MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Regulatory Impact Statement

The regulation of insolvency practitioners

Agency Disclosure Statement

This regulatory impact statement has been prepared by the Ministry of Business, Innovation and Employment.

It provides an analysis of options to improve the integrity of the insolvency system by increasing public confidence that persons accepting insolvency engagements will carry out insolvency processes in accordance with their statutory duties.

There are some constraints in the analysis. It is not possible to quantify the benefits associated with the overall objective of increasing public confidence in any meaningful way.

In addition, the options considered in this RIS include the possibility of introducing a licensing system for insolvency practitioners. It is very difficult to predict how effective a licensing regime will be because the quality of the outcomes crucially depends on the culture of the regulator and its willingness to make hard choices when the need arises.

The issues giving rise to the policy objectives relate to practitioner dishonesty, debtor-friendliness and sub-standard decision-making. Quantifying the magnitude of these issues is difficult as every insolvency case varies in circumstances and outcomes; what may be a reasonably expected outcome in one case may not be in another. Additionally, much of the poor practice goes without challenge because of the cost of taking court action.

As a result, many of the costs and benefits of the options are also difficult to quantify.

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List of Acronyms

CAANZ	Chartered Accountants Australia and New Zealand
Court	High Court
DOCA	Deed of Company Arrangement
IESBA	International Ethical Standards Board for Accountants
MBIE	Ministry of Business, Innovation and Employment
NOCLAR	Non-compliance with Laws and Regulations
NZICA Act	New Zealand Institute of Chartered Accountants Act 1996
Registrar	Registrar of Companies
RITANZ	Restructuring, Insolvency and Turnaround Association of New Zealand
SME company	Small and medium enterprise company
SOP	Supplementary Order Paper

Executive Summary

1. Insolvency practitioners have broad statutory powers to manage and make decisions about other people's money and other assets. They also have commensurate statutory duties. For example, the liquidator of a company is, among other things, required to take possession of, protect, realise, and distribute the assets or the proceeds of realisation of the assets of the company to its creditors in a reasonable and efficient manner.

Problems

2. There are two problems:

   a. Problem I relates to practitioners who are incompetent, dishonest and/or debtor-friendly. It is a serious problem for two reasons. First, it occurs frequently in the SME company liquidation part of the market. Second, incompetence, dishonesty and debtor-friendliness almost always lead to unsatisfactory outcomes for creditors, i.e. the people whose interests that liquidators are supposed to protect first and foremost. The Inland Revenue Department, which is the largest creditor organisation in New Zealand, and the major four trading banks, advise that they see numerous instances of this form of conduct, predominantly in SME company liquidations.

   b. Problem II relates to wider concerns that the standard of insolvency practice is generally not as high as it should be. There is, for example, evidence that practitioners who are not members of professional bodies cannot be held accountable for the mistakes they make. This is problematic given the role insolvency practitioners play in managing and protecting other people's money and property. Practitioners within the industry also believe that standards could be raised if insolvency-specific professional development courses were to be developed. However, we consider that it is difficult to determine whether the problems are sufficiently large to justify government intervention.

Option 2

3. Option 2 (which is referred to as Solution A in the Cabinet paper) comprises a set of about 30 enhancements to the *Companies Act 1993* (the **Companies Act**), and *Receiverships Act 1993* (the **Receiverships Act**). There is a strong case for making these changes because they are squarely targeted at many of the problems (particularly Problem I) and can be implemented at little cost. These measures include such things as:

   a. broadening the statutory disqualifications for being an insolvency practitioner by making the list of dishonesty-related convictions comprehensive and adding new conflict of interest rules;

   b. making it much more difficult for the debtor company's directors and owners to appoint debtor-friendly liquidators. These changes will consequentially give creditors the powers they need for the appointment of reliable practitioners. They will also substantially reduce the opportunities for debtor-friendly liquidators to get work; and

   c. reducing 'phoenixing' by directors and shareholders of the debtor company by voiding the transfer of a company's assets once a liquidation application has been filed (with some exceptions).

Option 3

4. The case for Option 3 (Insolvency practitioner licensing and independent oversight by the Registrar of Companies) is weaker. There is evidence to indicate that licensing/independent oversight will produce benefits in addition to those achieved by implementing Solution A on its own. However, it is not sufficiently clear whether the additional benefits will be sufficiently large to outweigh the associated costs.

5. The main tangible cost will be the direct costs of independent oversight. We estimate it to be $750,000-$1 million a year.

6. There are two significant intangible costs, namely:

   a. First, there are 'closed shop' type risks with occupational licensing, such as imposing barriers to entry that are higher than are needed to protect the public interest. It is not possible to anticipate how large these risks might be. However those risks will be ameliorated by providing the Registrar with the power to prevent frontline regulators from making material changes to the licensing system, on public interest grounds.

   b. The other is a risk related to the difficulties of removing government licensing regimes once they have been established. Our view is that if there are significant doubts about whether licensing should be introduced, then it is better to err on the side of caution knowing that the decision can be reversed than to establish a licensing regime.

Conclusions

7. We consider that the best approach is to implement Solution A (i.e. the 30 or so Companies Act and Receiverships Act enhancements) and carry out a post-implementation review no less than three years after they have come into force. This will provide the foundation for making more informed decisions than can currently be made about whether the Solution A changes alone are sufficient, or whether practitioner licensing and independent oversight are also needed.

Context, status quo and problem definition

Context

8. Corporate insolvency arises when a company is unable to pay its debts when they fall due and/or has liabilities that exceed its assets. The main aim of corporate insolvency law is to provide incentives for any remaining assets of the company to be reallocated to their most efficient use. A business should be rehabilitated if it is viable. If not, the company should be liquidated, the assets realised and distributed to creditors in accordance with the legislative and regulatory framework outlined under the Companies Act, and with a minimum of delay and expense.

9. Several OECD studies have drawn the connection between a high cost to close a business to weak productivity outcomes through less scope for productivity spill-overs, and the misallocation of labour, capital and skills.[1]

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

11. There are two fundamental principles of insolvency policy: equal sharing between unsecured creditors (also called the *pari passu* principle) and having an orderly process immediately preceding and during the formal insolvency administration. These two principles are interdependent: to give effect to both principles of equal sharing and having an orderly process, all creditors must be seen as one.

12. Insolvency practitioners are appointed to carry out certain statutory processes: liquidations, receiverships, voluntary administrations and compromises. Insolvency practitioners hold and manage other people's assets in a fiduciary capacity and make decisions that can materially affect the total amount available for distribution to creditors. He or she works in the interests of creditors, but those creditors are usually diverse and multiple. As a body creditors have rights and powers, but as individual creditors information asymmetries exist and the costs outweigh the benefits of:

    a. monitoring the insolvency practitioner's judgements and decisions; and

    b. pursuing redress from insolvency practitioners through the courts.

