CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

7 October 2016

Corporate Law
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: corporate.law@mbie.govt.nz

Submission on the Review of Corporate Insolvency Law

Chartered Accountants Australia and New Zealand welcomes the opportunity to comment on the recommendations made by the Insolvency Working Group in Report No.1 ("the Report"). Our responses to the specific questions raised in the consultation document are set out in Appendix A. Appendix B includes more information about CA ANZ.

General Comments

We strongly support the recommendation to introduce a co-regulatory regime for insolvency practitioners to improve the integrity and skill of those undertaking insolvency engagements and improve the outcomes for creditors and other stakeholders.

Preferred option

We consider that Option C, introduction of a co-regulatory insolvency practitioner regime, is the preferred option. In our view, maintaining the status quo does not provide adequate protection for creditors and other stakeholders. The introduction of a co- regulatory regime will provide greater protection for the public.

Central register

The options included in the Report and Consultation Paper would allow separate accredited bodies (or professional bodies) to license insolvency practitioners. We consider it is important that a central register of all accredited insolvency practitioners is established and maintained so that consumers are able to easily ascertain which practitioners are able to undertake regulated insolvency engagements.

Consistent entry standards

It is essential that consistent standards of entry are established and applied in licensing insolvency practitioners to ensure the credibility of the regime. Prescribed minimum standards of accreditation should be set by regulation to ensure their application is mandatory.

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Transitional considerations

Given the level of rigor applied in the current voluntary regime established by CA ANZ and RITANZ, we recommend that insolvency practitioners who have been accredited by CA ANZ/RITANZ should be deemed to be accredited under any co- regulatory regime (assuming the prescribed minimum standards of accreditation are aligned).

Distinction between solvent and insolvent liquidations

We support the proposal to draw a distinction between solvent liquidations and insolvent liquidations and consider that accountants who are members of a professional body and hold a Certificate of Public Practice are suitability qualified to undertake solvent liquidations. We consider a higher level of specialisation is required for regulated insolvency engagements.

Accreditation process

In our view, it would be appropriate to leverage off any current, relevant accreditations in accrediting professional bodies to license insolvency practitioners. Given the similar principles and main features underlying the auditor regulation and proposed insolvency practitioner regulation regimes, we consider that it would be appropriate to use accreditation under the Auditor Regulation Act as a basis for accrediting entities under the insolvency practitioner's regime[1]. Leveraging off relevant, existing accreditations would help to minimise the compliance costs incurred in introducing the regulatory regime.

Should you have any queries concerning the matters in this submission, or wish to discuss them in further detail, please contact Geraldine Magarey (Leader – Policy and Thought Leadership) via email at geraldine.magarey@charteredaccountantsanz.com or phone +61 2 9290 5597.

Yours sincerely

Rob Ward FCA AM
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[1] The Prescribed Minimum Standards for being recognised as an accredited body for the purposes of the Auditor Regulation Act can be found here: https://fma.govt.nz/assets/Compliance-section/120404-auditor-regulation-act-2011-prescribed-minimum-standards-for-accredited-bodies-notice.pdf. These include obligations relating to licensing, monitoring, promoting and monitoring competence and taking action against misconduct, which are closely aligned to the criteria for being recognised as an accredited frontline regulator for insolvency practitioners (outlined in R3 of the Report No. 1).

Appendix A: Responses to specific questions raised in the consultation document

Insolvency Practitioner regulation

1. **Do you agree with the Working Group's views on the problems with the status quo (outlined in paragraphs 39-77)?**

We agree with the Working Group's views on the status quo. We consider that it is in the public interest to introduce a regulatory framework to ensure that only those with appropriate skills, experience and integrity are able to undertake insolvency engagements. This framework should also ensure that all insolvency practitioners are subject to a code of ethics, review, ongoing competence requirements and a robust disciplinary process.

What is the scale of harm being caused by these problems? If applicable, please describe the impact of the current insolvency practitioner regulation regime on your business.

Given the nature of the work undertaken by insolvency practitioners, we consider it is in the public interest to ensure that all practitioners are appropriately regulated and able to demonstrate they meet minimum standards of competence and experience. An appropriate level of regulatory oversight will help to minimise the impact of, and level of harm caused by, inexperienced, incompetent or unethical practitioners.

2. Do you agree with the listed objectives? (see paragraphs 78-81)

We agree with the listed objectives. An enhanced regulatory regime for insolvency practitioners would enhance overall business confidence, as stakeholders would have an increased level of assurance that insolvency processes would be dealt with in a competent and consistent manner. As such, there is considerable public interest in the establishment of such a regulatory regime.

