cost for practitioners as this is currently considered to be industry best practice[53].

319. The proposal will remove the need for convening a meeting for administrations where the work involved, or the assets in the administration, is not expected to exceed the maximum default cost for an administration.

320. The option is estimated to save practitioners from incurring unnecessary costs of calling and holding a meeting in half of all low asset administrations, where the only need for the meeting is obtaining approval of remuneration. Such a cost is estimated to not be incurred in the other half of low asset administrations as there is insufficient funds to pay any remuneration that would be approved, and would have been uncommercial for the practitioner to incur any such expense. The measure is therefore estimated to save the insolvency industry $11.8 million per year.

321. Corporate insolvency practitioners would also be banned from using a casting vote for a resolution on his or her own remuneration will remove the perception of, and potential for, conflict of interest in relation to remuneration resolutions. Corporate insolvency practitioners may however incur Court costs for remuneration approval where there has been a deadlock instead of dealing with the issue in the creditors meeting[54].

Remuneration duties

322. The alignment of insolvency practitioners' duties regarding remuneration will result in explicit rules preventing a corporate insolvency practitioner deriving, or conferring upon a related party, a benefit without approval by the creditors. The alignment of insolvency practitioners' duties will also reduce complexity for unsophisticated creditors dealing with both systems (for example, in relation to the administration of interrelated small companies).

323. The proposal will potentially result in increased costs to the administration due to the need for a resolution to be passed in situations where previously no agreement was needed, but will remove the potential for conflicts of interest in relation to the conferring of a benefit on a related party (for example, a family

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[53] ARITA Code of Conduct, clause 15.2.2.

[54] See submissions of the IPA and ICA to the *Options Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia.*

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member etc.). The measure is unquantifiable, but there may be a small administrative increase in costs.

Cost assessment

324. It can be difficult for creditors to assess the reasonableness of a practitioner's claim for remuneration. This Option will give creditors the power to obtain the information that they need regarding the conduct of an administration from an independent third party.

325. This option will assist in providing creditors with the information that they need in order to be able to meaningfully exercise their rights to challenge a practitioner's remuneration (or other rights, such as the right to replace a practitioner).

Table 19: Cost/ Savings estimates

Arising from	Saving/ cost
Introduction of default maximum remuneration – corporate	$11.3 million saving
Provide creditor right to appoint a reviewing practitioner – corporate	$240,000 cost
Total	$11.0 million saving

Source: ASIC, Treasury assumptions, ARITA

Option 5.3 – changes to industry codes of conduct

326. Effective self-regulation can limit the presence of overly prescriptive regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations. However, community cynicism regarding the insolvency industry regulating itself may lead to a distrust of any increased reliance on self-regulatory measures.

327. It is not expected that the changes to the code of conduct would have a substantive regulatory change, just as the same changes under Option 5.2 are not expected to have a regulatory saving.

328. The cost of appointing a reviewing practitioner would not be expected to differ to Option 5.2.

329. Unlike under Option 5.2, industry regulation could not override statutory requirements to obtain approval for remuneration and therefore would not be able to provide the savings through providing maximum default remuneration.

330. Furthermore, industry codes of conduct do not provide legal obligations, which parties other than a professional body can enforce. This may therefore limit the scope of the measures to be enforced compared to Option 5.2.

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Table 20: Cost/ savings estimates

Arising from	Saving/ cost
Provide creditor right to appoint a reviewing practitioner – corporate	$240,000 cost
Total	$240,000 cost

Source: ASIC, Treasury assumptions

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Recommended option

It is recommended that Option 5.2 be implemented.

This option will reduce unnecessary costs for the approval of remuneration in low-asset insolvencies, assist creditors in both personal and corporate insolvencies to better understand when a practitioner can confer benefits on related parties. This option will also assist in providing creditors with the information that they need in order to be able to meaningfully exercise other rights, such as the right to replace a practitioner.