13. The alternative to a singularly managed process could be a free-for-all where creditors would be involved in a race to the courts to pursue their rights against the debtor company and enforce the resulting court decisions. A free-for-all would be highly unsatisfactory for the following reasons:

    a. The debtor company's assets would be wasted in defending multiple court actions from individual creditors, and creditors would incur unnecessary litigation-related costs;

[1] OECD, *Insolvency regimes and productivity growth: a framework for analysis*, Economic Policy Committee, 25 March 2016, paragraph 2.

b. It would be unfair on creditors who ‘came too late’ to the race because they would have a right to enforce their claims, but there will be no assets to enforce them on; and

c. It would be unfair on creditors who are owed small amounts and consequentially decide not to litigate.

Status quo

How insolvency practitioners are appointed

14. Insolvency practitioners include liquidators, administrators and deed administrators, appointed under the Companies Act, receivers governed under the Receiverships Act, and trustees appointed under Part 5 of the Insolvency Act 2006. Insolvency practitioners also administer compromises[2] under Part 14 of the Companies Act.

15. A liquidator may be appointed by:

a. special resolution of shareholders entitled to vote and voting on the question; or

b. the board of the company (i.e. the directors) on the occurrence of an event specified in the constitution; or

c. the court, on the application of various parties, notably creditors.

16. Under section 241AA(2) of the Companies Act shareholders or directors can voluntarily appoint a liquidator up to 10 working days after the service on the company of a liquidation application by a petitioning creditor. A voluntary administrator may be appointed during the same period under section 239(1) of the Act.[3]

17. An administrator may be appointed by:

a. the company; or

b. the liquidator if the company is in liquidation; or

c. a secured creditor holding a charge over the whole, or substantially the whole, of the company’s property; or

d. the court.

18. A receivership is usually initiated by a company’s secured creditor (i.e. a bank or a private debenture holder) based on the terms of the security agreement, if the company fails to repay its debts.

Current insolvency practitioner disqualification criteria

19. The Companies Act and the Receiverships Act provide a set of disqualification criteria in relation to who can be appointed as insolvency practitioners, and gives the High

[2] The Companies Act provides for an insolvent company to continue to operate by agreeing a compromise agreement with its creditors. A compromise arises when a company and its creditors reach an agreement cancelling all or part of the company’s debts, varying the rights of its creditors or the terms of the debt, or altering the company’s constitution in ways that affect the likelihood of the company being able to pay a debt.

[3] Voluntary administration is short-term measure that freezes the company’s position while an administrator takes full control of the company and then reports to creditors to determine the company’s future. The administrator reports to creditors on whether the business of the company is viable. If it is not possible to save the company or its business, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation.

Court the power of supervision over liquidators, administrators, deed administrators and receivers.

20. There are some minimal statutory restrictions on being an insolvency practitioner (e.g. being over the age of 18 and not being certified under mental health legislation). However, there is no fit and proper person test and no requirements that insolvency practitioners have any particular qualifications, level of education or knowledge of, and skill, in carrying out insolvency processes.

The market for insolvency practitioners

21. The average number of insolvency engagements per year over the last three years is 2,500. Around 95% of engagements are liquidations.

22. Based on Companies Office statistics for the period August 2015–August 2016, there were 83 insolvency practitioners who took 10 or more appointments over this period.[4] However, over the same period, around 197 individuals have taken fewer appointments, of which around 149 persons took only one or two appointments. These numbers include solvent liquidations, so they overstate the number of practitioners that are the main focus of this review.

23. Most insolvency engagements are accepted by practitioners within 10 to 12 firms comprising the 'Big 4' accounting firms, some mid-tier accounting firms and boutique practices that specialise in insolvency, recovery and turnaround services. There are also numerous small firms or sole practitioners, some of whom take large or moderate numbers of appointments, while others just do the occasional liquidation.

24. Analysis of liquidation advertisements in the *Gazette* from 1 January 2016 to 22 September 2016 shows there were 1,055 liquidation appointments in total. 312 were appointed by the High Court and 743 were appointed by directors or shareholders. It is unclear how many of the liquidations were solvent.

25. Inland Revenue, who make the largest number of liquidation applications to the Court, operates a panel system for appointing insolvency practitioners. Under this panel system, Inland Revenue engages practitioners from three firms: PwC, KPMG and Deloitte.

Previous consideration of insolvency practitioner regulation

26. In April 2010 the Insolvency Practitioners Bill (the **Bill**) was introduced into Parliament. It proposed the following:

    a. To empower the Registrar of Companies to restrict or prohibit certain individuals from providing corporate insolvency services (i.e. negative licensing); and

    b. To broaden the automatic disqualifications.

27. Considerable opposition was expressed to the Bill at the Commerce Select Committee, mainly because it did not provide a means of doing anything about practitioner dishonesty and incompetence until after the damage was done. The Committee reported the Bill back with the following changes:

    a. Enhancements to practitioners' duties, and additional offence provisions; and

    b. The replacement of the negative licensing regime with a registration system that included stronger disqualification criteria. Under the registration regime only those registered would be able to take insolvency appointments, but there would be no restrictions on who may be registered, apart from the disqualifications in the

[4] Appointments to liquidate a solvent or insolvent company, or to be a receiver, administrator or deed administrator.

Companies Act and Receiverships Act. Registration would not convey any suggestion of honesty, competency or quality of service.

28. Although the Bill received a second reading on 7 November 2013, it has not been progressed further.

29. In November 2015 the Minister of Commerce and Consumer Affairs established an Insolvency Working Group (**IWG**) to provide him with advice and recommendations on the changes to corporate insolvency regulation, including whether the Bill should be withdrawn, progressed or replaced with a licensing regime. The IWG recommended a range of measures to enhance and improve existing Companies Act and Receivership Act (described as Option 2 below) and a co-regulatory licensing regime be implemented for insolvency practitioners (described as Option 3 below).

30. On 1 January 2016 Chartered Accountants Australia and New Zealand (CAANZ) and the Restructuring, Insolvency and Turnaround Association of New Zealand (RITANZ) introduced a voluntary accreditation system (**CAANZ/RITANZ accreditation system**) for their members with the following key features:

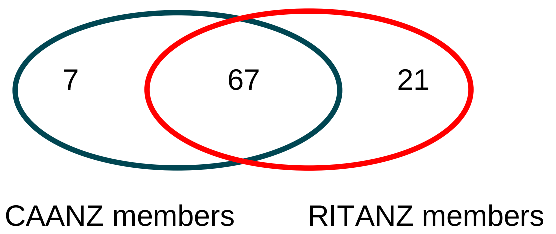
a. minimum entry and ongoing qualification requirements;

b. adequate professional insurance; and

c. a complaints and disciplinary regime underpinned by a code of ethics and an insolvency engagement standard.