3. Do you generally agree that changes proposed in the Insolvency Practitioners Bill that do not relate to the registration regime proposed in that Bill along with the additional related changes proposed by the Working Group should be progressed? Please include any comments you have on one, some or all of the proposals detailed in Annex 3.

Yes, we consider the additional related changes proposed by the Working Group, will significantly strengthen the current Bill, and should be progressed.

Our specific comments are:

- We support the proposal to clarify who may not be appointed as the liquidator of a company, particularly with respect to allowing practitioners brought in at the end of the company's trading life to provide professional advice (such as investigating accountants) to be appointed as the liquidator. We agree that para 19 of the NZICA Insolvency Engagement Standard provides a useful approach to follow on this matter[2].
- We support the proposal to require insolvency practitioners to report 'serious problems' to an appropriate party, such as the Police, the Serious Fraud Office and the relevant authority and the proposal to appropriately define 'serious problems' in the Act. We agree that doing so will make it necessary to introduce a mechanism to ensure that practitioners are adequately protected should they be required to report serious problems, such as breaches of director's duties. Such a requirement is in line with the recently approved requirement for auditors and other assurance practitioners to disclose potential non-compliance with laws and regulations to

[2] Para 19 of the NZICA Engagement Standard "Insolvency Engagements" states that '*A member providing insolvency services shall ensure that they have adequate training, experience and technical competency to perform an insolvency engagement'*.

appropriate public authorities without breaching the ethical duty of confidentiality[3]. In addition, the IFAC Code of Ethics has recently been updated to require all professional accountants to disclose non-compliance with laws and regulations to a public authority. As members of IFAC, CA ANZ and NZICA will be adopting these changes within the respective codes.

- We agree that a summary statement of receipts and payments should be included in the liquidator's six monthly report and agree with the recommendation on page 50 of the Report that the requirement to list payer and payee details should be removed. We believe providing this level of detail would not add any material benefit.

4. Do you agree with the proposed changes to the High Court supervision of liquidators? (see paragraphs 154-156)

Yes, we consider it is appropriate to repeal section 286 of the Companies Act and amend section 284 to include powers to enforce a liquidator's duties and provide for removal and prohibition orders. In our view retaining and strengthening the High Court's powers to enforce liquidator's duties is a useful 'last line of defence'.

5. What are your views on the four occupational regulation options proposed by the Working Group? (see paragraphs 116-146)

We consider that Option C is the preferred option, given the size of the New Zealand insolvency market. Adoption of a co-regulatory model would provide protection to creditors and other stakeholders, and allow insolvency practitioners to be recognized as a specialist profession with the regulatory oversight expected by the public and consistent with international jurisdictions.

Option C builds on the self-regulatory regime introduced by CA ANZ and RITANZ in 2015 and, as a result, the costs involved in introducing the regime would be incremental. In our view Option C effectively balances the costs of regulation with the benefits provided to the public.

We have the following specific comments to make on the proposals:

- **Independent oversight and prescribed minimum standards for entry.** The introduction of independent supervision and prescribed minimum standards would ensure that a consistent approach is applied across the insolvency market and all practitioners are subject to the same standards.
- **Accreditation process.** In our view, it would be appropriate to leverage off existing accreditations when accrediting professional bodies to license insolvency practitioners. Given the similar features underlying the auditor regulation regime and those proposed in R3 of the Report to apply to the insolvency practitioner regulation regime, we consider that it would be appropriate to use accreditation under the Auditor Regulation Act as a basis for accrediting entities under the insolvency practitioner's regime[4]. This would help to minimise the compliance costs incurred in introducing the regulatory regime.
- **Transitional issues.** Given the level of rigor applied in the current voluntary regime, we recommend that insolvency practitioners accredited by CA ANZ/RITANZ should be deemed to

[3] Amendments to Professional and Ethical Standard 1 (Revised) Responding to Non-Compliance with Laws and Regulations issued by the NZAuASB August 2016, effective from 15 July 2017. Further details available here: https://www.xrb.govt.nz/Site/Auditing_Assurance_Standards/Current_Standards/Professional_Ethical_Standards.aspx?EMAIL=26118008

[4] The Prescribed Minimum Standards for being recognised as an accredited body for the purposes of the Auditor Regulation Act can be found here: https://fma.govt.nz/assets/Compliance-section/120404-auditor-regulation-act-2011-prescribed-minimum-standards-for-accredited-bodies-notice.pdf. These include obligations relating to licensing, monitoring, promoting and monitoring competence and taking action against misconduct, which are closely aligned to the criteria for being recognised as an accredited frontline regulator for insolvency practitioners (outlined in R3 of the Report No. 1).

be accredited under any statutory regulatory regime (assuming the accreditation criteria are aligned).