Not unexpectedly there has been much industry comment on potential changes to practitioner remuneration during the various consultation processes. These comments have rarely challenged the desired outcomes but instead focused on the practical implications and potential consequences of the draft provisions.

Amongst other things, Option 5.2 seeks to limit the misuse of disbursements by creditors through allowing creditors to control the use of disbursements where the practitioner or a related party would receive a profit or advantage.

Insolvency industry submissions in the latest consultation remained strongly critical of a measure included in the Insolvency Law Reform Act that requires that insolvency practitioners obtain approval from creditors for the engagement of the practitioners firm. Most modern practice structures engage all staff (including potentially the corporate insolvency practitioner themselves), computer and office equipment, stationery and office supplies through related entities. The operation of this new obligation should be monitored.

Amendments were also made to replace the obligation not to ‘give up’ remuneration which is present in the Bankruptcy Act, the meaning of which remains unclear despite its long presence in the law, with the obligation not to give any inducement to secure an appointment as a corporate insolvency practitioner to a particular administration which is currently present in the Corporations Act.

It has been six years since the completion of the 2010 Senate Inquiry and the ARITA code of professional practice has been amended twice during that time. Despite these efforts there has been little change in the confidence in which the market has with the profession as indicated by ASIC’s 2013 stakeholder survey. Judicial concern with current industry practices around remuneration has also been commented on recently indicating that industry efforts to address community concerns in the absence of regulatory reform have failed.

Option 5.2 has been implemented through the Insolvency Law Reform Act, however this new requirement should be monitored given the ongoing industry concern with obtaining creditor approval to engage their staff.

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6. Improving information for corporate insolvency practitioners

331. Five options have been identified to address the problems associated with insolvency practitioners obtaining the RATA and books of the company from the company's directors in order to improve the efficiency of external administrations.

Option 6.1 – status quo

332. Under this option, where the directors of a company wish to wind up their company, the directors call a meeting of the company. At that meeting a corporate insolvency practitioner will be appointed. After that meeting the directors will be continue to be obliged to provide the corporate insolvency practitioner with a completed report as to affairs (RATA).

333. Where directors fail to submit a detailed RATA early in an administration:

- the corporate insolvency practitioner will continue to expend additional time and expense identifying the company's assets and liabilities and getting directors to comply with their statutory obligations; and

- the corporate insolvency practitioner may continue to approach ASIC under the Corporate insolvency practitioner Assistance Program (LAP). The LAP seeks the provision of the completed RATA or the company's books and commences prosecutions against non-compliant directors.

334. Where ASIC prosecute a director for breaching their obligations, the Court can continue to apply a penalty of 10 penalty units in a creditors voluntary liquidation or 25 penalty units in a court-ordered liquidation.

Option 6.2 – require RATA to be provided at point of appointment of corporate insolvency practitioner

335. Under this option, where a director wishes to place his or her company into liquidation, the director would be required to provide a RATA to the corporate insolvency practitioner at the company meeting at which the corporate insolvency practitioner is engaged.

336. If a RATA is not provided the practitioner would not accept the appointment.

Option 6.3 - Administratively suspend a director for failure to provide RATA or books of company

337. Under this option, a new 'contingent' disqualification provision for directors that fail to comply with their obligations to provide a report as to affairs (RATA) or to provide the books and records of the company to the registered corporate insolvency practitioner could be included in the Corporations Act. The new process could be utilised by ASIC either as an alternative or in addition to criminal prosecution.

338. Under the new scheme, ASIC would provide a warning notice to the director. If the director did not comply with their obligations or provide a reasonable excuse, ASIC may then formally demand compliance by the director. If the director did not comply with the demand, ASIC would be required to file a

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notice of disqualification on the public record. Upon being recorded on the public register, the director would be prohibited from managing a company.