31. There were 95 registrations under the CAANZ/RITANZ accreditation system as at 30 September 2016. Of the 95 accredited practitioners, 51 are based in Auckland, 13 in Christchurch, 12 in Wellington and 19 in other centres. Under RITANZ's revised rules, members accepting formal insolvency engagements must be accredited.

Diagram One: Accredited insolvency practitioners (September 2016)



Problem definition

32. The problems with the status quo can be broadly described as:

a. dishonesty and incompetence in connection with SME company liquidations; and

b. substandard performance in relation to the range of insolvency administrations.

33. Although a distinction is drawn above between liquidations and other forms of insolvency administrations, there is no separate profession of liquidators. Most practitioners who carry out the other forms of insolvency administrations also carry out liquidations.

Dishonesty and incompetence issues

34. There is no evidence of dishonesty and incompetence of sufficient scale to justify government intervention in relation to:

a. major corporate insolvencies;

b. administrators and deed administrators appointed under the voluntary administration regime;

c. receivers appointed under the Receiverships Act;

d. solvent liquidations;

e. the administration of compromises; or

f. liquidators appointed by the High Court.

35. Solvent liquidations can usually be carried out by a wider range of persons than insolvency specialists. They do not usually raise complex issues. Companies are often put into liquidation in this way simply because a business has been sold, closed down, or reorganised for tax and/or management purposes. The directors must first make and file resolutions as to solvency and the shareholders must then pass a resolution to appoint a liquidator before the liquidation can commence. Thus, there are no creditors' interests to be protected as long as the judgments the directors made at the outset as to solvency subsequently prove to be correct.

36. Those who make those appointments, or make application to the courts, have incentives to select capable and reputable practitioners. They also tend to have a good understanding of the market for insolvency services.

37. The problems are concentrated in the SME company liquidation part of the market. Examples of unsatisfactory conduct include:

a. egregious conduct, i.e., activity that is tantamount to theft from creditors;

b. liquidators putting self-interest ahead of their statutory duties to creditors by, for example, charging excessive fees and doing unnecessary work to generate additional fees. We have been advised that there are some practitioners whose fees and expenses are often whatever amount is left over after secured creditors have been paid; and

c. liquidators placing the interests of the company's directors and shareholders ahead of their statutory duties to creditors. These 'debtor-friendly' liquidators never seek to recover transactions at undervalue or for inadequate or excessive consideration, or enforce directors' duties.

38. These problems are concentrated in the insolvent SME company part of the market because:

a. the shareholders' investments in the company are gone, so they do not have financial incentives to select a good liquidator. In addition, most of them do not understand the market because they are not regular buyers of insolvency services. Thus, dishonest and self-interested practitioners are able to make a living by marketing their services to indifferent and unsuspecting directors and shareholders;

b. directors who engage in unlawful activity (e.g. by selling the company's assets to a related party at undervalue) have a conflict of interest. They have incentives to appoint a debtor-friendly liquidator in order to avoid the risks of legal claims against themselves; and

c. the amounts individual creditors are owed by SME companies are usually not large enough to provide sufficient financial incentives to monitor liquidators' performance or incur the expense of seeking remedies from the courts.

39. Currently, shareholders or directors can voluntarily appoint a liquidator up to 10 working days after service on the company of a liquidation application by a creditor. This provides the opportunity to appoint a debtor-friendly, incompetent or dishonest liquidator.

40. There are often no clear distinctions between incompetence, dishonesty and debtor-friendliness. There are, perhaps, 10 to 20 such practitioners at any one time, including up to five who are grossly dishonest.

41. There is some evidence of problems with egregious conduct through cases that have reached the courts. For example, in July 2016, the High Court found that Geoff Smith had forged a document and did not account for receipts of $540,000. It is likely that other egregious behaviour goes undetected because most creditors do not have the incentives or means to effectively monitor a liquidator's performance.

42. The evidence of problems b and c identified in paragraph 37, and the scale of these problems, is largely anecdotal and difficult to quantify. However, Inland Revenue, which is the largest creditor organisation in New Zealand, and the four major trading banks have good market knowledge of insolvency practitioners and have advised that they observe numerous instances of this form of conduct.

Wider performance issues

43. This problem is mostly associated with practitioners who lack the skills, training and experience to complete the work to a high standard. Among other things, these problems may arise because the practitioner:

    a. does not have sufficiently good understanding of insolvency legislation and case law;

    b. is not very skilled in professional judgment matters such as deciding whether to sell the company's assets as a package or individually and identifying the best potential buyers; and

    c. does not have sufficiently good processes and systems within his or her practice to efficiently manage insolvency administrations.

44. These problems are more common in relation to practitioners who carry out small numbers of insolvency administrations.

45. There are also wider concerns about general standards of insolvency practice. Standards are likely to rise over time under the RITANZ/CAANZ accreditation scheme with or without a government licensing regime. However, those improvements are only likely to occur in relation to the practitioners who choose to join the scheme absent some form of government regulation, and won't capture the problematic practitioners where the harm is occurring.

46. There is also a general lack of accountability to creditors at present for individual practitioners who make mistakes or errors of judgment. While these lapses may not indicate systematic incompetence or unprofessionalism, there is little accountability in relation to practitioners who are not members of a professional body.

47. The evidence of problems with wider performance issues is largely anecdotal and difficult to quantify. For example, with respect to issues with professional judgment, it can be difficult to tell whether an insolvency practitioner should have obtained a higher price on the sale assets.

Objectives

48. The main goal is to improve the integrity of the insolvency system by increasing public confidence that persons accepting insolvency engagements will carry out insolvency processes in accordance with their statutory duties. Our view is that there are two key criteria when considering any changes, namely:

    a. decreasing the number of dishonest and/or incompetent insolvency practitioners; and

    b. increasing accountability of insolvency practitioners to the creditors they represent.

49. In addition, there are two secondary objectives to consider as a consequence of proposing changes to the status quo in order to achieve the primary objective:

    a. mitigating any competition effects (we do not want to exclude capable insolvency practitioners from participating in the market); and

    b. the cost of new regulation is not excessive.

Options and Impact Analysis

Feasible Options

50. The Insolvency Practitioners Bill in the House, awaiting the Committee of the Whole stage, would introduce a registration regime where only those registered would be able to take insolvency appointments, but there would be no restrictions on who may be registered, apart from the disqualifications in the Companies Act and Receiverships Act. Registration would not convey any suggestion of honesty, competency or quality of service. This is the **status quo** for the purposes of this RIS.

51. We have identified following feasible options. These are:

    Option 1: Withdraw the Bill. Under this option, the registration regime set out in the Bill would not be implemented, but the current voluntary CAANZ/RITANZ accreditation system would remain.