We consider that Option A would not offer adequate protection and may mislead the public as there may be a perception that individuals included on the Register have been through a more robust screening process than is the case. Option B does not offer adequate protection to the public. While the public can have confidence in the self- regulatory regime, Option B does not place any restrictions on the individuals who undertake insolvency engagements in New Zealand and the status quo remains. Option D may be prohibitive from a cost perspective given the size of the market.

6. Do you agree with the details of the co-regulation system recommended by the Working Group? (see Recommendations 3-8 on pages 3 and 4)

We generally agree with the main features of the co-regulatory regime included in Recommendations 3 – 8 of the Report, subject to the comments made in Question 5 and below.

We do not consider that accredited bodies and insolvency practitioners should be required to meet the full costs of co-regulation when a far broader range of stakeholders will benefit from the regime. An independent government regulator should be appropriately funded to accredit professional bodies, perform oversight functions and maintain a central register, with licensed insolvency practitioners making some contribution to costs through levies.

7. Are there are other feasible options to address the problems identified by the Working Group with the provision of insolvency services?

No.

8. An alternative option for regulating insolvency practice would be to only require the practitioner to be a member of a professional body, such as CAANZ or RITANZ, without any oversight from an independent government regulator. Would this option provide a more cost effective model for regulating insolvency practitioners?

While this option may be more cost-effective, it will not provide the full benefits of a co-regulatory model. In particular, it may impact on the following:

- **Credibility of the regime**
  There is a risk that, without adequate oversight from an independent government regulator the credibility of the regime, both at a domestic and an international level, may be impaired. We note that the Australian regulatory model involves the government regulator, ASIC, being responsible for licensing and monitoring, with relevant professional bodies, such as ARITA and CA ANZ, providing ancillary services, such as education of practitioners. In the UK individual member bodies ("authorising bodies") are authorised by a government regulator, The Insolvency Service, to license insolvency practitioners and monitor the provision of insolvency services.
  Given the size of the New Zealand market for insolvency services, and the number of practitioners, we consider that it will be more cost effective for accredited bodies to assume licensing and disciplinary responsibilities, with oversight provided by an independent government regulator (e.g. FMA or MBIE) in a similar way to the regulatory regime established in the UK.
- **Establishment of consistent standards**
  To ensure consistent standards across the insolvency market it is essential that core standards of entry are established and applied in licensing insolvency practitioners. The

alternative option would allow individual professional bodies to set and apply their own minimum standards of entry, which may result in inconsistency.

- **Transparency**
  To ensure that consumers are able to determine who is able to undertake an insolvency engagement, we consider it is essential that a central register is developed and maintained (R3 of the Report). While the development and maintenance of a central register is an operational consideration, it is important that consumers are able to identify who is appropriately qualified. If individual professional bodies are responsible for licensing, this could lead to multiple registers and confusion for users.

9. Should insolvency services be restricted to only certain members of an accredited professional body, as opposed to all members of the accredited professional body?

In our view insolvency is a specialist service requiring adequate and appropriate experience and on-going professional development. Members of CA ANZ with a practicing certificate (i.e. Chartered Accountants with a Certificate of Public Practice) would be suitably competent to undertake solvent liquidations, as these engagements generally present a lower risk and are less complex than "regulated insolvency engagements"[5]. We note that all members of CA ANZ are bound by a Code of Ethics and should only undertake engagements for which they are professionally competent. However, regulated insolvency engagements are complex and require a higher degree of skill than solvent liquidations. We are supportive of restricting these engagements to individuals who have demonstrated an adequate level of competence and experience.

We consider that it is in the public interest to recognise the specialisation of regulated insolvency engagements and that minimum standards of entry apply to those providing these services.

If so, what criteria should be applied to determine which members of the accredited professional body would be permitted to provide insolvency services?