339. There would be a delay after lodgement and notice to the director before the suspension became effective, to enable directors to seek judicial review. In particular, a director would be able to approach a Court to prevent the disqualification from taking effect where the director has a reasonable excuse for not providing the RATA or the books and records.

340. The disqualification would come to an end upon a person complying with their lodgement obligations; upon the completion of the insolvency administration; or after three years of non-compliance.

Option 6.4 – improve the RATA form

341. Under this option, the content and form of the RATA could be revised by ASIC to make the form more user-friendly and easier for directors to understand and complete.

Option 6.5 – increase the penalty level for failure to provide RATA

342. Under this option, the penalty for failure to lodge a report as to affairs would be increased to 50 penalty units and aligned across all forms of insolvency.

What is the likely net benefit of each option?

Option 6.1 – status quo

343. ASIC has noted that the failure to submit a detailed RATA early in an administration results in:

- the corporate insolvency practitioner expending additional time and expense identifying the company's assets and liabilities and getting directors to comply with their statutory obligations; and
- the corporate insolvency practitioner approaching ASIC under the Corporate insolvency practitioner Assistance Program (LAP). The LAP seeks the provision of the completed RATA or the company's books and commences prosecutions against non-compliant directors.

344. A 'do nothing' option is to be considered in cases where problems may be self-corrected by market mechanisms. As the problems are caused by the failure of the existing legislative requirements to encourage directors to provide meaningful information to insolvency practitioners in a timely fashion, maintaining the status quo and hence doing nothing will not resolve the issues.

Option 6.2 – require RATA to be provided at point of appointment of corporate insolvency practitioner

345. This option would not place a new obligation on directors but rather bring forward the point at which the directors of a company are expected to have prepared the RATA, and is therefore not expected to have a regulatory cost for directors. By requiring the RATA to be prepared earlier, corporate insolvency practitioners will be able to provide information to creditors earlier about the administration, which will better enable creditors to exercise their rights to

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replace a corporate insolvency practitioner before the costs of changing become prohibitive. This option will have unquantifiable cost savings for insolvency practitioners who would not be required to seek the RATA from directors at the later point in time.

346. The option would not however address issues regarding the non-provision of the RATA in a court-ordered winding up, where it would be expected that directors are less likely to be forthcoming in providing the information[55].

Table 21: Cost/ savings estimates

Arising from	Cost/ saving
Requiring RATA earlier	No cost or saving
Total	**No cost or saving**

Option 6.3 – Administratively suspend a director for failure to provide RATA or books of company

347. This option would seek to achieve a similar outcome as that currently provided for in personal insolvency[56] with the regulator assisting insolvency practitioners to obtain important information regarding the company under administration, which will assist in the efficient completion of the winding up.

348. The measure may assist in addressing phoenix activity in limited circumstances where a director has transferred assets out of their initial company (OldCo) into a new company (NewCo), placed OldCo into liquidation, is refusing to assist the corporate insolvency practitioner in completing the winding up of OldCo and is managing NewCo.

349. This option was included as part of the 2012 Bill. The measure was criticised by company directors for:

- imposing a penalty that is not proportionate to the misconduct;
- failing to provide appropriate Court oversight to the new power for ASIC to disqualify directors;
- providing insufficient procedural fairness;
- inappropriately balancing the power of ASIC with the rights of the individual directors; and
- failing to recognise the significance of disqualifying directors.

350. The option was further criticised by insolvency practitioners for not addressing a director's incentive to breach their obligations. In particular, in a no-assets,

[55] Where the liquidation has commenced as a result of the directors actions it can be expected that directors are more engaged in the process as they are responsible for commencing the external administration in the first place.

[56] Section 77CA of the Bankruptcy Act; with an offence provision for non-compliance in section 267B.

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no-records matter, a director that is attempting to avoid their obligations to provide information may be able to avoid disqualification by delaying the process and ensuring that the company administration finishes before the disqualification starts.