    Option 2: Remove the registration regime set out in the Bill, and instead enact changes to enhance and improve existing Companies Act and Receivership Act provisions[5] (attached as Annex One), including:

    - modifying the insolvency practitioner disqualifications;
    - clarifying and adding to insolvency practitioners' responsibilities, roles and duties;
    - enhancing the reporting requirements of insolvency practitioners;
    - providing the High Court with a workable power to make orders to enforce a liquidator's duties, remove a liquidator from office and make a prohibition order;

[5] Most of the proposed changes to the Companies Act and Receiverships with respect to bullet points 1-3, Option 2, paragraph 52 are already in the Insolvency Practitioners Bill as reported back by the Commerce Select Committee.

- providing for the petitioning creditor to approve the appointment of the liquidator proposed by the directors or shareholders of the company to be liquidated, unless the court give permission otherwise (**Measure #1**); and
- introducing a prohibition on the transfer of assets to an associated party in either full or partial satisfaction of a debt by shareholders and directors after service of an application to liquidate and prior to the appointment of a liquidator (**Measure #2**).

Under this option, the voluntary CAANZ/RITANZ accreditation system would likely remain.

Option 3: Implement option 2 and introduce a co-regulation licensing system. A government regulator would:

- consider applications from professional bodies to be accredited to regulate their members that offer insolvency services;
- set the criteria for accreditation;
- monitor and report on the adequacy and effectiveness of each accredited body's regulatory systems and processes; and
- have powers to investigate and prosecute contraventions of law by insolvency practitioners.

The accredited professional body would issue licences to practise and carry out all other aspects of frontline regulation of insolvency practitioners, including:

- regulating entry (e.g. by requiring a practitioner to be fit and proper person, and testing to ensure that the practitioner is sufficiently knowledgeable and skilled);
- regulating ongoing requirements to retain a licence;
- promulgating and monitoring compliance with codes of conduct;
- receiving and investigating complaints, and taking disciplinary action where appropriate; and
- carrying out practice reviews.

Option 4: Implement option 2 and introduce a Government-run licensing scheme whereby all licensing functions as discussed under option 3, would be carried out by a single regulator that is independent of the interests of the insolvency profession.

52. We considered several other options to address the problems, but dismissed them as infeasible as follows:

a. **negative licensing**: this was provided for in the Bill as introduced and was rejected by the Commerce Committee.

b. **registration regime as recommended by the Commerce Committee**: this approach is clearly inferior to options 1-4. It is likely to do more harm than good because it would mislead inexperienced users of the insolvency solvency practitioners services into assuming that if a person's name on the register, then an independent regulator would have first verified that he or she met certain minimum standards of competency and honesty.

c. Regulate insolvency practitioners under the New Zealand Institute of Chartered Accountants Act 1996: the NZICA Act 1996 requires CAANZ to regulate its New Zealand members in the public interest. Adopting this approach would amount to providing NZICA with the power to regulate insolvency practice without independent oversight. Other than increasing potential over-regulation risks, this approach would seriously harm competition because it is based on the assumption that insolvency practice is a subset of accountancy. This assumption is incorrect. 21 of the 95 practitioners accredited by RITANZ/CAANZ are not Chartered Accountants. Five are lawyers. The other 16 have obtained accreditation through an alternative insolvency experience-only qualification system.

Analysis of the options

53. Table 1 provides a high level summary of whether, and to what extent, each option meets the objectives sought.

Assumption

54. The following analysis is based on an assumption there are around 100 fulltime insolvency practitioners.

Table 1: Summary of options evaluated against the objectives

	Option 1 Withdraw Bill	Option 2 (preferred) Enhance existing provisions	Option 3 Co-regulation	Option 4 Government licensing
Decrease the number of dishonest practitioners	No change	✓✓	✓✓½	✓✓½
Increase accountability of practitioners	No change	✓	✓✓	✓✓
Mitigate competition effects	No change	No change	x	x
Costs of regulation	No change	x	x½	xx
Overall cost effectiveness[6]	No change	✓	?	?

Key:	✓	some improvement	x	some costs
	✓✓	good improvement	xx	moderate costs
	✓✓✓	substantial improvement	xxx	substantial costs
	?	Unknown		

Option 1: Withdrawing the Bill

55. Withdrawing the Bill would do nothing to address the current problems with unsatisfactory persons taking insolvency appointments. This option would not decrease the number of dishonest practitioners nor would it increase the accountability of practitioners.

56. It is highly likely that the CAANZ/RITANZ accreditation system would remain in place under option 1. It is also likely that standards of practice will rise over time under this accreditation system, although it is too early to ascertain how long this will take and what effect it would have on improving the integrity of the insolvency system. The voluntary nature of accreditation system means that it is unlikely to have any material impact in relation to the practitioners whose standards are the lowest. Those practitioners have no incentives to subject themselves to the professional and ethical standards and disciplinary processes within the CAANZ/RITANZ accreditation system.

[6] The costs and benefits of options 3 and option 4 are more uncertain than option 2. It is difficult to come to an overall conclusion on the cost-effectiveness of options 3 and 4 given these uncertainties.

Option 2: Enhanced insolvency provisions (preferred option)

57. The great majority of these amendments are straightforward and deal with existing legislative weaknesses in targeted ways. Enacting these amendments would substantially improve the integrity of the insolvency system and would go some way towards addressing the problems.

58. The enhancements would have a significant impact in reducing egregious conduct through the addition of dishonesty-related disqualifications and by providing the courts with a workable power to enforce liquidators' duties, remove the liquidator from office, and make prohibition orders.

59. **Measure #1** (bullet point 5, option 2, paragraph 51) would go a long way to addressing the problems of debtor-friendly practitioner appointments. To avoid a potential loophole, we also consider that this should apply to voluntary administrations so that an administrator cannot be appointed by the company if there is an application from a creditor already filed to appoint a liquidator to the company.

60. Some submitters suggested that Measure #1 should not be made on the grounds that it would unreasonably restrict directors' and shareholders' ability to exercise their legitimate rights.

61. We disagree with this concern for three reasons.

    a. The insolvent company will have had any time prior to the service of the notice to call in a liquidator or administrator on its own volition. Commercial and Crown practise in debt collection means the service of a winding-up liquidation application is usually the last resort creditors turn to after the service of a statutory demand notice.

    b. Making this change will provide an incentive for directors and shareholders of the debtor company to act earlier. This will usually benefit the company's creditors as a whole as more of the assets of the company will remain.

    c. It will substantially reduce the scope for the appointment of debtor-friendly liquidators.

62. **Measure #2** (bullet point 6, option 2, paragraph 51) is intended to address the harm associated with 'phoenixing'. There is anecdotal evidence that, the liquidation application is often the signal for a rapid transfer of assets, often at undervalue or at no value, by shareholders and directors prior to the appointment of a liquidator.

63. There are existing provisions in the Companies Act within the voidable transactions regime that provides liquidators with the power to 'clawback' assets transferred at undervalue after the event. However, Measure #2 would prevent these transactions from occurring in the first place and prevent the harm being caused. In addition, the voidable transaction regime is complex law and using the clawback provisions may incur significant legal costs.