It is important to distinguish between solvent liquidations, which we consider could be undertaken by members of a professional body with a practising certificate, and "regulated insolvency engagements". We consider that the current accreditation criteria for CA ANZ/RITANZ accredited insolvency practitioners would be appropriate criteria to determine which members of an accredited professional body should be permitted to provide regulated insolvency engagements. These are:

- Being bound by a Code of Ethics
- Holding a Certificate of Public Practice (or equivalent)
- Satisfying "fit and proper person" status
- Practical insolvency experience or able to demonstrate they are "otherwise competent" (CA's need to have a minimum of 1,000 hours of practical experience on regulated insolvency engagements over the three years immediately prior to application, at a senior

[5] "Regulated insolvency engagement" means an engagement as:

- A receiver appointed under the Receiverships Act 1993;
- A liquidator appointed under the Companies Act 1993;
- An administrator appointed under Part 15A of the Companies Act 1993;
- A deed administrator appointed under Part 12 of the Companies Act 1993;
- A trustee of a personal creditor compromise proposal under the Insolvency Act 2006;
- A statutory manager under the Corporations (Investigations and Management Act) 1989, subpart 4 of Part 4 of the Insurance (Prudential Supervision) Act 2010 or Section 117 of the Reserve Bank of new Zealand 1989; or
- An administrator, supervisor or monitoring accountant (or similar role) appointed under Part 14 of the Companies Act 1993;
- But excludes an engagement as a liquidator of an entity that, as at the date of liquidation, satisfies the "solvency test" as defined in section 4 of the Companies Act 1993 (modified as necessary for entities that are not companies)

level, or ability to demonstrate they are otherwise competent to undertake regulated insolvency engagements)
- Be subject to disciplinary processes
- Be subject to practice review
- Complete a set number of CPD hours (120 hours over three years with at least 30 hours being related to insolvency training. The 120 hours should include a mandatory component of ethics training)
- Adequate professional indemnity insurance cover appropriate to the nature and scale of services offered to the public

Further information on the CA ANZ and RITANZ accreditation criteria can be found on the NZICA website: http://www.nzica.com/Technical/Accredited-Insolvency-Practitioners.aspx

10. How might the different options impact on competition within the insolvency services sector? How would the different options impact on the availability of insolvency services to businesses and creditors outside the main centres of New Zealand?

Under the status quo, the public have access to suitably competent and experienced practitioners to undertake solvent liquidations in New Zealand. Where these engagements become insolvent liquidations, they become much more complex and specialised. Given the specialised skill of regulated insolvency engagements most of the practitioners with the necessary skills to undertake this work are based in the larger centres.

Under the current self-regulatory regime established by CA ANZ and RITANZ, the majority of accredited insolvency practitioners are based in one of the three main centres (Auckland, Wellington and Christchurch)[6]. However, many of these practitioners are part of network firms and insolvency work can be undertaken by appropriately qualified staff in regional centres, with oversight, guidance, support and ultimate responsibility provided by an accredited practitioner. We do not consider that implementation of Option C will limit the current access to insolvency practitioners across New Zealand.

Voluntary liquidations

11. Do you agree that introducing a licensing regime for insolvency practitioners would reduce much of the harm raised by aspects of the voluntary liquidation process? (see paragraphs 174-178, 201)

We agree that the proposal to introduce a licensing regime for insolvency practitioners would ensure all practitioners comply with professional and ethical requirements which should help in reducing much of the harm raised by aspects of the voluntary liquidation process.

12. Do you agree that the latent defect problems in the building and construction sector are issues best solved by building and construction sector law and should not be directly addressed by changing insolvency law? (see paragraphs 179-186) If not, what would you suggest?

We agree it is appropriate to separately address the issues relating to the latent defect problems in the building and construction sector within building and construction sector law.

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[6] As at 7 September 2016, 73 of the 85 (86%) voluntary accredited insolvency practitioners were based in Auckland, Wellington or Christchurch. The remaining practitioners were spread throughout the North Island, in Whangarei (2), Tauranga (4), New Plymouth (1), Paraparaumu (1) and Palmerston North (2). Source: RITANZ Accredited Insolvency Practitioner register http://www.ritanz.org.nz/search/. This is comparable to the 85% of licensed auditors who are based in the three main centres.

13. Do you agree that one, some or all of the three measures proposed by the Working Group will address the harm of some voluntary liquidations? (see paragraphs 187-200)

We do not have any specific comments to make on this question.

14. Do you agree with the benefits of a unique identification number for directors?

We agree that introduction of a unique identification number for directors will increase transparency and allow creditors and other stakeholders to easily identify directors.

15. Do you have any other comments on Report No. 1?

We consider that the term 'Accredited Insolvency Practitioner' should be specifically recognised in legislation and it should be an offence for non-accredited practitioners to use this term. This, together with a central register, will assist with educating the business community and other stakeholders of the need to appoint an Accredited Insolvency Practitioner to undertake regulated insolvency engagements.

Appendix B: About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets.

We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.