351. This option has been assessed as having a regulatory cost on directors of $4.5 million[57].

Table 22: Cost/ savings estimates

Arising from	Cost/ saving
Administrative banning of director for failure to provide RATA	$0.2 million cost
Total	**$0.2 million cost**

Source: Treasury assumptions

Option 6.4 – improve the RATA form

352. This non-regulatory option would make it easier for directors to complete their regulatory obligations, which can be expected to result in more directors either choosing to complete the form or completing the form in a manner which results in corporate insolvency practitioners obtaining the information they need to commence a winding up in an efficient manner.

353. The current RATA form approved by ASIC remains fundamentally the same as the Statement of Affairs prescribed in the Uniform Companies Acts in 1961. A large number of the questions are no longer relevant in the modern economy and can be confusing for directors who are required to fill out the form.

354. A survey of insolvency practitioners undertaken in 2011 clearly indicated that there was considerable dissatisfaction with not only the non-provision of books and RATAs but also with the inadequate information received by corporate insolvency practitioners in many RATAs. Corporate insolvency practitioners blamed not only the directors themselves for this, but also the incomprehensibility of the form used[58].

355. The savings from this Option are unquantifiable as they would be heavily dependent on the changes made to the form, including to the length and complexity of the document.

[57] This figure is based on 1018 instances of non-provision of RATA and assumes that 50% of directors would comply following receipt of a first notice; 20 % would challenge the notice; and 30% would ignore the first and second notices. It is further assumed that a director would take 20 minutes to read and comprehend each notice, and that if a director wishes to challenge that they would incur the costs for 2 hours of legal advice.

[58] Keenan P J, *An appraisal of the report as to affairs*, March 2012, http://www.arita.com.au/docs/events-documents/the-rata---research-paper---keenan---2012---ipa-tts.pdf?sfvrsn=0

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Table 22: Cost/ savings estimates

Arising from	Cost/ saving
Improve usability of RATA form	Unquantifiable
Total	Unquantifiable

Option 6.5 – increase the penalty level for failure to provide RATA

356. This option would provide a more appropriate penalty for breaches of the directors' obligation to provide corporate insolvency practitioners with a report as to affairs thereby providing a better disincentive for breaches. It would also remove the unjustified divergence between the penalty levels for identical conduct based of how the insolvency proceedings have commenced.

357. Increasing the penalty for breaches of these provisions is expected to have a positive impact on the rate of compliance, with positive flow on impacts for the efficiency of those insolvencies.

358. Increasing the penalty quantum will not have a regulatory impact on any individual, as a practitioner is already obligated to hold insurance.

Table 23: Cost/ savings estimates

Arising from	Cost/ saving
Increase penalty levels	No cost or saving
Total	No cost or saving

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Recommended option

It is recommended that Options 6.2 and 6.5 be adopted through legislative amendments concurrently with ASIC taking action to implement Option 6.4.

Option 6.2 was raised by the insolvency industry and ASIC during various consultations as an efficient means of obtaining the RATA in a creditor's voluntary winding up. As the measure would not add any new regulatory burden on directors but merely draw forward the point at which the document must be provided, it is expected to avoid unnecessary expense for corporate insolvency practitioners in seeking to obtain the document without placing any undue burden on directors or involving the regulator.

However while Option 6.2 addresses the non-provision of books and the RATA in creditors' voluntary liquidations, applying a similar rule in a court ordered liquidation would not be feasible. A different means of encouraging compliance with these obligations in order to reduce the costs on administrations from non-compliance is therefore necessary.

The high rate of non-compliance may reflect the complexity of the RATA form and confusion that directors are facing in completing it. However the level of maximum penalty under the law does not appear to be providing the necessary deterrent for directors who face a choice of whether to comply or not, particularly as the average fine per offence in the 2013/14 was around $1261. If the director has breached their obligations in the lead up to the external administration of the company such a fine for frustrating efforts to uncover those breaches may appear attractive.