64. Measures #1 and Measures #2 would reduce the number of self-interested and/or debtor-friendly practitioners taking insolvency appointments. The two enhancements would make it easier for creditors to prevent such undesirable practitioners being appointed and to replace them after appointment. This would have the effect of limiting undesirable practitioners getting work, thus forcing them to exit the market for insolvency services.

Effect of Option 2 on competition

65. Option 2 will decrease the number of insolvency practitioners operating in the market. However, the measures are targeted towards removing unsatisfactory practitioners who should not, from a public policy perspective, be offering services due to the problems described in paragraph 37. There will still be sufficient competition in the market between capable practitioners.

66. There is a potential competition issue in connection with Measure #1. Inland Revenue only engages practitioners from three firms. There is a risk, therefore, that increasing creditors' powers will increase market concentration and make it more difficult for smaller firms to compete on their merits. This will particularly be a risk for firms that obtain most or all of their work through director and shareholder appointments.

67. Inland Revenue has agreed that it will review its requirements for liquidation services in light of decisions made, to ensure that there are no material competition effects. We are relying on Inland Revenue's review in coming to the judgment in the table that there will be no change in competition effects.

Other enhancements to the Companies Act and Receiverships Act

68. The cost increases and cost reductions associated with most of the amendments in Annex One are relatively low. The main increases in costs relate to the requirements for a practitioner to produce an interests statement for creditors and enhanced initial, six monthly, and final reports.

69. The interests statement would help identify material conflicts of interests for creditors so that an informed decision could be made about the appointment of an insolvency practitioner. We consider the independence of an insolvency practitioner is critical to the integrity of the insolvency system and consider the proposal to be appropriate. The costs of producing an interest statement would be minimal and they would likely not need to be updated very often.

70. The development of the reporting requirements in the Bill is based on the more detailed requirements already set out in the Receiverships Act. There are currently only very broad requirements in the Companies Act for liquidators. The new provisions for receivers re-state the existing requirements and add further financial information requirements.

71. There are information asymmetries between insolvency practitioners and creditors. The requirement for more detailed reporting enables data about the effectiveness of the liquidation process to be more available to consumers of insolvency services. It would not be too onerous as liquidators will necessarily have precise details of such matters.

72. There would be additional business compliance costs for liquidators arising from the complying with the enhanced reporting requirements. For example, we expect that the six-monthly and final reports could add an additional cost of around $500 per report. However, it is difficult to estimate the total extra costs arising from these changes for two reasons. First, many of proposed enhancements and improvements concern practices and procedures that good practitioners already follow. For these practitioners the enhancements would not result in a material increase in business compliance costs. Second, the number of additional reports over the course of a year for each liquidation will depend on such things as the amount of time it takes to liquidate the company and the complexity of the liquidation.

73. Ultimately the additional cost on insolvency practitioners complying with the enhancements would be passed onto creditors through the fees charged by practitioners.

Option 3: Co-regulation

74. This option would provide an extra means for dealing with egregious conduct, but the additional benefits would not be substantially greater than option 2.

Additional benefits of Option 3 over Option 2

75. The requirement under co-regulation for liquidators to uphold minimum standards of professional and ethical conduct, combined with enforcement of those standards through a complaints procedure and practice reviews, would have a beneficial impact on the problem of self-interested liquidators and debtor-friendly liquidators.

76. Although co-regulation also has the potential to raise the standard of decision-making through the introduction of educational programmes and practice reviews, the lack of moral culpability makes it very difficult to use enforcement procedures in relation to questionable professional judgements by a licensed practitioner. It could be expected that the introduction of a government-backed licensing system would provide the additional benefits of generally increasing the standards of the profession over time. However, we do not have good evidence on the scale of this additional benefit, which makes it difficult to identify whether there would be net benefits.

77. It would be impossible to estimate the increased returns to creditors through better decision making by insolvency practitioners (assuming licensing increases the standards of the profession).

Additional costs of Option 3 over Option 2

78. Most of the frontline costs for implementing co-regulation are already being incurred under the current CAANZ/RITANZ scheme. Additional frontline costs are expected to arise due to:

    a. need for additional 10 or so fulltime practitioners to join the scheme to continue to practise; and

    b. more monitoring and other related activities than currently occurs.

79. We estimate that the annual cost for a government regulator overseeing the CAANZ/RITANZ scheme would cost around $750,000-$1,000,000. This estimate is based on Financial Markets Authority's experience under the Auditor Regulation Act 2011, in which auditors are regulated under a co-regulatory model.[7] The size of the audit profession is approximately 100 practitioners, similar to the insolvency services market. If costs were to be recovered from the profession in the form of fees and levies, this would mean the costs per practitioner would be approximately $7,500-$10,000.[8] An annual licensing fee in this order of magnitude would likely drive some smaller practitioners out of the market harming competition.

80. Both the cost of frontline regulation and government oversight would need to be met from within the insolvency system (for example, through the Companies Office annual return), especially from the fees charged by practitioners taking insolvency appointments. We expect these costs would be passed on to the administration of an insolvency process i.e. these costs would be met creditors and in particular unsecured creditors.

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[7] CAANZ acts as the frontline regulator with independent government oversight by the Financial Markets Authority.

[8] The application fee for accreditation under the CAANZ/RITANZ accreditation scheme is $250 for CAANZ members. It is $750 for RITANZ members who are not also CAANZ members. The annual renewal fee is $250 for all practitioners.

81. There is also a risk that introducing a licensing system would reduce diversity in the range of services offered by the insolvency profession. Some company liquidations are relatively simple to perform and can be carried out at relatively low cost. There are risks that licensing would have the effect of over-complicating such liquidations.

82. There are two other significant intangible costs, namely:

    a. First, there are 'closed shop' type risks with occupational licensing, such as imposing barriers to entry that are higher than are needed to protect the public interest. It is not possible to anticipate how large these risks might be. However those risks will be ameliorated by providing the Registrar with the power to prevent frontline regulators from making material changes to the licensing system, on public interest grounds.

    b. The other is a risk related to the difficulties of removing government licensing regimes once they have been established.

83. There is evidence to indicate that co-regulation would produce benefits in addition to those achieved by implementing option 2 on its own. However, it is not sufficiently clear whether the additional benefits would be sufficiently large to outweigh the associated costs associated with implementing and maintaining the co-regulatory licensing regime.

Option 4: Government licensing

84. A licensing regime operated by a government regulator would be expected to provide many of the same benefits as co-regulation under option 3. As discussed above, these benefits are intangible and not able to be quantified.

85. However, there are potential differences to option 3. A government regulator may not achieve the same quality of outcomes as a result of not having as good an understanding of the insolvency market as a professional body.

86. The effectiveness of the government regulator, and therefore the integrity of the insolvency systems, would be also be dependent on its efforts to supervise licensed practitioners, including to investigate complaints about the conduct of practitioners and undertake practice reviews.

87. We have not attempted to quantify the costs under this option. However, we have assumed that the initial costs of setting up the regulatory regime would be higher than option 3 (because option 3 leverages off the CAANZ/RITANZ system). We estimate the annual operating costs of running licensing would be similar to option 3. If implemented, this option would mean that the CAANZ/RITANZ scheme would become redundant.

88. The cost of government licensing would need to be recovered through fees charged to persons licensed to take insolvency appointments. These additional costs would need to be recovered through fees charged by practitioners taking insolvency appointments. This would mean that creditors, especially unsecured creditors, through reduced returns from insolvent liquidations.

89. As discussed under option 3, this option also would also have a significant intangible costs associated with the risk related to difficulties of removing government licensing regimes once they have been established.

90. As with the analysis of option 3, there is evidence to indicate that government licensing would produce benefits in addition to those achieved by implementing option 2 on its own. However, it is not sufficiently clear whether the additional benefits would be sufficiently large to outweigh the associated costs associated with implementing and maintaining a licensing regime.

Consultation

91. On 25 August 2016 Report No.1 of the Insolvency Working Group was released on the MBIE website for public consultation purposes. The report covered insolvency practitioner regulation, including:

   a. Introducing a licensing system for insolvency practitioners; and

   b. Making various other changes to legislative settings that impact on insolvency practitioners (Annex 3 recommendations) such as:

      i. Modifications to insolvency practitioner disqualifications

      ii. Additions and clarifications to insolvency practitioners' responsibilities, roles and duties; and

      iii. Changes relating to reporting requirements; and

   c. Additional measures related to voluntary liquidations such as:

      i. Preventing company/shareholder appointments of liquidators and voluntary administrators from the date of service of a liquidation application by a creditor, other than with the applicant creditor's consent; and

      ii. A prohibition on the transfer of a company's assets once a liquidation application has been filed, other than in the ordinary course of business, where the court has given leave, or where the liquidator has ratified the transfer, save for transfer by an administrator or receiver.

92. Invitations to submit on the report were sent to a variety of stakeholders, including to industry bodies, such as CAANZ and RITANZ, to building and construction sector participants, and to all individuals who had taken at least one insolvency appointment over the preceding 12 months.

93. 30 submissions were received, of which 29 related to the proposals in this paper.

Submissions on insolvency practitioner licensing

94. Twenty-four submitters supported the introduction of a licensing regime. Twenty two submitters preferred co-regulation (option 3) and noted that the following benefits:

   a. co-regulation would build on the existing CAANZ/RITANZ scheme.

   b. CAANZ and RITANZ have better industry and market knowledge.

   c. co-regulation would likely have lower costs than government licensing.

   d. government oversight is needed if regulation is to be mandatory.

95. The two submissions supporting government licensing (option 4) considered that RITANZ has a conflict of interest and a bias towards large accounting firms.

96. Two submissions opposed any form of licensing regime because it:

   a. would create barriers to entry;

   b. is not warranted as sufficient protections already existed in law;

   c. would not provide an effective discipline regime because of the small size of the industry where everyone knows most of the other practitioners providing insolvency services; and

d. RITANZ's focus is on protecting the interests of larger accounting firms, whose partners and staff making up the majority of RITANZ's membership.

Submissions on Measure #1

97. The majority of submitters either supported in full or gave qualified support to Measure #1. The main reason given was that removing the 10-day window would go a long way to addressing the problems with debtor-friendly liquidator appointments.

98. Submissions opposing Measure #1 noted that the measure:

   a. isn't needed because the licensing of insolvency practitioners will address the mischief to a considerable extent;

   b. may undermine legitimate restructuring opportunities;

   c. may undermine the voluntary administration regime; and

   d. lessens competition because it favours existing firms that provide services to the Inland Revenue.

Submissions on Measure #2

99. There was split opinion on Measure #2. Some submitters thought the proposal was too wide and may prevent legitimate sales to third parties at fair value. A blanket prohibition might create more problems than it would solve and might give rise to unnecessary commercial uncertainty.

100. Two submitters thought the proposal should be narrowed to only apply to the transfer of assets to associated parties and transfer of assets in full or partial satisfaction of debt.

101. Five submitters opposed the proposal because:

   a. this measure may not be necessary in the event a licensing regime is introduced;

   b. the phrase 'ordinary course of business' has a notorious history; and

   c. it would increase commercial transaction costs through the need for expensive due diligence procedures.

Conclusions and Recommendations

102. As discussed in the problem section the evidence of problems with insolvency practitioners appear to be confined to the SME company market and are largely anecdotal and difficult to quantify.

103. We recommend that the best approach to address the problems is to implement option 2 (i.e. the 30 or so Companies Act and Receiverships Act enhancements and improvements) and carry out a post-implementation review no less than three years after they have come into force. This would provide the foundation for making more informed decisions than can currently be made about whether the option 2 changes alone are sufficient, or whether practitioner licensing and independent oversight are also needed.

Implementation Plan

104. The recommended option (option 2) requires making 30 or so changes to the Companies and Receiverships Acts. To give effect to this option, the registration regime set out in the Bill would be withdrawn. The recommended changes that are already included in the current Bill would be kept, and those not currently included would be introduced by Supplementary Order Paper (SOP).

105. A competition risk could arise from the proposal to require the petitioner to approve a liquidator. However, this risk is most likely to arise in regards to appointments made by the most frequent petitioning creditor, the Inland Revenue. Inland Revenue's panel system currently reduces the number of insolvency practitioners available for appointment to only those from the three firms. Inland Revenue has agreed that it will review its requirements for liquidation services in light of decisions made.

106. We expect that the changes will come into force about one year after the Bill is enacted. We would expect a transition period to comply with the new requirements to allow stakeholders to change their procedures to give effect to the new requirements.

107. The proposed timeframe in regards to some changes might impose design risks. Many of the changes are already in the Bill, and many not yet included should not be difficult to draft. However, as noted above, there are a few substantive changes that will require skilled drafting to ensure the intent of the policy is met. Rushed legislation could risk missing important required detail, resulting in low quality legislation.

Monitoring, Evaluation and Review

108. To ensure the proposed option achieves its objectives, a post-implementation review should be carried out no less than three years after the amendments to the Companies Act and Receivership Act contained in the Bill have come into force. This would also provide information on whether the changes alone (option 2) are sufficient, or whether practitioner licensing is also needed.

109. We will monitor the insolvency services market through the collection of information from a range of sources, including:

    a. Companies Office statistics to monitor who is taking appointments and the frequency of appointments;

    b. New Zealand Gazette Publications which show the breakdown between court-appointed and voluntary appointed liquidations;

    c. High courts cases about insolvency and, in particular, on the performance of insolvency practitioners, especially those related to dishonesty and performance their statutory duties;

    d. Regular communication with Inland Revenue, the largest creditor body in New Zealand, with CAANZ and RITANZ to check-in on the development of the accreditation system, and with others close to the insolvency market such as practitioners, lawyers and creditors, on the impact of the enhancements and improvements on the integrity of the insolvency system.