It is appropriate that if the penalty for not providing a RATA is increased, that compliance does not continue to be unnecessarily difficult for directors. Updating the form to make it easier to understand for directors would also be expected to have an as yet unquantified positive regulatory saving.

Some form of mechanism to disqualify directors based on the non-provision of a RATA or books and records was clearly supported by the insolvency industry throughout the various consultations on the package. However director groups who noted that any process that could result in the disqualification of directors should be subject to either Court oversight or strong natural justice protections before the power could be exercised vehemently opposed it. Attempts to mitigate these concerns were not successful as any such efforts resulted in a process that could be too easily gamed to frustrate the administration by delaying the provision of the documents.

Option 6.5 was implemented through the Insolvency Law Reform Act. Options 6.2 should be implemented as part of the next passage of legislative reforms to the insolvency law whenever that may be.

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Consultation on these options?

2010 Senate Inquiry

359. During its inquiry, the Senate Committee received 94 submissions from industry representatives, industry participants, academics, Australian Government agencies and other affected parties. It also held hearings in Canberra, Adelaide, Newcastle and Sydney.

360. Concerns were raised during the Inquiry about a perceived lack of regulatory oversight of corporate insolvency practitioners by ASIC. In particular, a perception that ASIC:

- pursues a reactionary and slow approach rather than a proactive approach to the supervision of corporate insolvency practitioners and liquidations; and
- is reluctant to take enforcement action when a complainant, such as a creditor or director, has their own private remedies such as the right to seek orders from the Court.

361. The committee also received submissions, and testimony, on a wide range of issues including:

- the current level of regulatory oversight of corporate insolvency practitioners and administrators;
- the timeliness and cost-effectiveness of the CALDB;
- the difficulty of obtaining private remedies against a corporate insolvency practitioner;
- the level of remuneration charged by insolvency practitioners; and
- a range of miscellaneous issues regarding the adequacy of a range of basic rules regarding maintaining insurance cover, record keeping rules and other procedural requirements in respect of which there had allegedly been abuses.

2011 Options Paper

362. 34 submissions were received in response to the options for reform outlined in the Options Paper released on 2 June 2011.

363. Generally, the submissions from industry stakeholders favoured alignment of the corporate and personal insolvency systems. This was, however, subject to comments that change should only be made where it was considered appropriate in the circumstances.

364. The majority of submissions from private individuals expressed disappointment in the Options Paper as those individuals did not feel that the failures of ASIC to act on complaints were adequately recognised or addressed.

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365. Following the receipt of submissions, Treasury officials met with key industry stakeholders to discuss the problems raised by the submissions, and the options for addressing those problems.

2011 Proposals Paper

366. 29 submissions were received in response to a Proposals Paper released by the former Government on 14 December 2011. The submitters were similar those that submitted to the earlier Options Paper.

367. Generally, the submissions from industry stakeholders favoured alignment of the corporate and personal insolvency systems. This was, however, subject to comments that change should only be made where it was considered appropriate in the circumstances.

368. Submissions from private individuals continued to express disappointment that the recommendation of the Senate Economics References Committee to remove responsibility for corporate insolvency from ASIC was not agreed to.

369. Following the receipt of submissions, Treasury officials met with key industry and private stakeholders to discuss the problems raised in the submissions. Those views were taken into account in drafting the exposure draft of the Insolvency Law Reform Bill, which was released in 2012.

Exposure of the draft Insolvency Law Reform Bill 2012

370. Following release of the Exposure draft of the Bill on 19 December 2012, Treasury and the Attorney-General's Department held several roundtable consultation sessions with interested stakeholders and received 16 written submissions.

371. Industry comments received through both formal submissions and industry roundtables were broadly supportive of the Bill. The consultation process highlighted a number of areas where unintended consequences were likely as a result of the draft Bill.

372. Directors were strongly critical of the measure relating to the disqualification of directors that failed to provide the corporate insolvency practitioner with the company's books, records or a RATA on the grounds that it was unjustifiably harsh. That proposal was removed from the draft *Insolvency Law Reform Bill 2014*.