110. Although unsecured creditors are unlikely to ever be satisfied with the returns from the liquidation of an insolvent company, we would expect implementation of option 2 to see a substantial reduction of complaints from creditors about the performance of liquidators, especially in the areas of dishonesty and debtor friendly conduct.

Annex One: Improvements to the Companies & Receiverships Acts

Table 1: Strengthen and modify insolvency practitioner disqualifications

No.	Description
1	Add the following offences to the lists of insolvency practitioner disqualifications: • Crimes of dishonesty as defined in the Crimes Act 1961; • Tax evasion and other serious offences under the Tax Administration Act 1994; and • Serious knowledge-based offences under other enactments. Add the following conflict-of-interest related disqualification criteria: • ensure that the general reference to 'creditor' includes secured creditor; • any persons who are or had been a director of a creditor company within the preceding two years before commencement of the liquidation; • any persons who had an interest in shares issued by the company or 5 per cent or more of any class of shares issued by a creditor of the company, within the preceding two years before commencement of the liquidation; • any persons who has an interest in 20 per cent or more of any class of shares issued by a related company of the company; • if there is an instrument conferring a power to appoint a receiver of a company, a person who is disqualified by the instrument from acting as the receiver of the company; and • persons (or their firms) who had a continuing business relationship with the company, or any of its directors or shareholders that have the power to appoint or remove a director of the company. Narrow the scope of two existing conflict-of-interest related disqualification criteria: • The continuing business relationship disqualification is too broad because it inappropriately includes a continuing business relationship with a secured creditor. In New Zealand, most financiers take a general security agreement as security for lending. This means that all insolvency practitioners who have worked for general security agreement financiers (e.g. trading banks) are unable to act as liquidators or administrators, unless the leave of the High Court is obtained. Making such applications is a waste of time and money. The reference to secured creditors should be removed. • The professional services relationship disqualification is too broad. This is because it excludes any practitioner where they or their firm have provided professional advice at the end of the company's trading life. This problem is especially acute for investigating accountants because they are also usually insolvency practitioners. This disqualification would be appropriately targeted if the wording was to be aligned with the definition of 'continuing professional relationship' in the Insolvency Engagement Standard issued by CAANZ.

No.	Description
2	In relation to the definition of 'relative', add a promoter or auditor of the grantor or a related company of the grantor. Add the following disqualification criteria: • If the grantor is a company, a person who has an interest, whether direct or indirect, in 20 per cent or more of any class of shares issued by a related company. • If the property in receivership is a company, a current or former administrator, deed administrator, or liquidator of the company.
3	The High Court is able to make a prohibition order under the Receiverships Act for a period not exceeding five years. There should be no time limit, as is the case under the Companies Act. Require the Registrar of Companies, rather than the Official Assignee to keep records of orders by the court.

Table 2: Additions and clarifications of practitioners' responsibilities, roles and duties

No.	Description of the change	Comments
4	• Require an administrator to transfer documents and property to a successor administrator. • Create an offence where the administrator fails to do so.	Ensures an efficient transition and that the replacement administrator or liquidator has all the documents and control necessary to perform their functions.
5	• Require an administrator to provide to the liquidator of a company in administration documents, information and property. • Create an offence where the administrator fails to do so.	
6	Require a deed administrator: • to certify that he or she is not disqualified from appointment; and • table an interests statement at the watershed meeting.	Provides creditors information about the independence of the deed administrator.
7	• Require a deed administrator to transfer documents and property to a successor deed administrator. • Create an offence where the administrator fails to do so.	Ensures an efficient transition and that the successor deed administrator has all the documents and control necessary to perform their functions.
8	• Add an offence for failure by the administrator to file accounts with the Registrar.	Promotes general deterrence.
9	• Clarify that a person to whom a prohibition order applies must not act as an administrator of a deed of company arrangement (DOCA). • Clarify that the court may make an order in respect of a past or current deed administrator of a company under a DOCA.	Technical amendments that improve the law.

No.	Description of the change	Comments
	• Clarify that the meaning of 'failure to comply' means failure to comply with an enactment, a rule of law, or court order, to the extent that it applies to the persons in their capacity as an insolvency practitioner. • Require the Registrar (not the Official Assignee) to keep records of orders made by the court.	
10	• Change the requirement on liquidators to hold accounts and records of the liquidation from one to six years, but retain the Registrar's discretion to vary the time period. • Include an offence provision for failure to comply.	Six years is consistent with the Limitation Act 2010 and the requirements under the Receiverships Act.
11	• Move, from regulations to the Companies Act, a requirement on a liquidator to deposit funds of a company under their administration at a bank and in either a bank account to the credit of the company or a trust account. • Permit a liquidator to invest money of a company that is not required for the time being to meet claims made against the company. • Require that all dividends, interest and other profits received from such investments be paid into the bank account or trust account. • Expressly state that funds which are deposited in a trust account must be held by the liquidator on trust for the benefit of the persons legally entitled to those funds. • Align the statutory provisions in relation to such trust accounts with the stricter rules in relevant professional codes of practice. • Create an offence when a liquidator fails to comply with duties in relation to company funds.	Adopts best practice in relation to handling money and technical amendments to improve the clarity of the law.
12	• Require a person vacating the office of liquidator to give written notice to the Registrar (instead of the Official Assignee). • If the office of liquidator is vacant, the Registrar (instead of the Official Assignee) may appoint another practitioner or an Official Assignee.	The Registrar is responsible for enforcing the Companies Act so it is appropriate for her to perform these functions.
13	• Move, from regulations to the Companies Act, the obligations relating to transferring documents and property to a replacement liquidator and add an offence.	Allows for an offence to be created.
14	• Add the Registrar to the list of those able to make an application for an order to enforce a liquidator's duties.	The Registrar is responsible for enforcing the Companies Act so it is appropriate for her to perform these functions.