Exposure of the draft Insolvency Law Reform Bill 2014

373. The proposed legislative package was released for community consultation in late-2014, with targeted consultation with industry stakeholder groups undertaken during the consultation period in order to identify and deal with identified issues in an efficient manner.

374. In conjunction with the release of the legislative package, a proposals paper on the regulations and other legislative instruments was also released for public comment. Specific consultation with interested stakeholder groups was then organised in order to identify issues and ensure that the suggested reforms to be included as subordinate legislation will be able to be implemented as envisioned.

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375. Further unintended consequences were uncovered as part of the consultation process on the Bill, and further refinements were made to the drafting of a range of provisions.

2014 Proposals paper on legislative instruments

376. A proposals paper was released outlining what would be included in the legislative instruments made under the Act. 5 submissions were received from the insolvency profession, accounting bodies and regulators.

377. The proposals paper formed the basis of the draft legislative instruments taking into account the submissions made. The draft legislative instruments were released for consultation in 2016.

Financial System Inquiry

378. The Financial System Inquiry draft report released in 2014 asked for views on the costs and benefits of implementing the 2012 proposals to reduce the complexity and cost of external administration for SMEs.

379. The final Financial System Inquiry report found that "in some cases, external administration and bankruptcy processes overlap, causing disproportionate complexity and cost. This particularly affects small and medium-sized enterprises, where the owner faces personal bankruptcy if their incorporated business fails" and that the "complaints and dispute resolution processes relating to the external administration regime could be improved.[59]"

Exposure of the draft Insolvency Practice Rules and Accompanying Regulations 2016

380. The proposed legislative instruments have been released for community consultation in October-2016, with targeted consultation with industry stakeholder groups undertaken before and during the consultation period in order to again identify and deal with potential issues in an efficient manner. 11 submissions from industry bodies, individual liquidators and the community sector were received. Further unintended consequences and miscellaneous technical fixes were uncovered as part of the consultation process on the instruments, and refinements made to the drafting of a range of provisions.

Post implementation consultation

381. To review the effectiveness of the changes it is proposed that the Treasury, Attorney-General's Department, ASIC and AFSA undertake a review five years after implementation. The review would assess the impact of the proposal and its effectiveness in meeting its objectives, taking account of any implementation and administrations costs.

[59] FSI 2014, page 266

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Implementation and evaluation of the chosen options

382. The recommended options have been partially implemented through the *Insolvency Law Reform Act 2016*. The options will be fully implemented through amending regulations and new legislative instruments known as Insolvency Practice Rules. The Rules will be made by the relevant Ministers responsible for corporate and personal insolvency.

383. Where amendment is necessary to administrative processes, which are the responsibility of ASIC or AFSA, those changes will be consulted on by those agencies in compliance with the Australian Government Guide to Regulation.

384. To review the effectiveness of the changes it is proposed that the Government undertake a review five years after implementation. The review will assess the impact of the proposal and its effectiveness in meeting its objectives, taking account of any implementation and administrations costs.

Status of RIS at major decision points of the proposal

385. An Early Assessment RIS was prepared to inform the decision of the Government to release of the draft *Insolvency Law Reform Bill 2014* in 2014.

386. An updated Early Assessment RIS was prepared to inform the decision of the Government to introduce the *Insolvency Law Reform Bill 2015* into Parliament. A copy of this RIS was included in the Explanatory Memorandum to the Bill.

    386.1 That Early Assessment RIS projected a regulatory saving of $50.1 million per year.

    386.2 The difference in the regulatory costing results primarily from changes in the number of external administrations per year as an input, minor policy changes (for example, new conditions on practitioners and the partial delay of the commencement of package) and updated assumptions for the cost of printing and postage of documents to creditors.

387. The Early Assessment RIS was updated to inform the decision of the Governor General to make the *Corporations and Other Legislation (Insolvency Law Reform) Regulations 2016*, the *Corporations (Fees) Amendment Regulations 2016* and the *Insolvency Law Reform (Transitional Provisions) Regulation 2016.*

388. The Final Assessment RIS informs the decision of the Minister of Revenue and Financial Services to make the *Insolvency Practice Rules (Corporations) 2016* and the Attorney-General to make the *Insolvency Practice Rules (Bankruptcy) 2016*.

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Appendix 1

Glossary

AA Fund	the Assetless Administration Fund
AAT	the Administrative Appeals Tribunal
AFSA	the Australian Financial Security Authority
ARITA	The Australian Restructuring Insolvency and Turnaround Association
ASIC	the Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Bankruptcy Act	collectively refers to the *Bankruptcy Act 1966* and the *Bankruptcy Regulations 1996*
CALDB	Companies Auditors and Corporate insolvency practitioners Disciplinary Board
COI	committee of inspection or committee of creditors. A COI is a small group of creditors appointed by the creditors as a whole to assist the corporate insolvency practitioner, approve fees, and approve the use of some of the corporate insolvency practitioners powers on behalf of all creditors
corporate insolvency	the insolvency of corporate entities
Corporations Act	collectively refers to the *Corporations Act 2001,* Corporations Regulations 2001, the *Corporations (Fees) Act 2001*, the *Corporations (Review Fees) Act 2003*, the Corporations (Fees) Regulations 2001, and the Corporations (Review Fees) Regulations 2003.
external administration	except where the context otherwise provides, includes the voluntary administration of a company, the winding up of a company, the administration of a scheme of compromise or arrangement or a DOCA, or as a receiver or controller over all or part of the assets of a company.
insolvency	except where the context otherwise provides, both personal and corporate insolvency
insolvency practitioner	both registered corporate insolvency practitioners and registered trustees
Official Trustee	the Official Trustee in Bankruptcy **-** a government trustee able to administer personal bankruptcies

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official liquidator	a registered corporate insolvency practitioner who is able to accept all appointments to externally administer corporate entities including court-ordered liquidations, provisional liquidations and all cross-border insolvency matters
personal insolvency	the insolvency of natural persons
Personal Insolvency Agreement	a personal insolvency agreement is a voluntary, statutory alternative to bankruptcy which is dealt with in Part X of the Bankruptcy Act
registered corporate insolvency practitioner	a natural person who is registered with the Australian Securities and Investments Commission to undertake the external administration of corporate entities (except court-ordered liquidations, provisional liquidations and some cross-border insolvency matters)
registered trustee	a personal insolvency practitioner is a private practitioner who administers personal bankruptcies
regulators	ASIC and AFSA
RATA	A report as to affairs prepared under the Corporations Act

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Appendix 2

Regulatory Burden Measurement

Average Annual Compliance Costs (from Business as usual)				
Costs ($m)	**Business**	**Community Organisations**	**Individuals**	**Total Cost**
Agency - Treasury	**28,784,323**	**0**	**0**	**28,784,323**
within portfolio	**28,784,323**	**0**	**0**	**28,784,323**
Outside portfolio - AGD	**307,034**	**0**	**0**	**307,034**
Total by Sector	**29,091,357**	**0**	**0**	**29,091,357**
Cost offset ($m)	**Business**	**Community Organisations**	**Individuals**	**Total by Source**
Agency - Treasury	-78,696,506	0	0	-78,696,506
Within portfolio	-78,696,506	0	0	-78,696,506
Outside portfolio – AGD	-498,773	0	0	-498,773
Total by Sector	-79,195,279	0	0	-79,195,279
Proposal is cost neutral?	**□ yes**	**□ no**		
Proposal is deregulatory	**□ yes**	**□ no**		
Balance of cost offsets	**-$50,103,922**	**$0**	**$0**	**-$50,103,922**

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