<table>
<tr><th>No.</th><th>Description of the change</th><th>Comments</th></tr>
<tr><td></td><td>• Require the Registrar, rather than the Official Assignee, to keep a record of orders by the High Court.</td><td></td></tr>
<tr><td>15</td><td>• Set out what must be disclosed in an interests statement by liquidators, administrators and deed administrators, and the steps the person must take in preparing the interests statement.
• Include a requirement that practitioners state how they intend to manage any conflict of interest.</td><td>Helps creditors make informed decisions about appointments.</td></tr>
<tr><td>16</td><td>• Transfer restrictions relating to the remuneration of an insolvency practitioner from regulations to the Companies Act.</td><td>Allows for an offence to be created.</td></tr>
<tr><td>17</td><td>• Transfer restrictions on the purchase of assets, goods or services from a person connected to an insolvency practitioner from regulations to the Companies Act.</td><td>Allows for an offence to be created.</td></tr>
<tr><td>18</td><td>• Provide for documents and property to be given to the receiver’s successor and create a new offence for failing to do so.</td><td>Ensures an efficient transition and that the replacement receiver has all the documents and control necessary to perform their functions.</td></tr>
<tr><td>19</td><td>• Create a new offence for a receiver failing to comply with their statutory duties in relation to money.</td><td rowspan="2">Provides a remedy where a receiver fails to comply with their statutory duties.</td></tr>
<tr><td>20</td><td>• Create a new offence for a receiver failing to comply with their statutory duties to keep correct accounting records.</td></tr>
<tr><td>21</td><td>• Align the meaning of ‘failure to comply’ in the Receiverships Act with the definition in the Companies Act.</td><td>Ensures consistency.</td></tr>
<tr><td>22</td><td>• Improve the effectiveness of insolvency practitioners’ whistleblowing duties in relation to serious offending by:
o removing an irrelevant test relating to whether the offence was material to the insolvency process
o expanding the range of statutes to which the obligation applies
o expanding the list of enforcement agencies that can receive a report (e.g. the Police, SFO and other agencies, where relevant, e.g. Inland Revenue in relation to tax)
o providing absolute privilege to administrators (as is already the case with liquidators and receivers).</td><td>Recognises that insolvency practitioners have wider responsibilities to society.

The provisions should be consistent with the standard for professional accountants made by the International Ethics Standards Board for Accountants (IESBA) called Responding to Non-compliance with Laws and Regulations (NOCLAR), which comes into force in July 2017.</td></tr>
</table>

No.	Description of the change	Comments
23	• Require liquidators and administrators to state in their notices of appointment who made the appointment or who applied for them to be appointed if they were appointed by the Court. • Require receivers to state in their notices of appointment the name of the appointing creditor, and information about the instrument under which the appointment was made. • Require deed administrators to give notice of appointment to the Registrar if he or she was not the administrator.	This information will be useful to creditors and improve transparency in relation to appointments.

Table 3: Changes relating to practitioners' reporting requirements

No.	Description of the change	Comments
24	• Require the administrator (at the end of an administration), and a deed administrator (on termination of a DOCA) to provide a summary report to the Registrar containing prescribed information. • Create an offence for failing to comply with this requirement.	This information would be used to collate data for statistical purposes, which will be useful for insolvency stakeholders and government agencies.
25	• Clarify that the liquidator must provide a statement of interests, report, and notices to every creditor for meetings of creditors.	Ensures that creditors obtain the information they need for decision-making and accountability purposes.
26	• Clarify that when a liquidator gives notice to creditors that a meeting will not be held, they must also give creditors a statement of interests, report, and notices to every creditor concerned.	
27	• Require the liquidator to send a statement of interests to every creditor, shareholder and the Registrar. • Require the liquidator's 6 monthly report be sent to every creditor and shareholder to include a statement of realisation and distribution that lists all amounts received and paid. Remove the requirement to list payers and payees. • Create an offence for a liquidator failing to comply with their reporting requirements.	Creditors obtain useful information for decision-making and accountability purposes. Reduces the 6 monthly reporting requirements to what is important i.e. the amounts distributed and how it was distributed between the different classes of creditors.
28	• Clarify that the final report sent to creditors and shareholders must list all amounts received and paid in respect of the liquidation, including payer and payee details. • Require the liquidator to provide a summary report of prescribed information to the Registrar.	Ensures that creditors obtain the information they need for accountability purposes. Providing cumulative information increases the relevance of information because creditors will not need to refer back to previous reports and do their own calculations.

No.	Description of the change	Comments
	• Create an offence for the liquidator failing to comply with any duty in relation to the final report and accounts.	
29	• Clarify what must be contained in the receiver's 6 month report and the final report.	Consistent with changes to improve reporting by liquidators to enhance transparency and accountability to creditors.
30	• Provide summary report at the end of a receivership to the Registrar. • Create an offence for not doing so.	

Table 4: Provide the High Court with an effective power to disqualify and ban liquidators

No.	The problem	The proposed change
31	There are powers for various parties to seek an order from the High Court to (a) enforce a liquidator's duties, (b) remove a liquidator from office, or (c) make a prohibition order against a liquidator for a specified or indefinite period. The existing powers have never been successfully used because the process is convoluted and time-consuming. The existence of a 'two-strike rule' means that it can take multiple hearings over several months before the Court can make an effective order.	Empower the court to make a disqualification or banning order for one bad action (e.g. theft) under a fast and efficient system.

Table 5: Prohibit company directors and shareholders from appointing a liquidator or administrator from the date of service of a liquidation

No.	The problem	The proposed change
32	Shareholders or directors can voluntarily appoint a liquidator up to 10 working days after service on the company of a liquidation application by a creditor. This provides them with the opportunity to appoint a debtor-friendly, incompetent or dishonest liquidator.	Expand the limitation, so that a company will be prevented from voluntarily entering into liquidation or administration from the date of service of a liquidation application by a creditor. Some submitters suggested that this change should not be made on the grounds that it unreasonably restricts debtors' ability to exercise their legitimate rights. We disagree for three reasons: • The insolvent company will have had plenty time prior to the service of the notice to appoint a liquidator or administrator on its own volition. • Making this change will provide an incentive for debtors to act earlier. This will usually benefit the company's creditors as a whole as more of the assets of the company will remain. • It will substantially reduce the scope for debtor-friendly liquidators to be appointed.

Table 6: Avoid the transfer of a company's assets to an associated party after service of a liquidation application, subject to certain exceptions

No.	The problem	The proposed change
33	There is no restriction on the transfer of a company's assets once a liquidation application has been filed. This is a problem because the liquidation application is often the signal for a rapid transfer of assets, often at undervalue or at no value, by shareholders and directors prior to the appointment of a liquidator.	Any transfer of assets outside the ordinary course of business would be rendered void after service of the application to liquidate. The onus would then shift to the transferee to prove a basis on which it should retain the assets. If not, the liquidator would be able to recover the asset. The provision would have some limits: • It should not apply to transfers by a receiver or administrator (or by the liquidator after being appointed). • The Court would have an ability to allow a transfer. • The liquidator should have the ability, once appointed, to ratify the transfer. A transfer of assets would give rise to a breach of duty claim against the directors, should the assets be transferred to an associated party.

Table 7: Only permit related parties to vote at creditors' meetings if approved by the High Court

No.	The problem	The proposed change
34	Related parties may vote unless the Court orders otherwise. This situation can lead to outcomes that are contrary to the collective interests of shareholders because related parties often have a conflict of interest.	Reverse the situation, so that related parties must obtain a court order to be able to vote.