McGrathNicol

**Submissions on:**
**Review of Corporate Insolvency Law**

Report No. 1 of the Insolvency Working Group,
on insolvency practitioner regulation and voluntary liquidations


| Submitted by: | McGrathNicol<br>Level 17, 34 Shortland Street<br>PO Box 91644, Victoria Street West, Auckland 1142<br>www.mcgrathnicol.co.nz |
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<tr><td colspan="2">Questions for submitters on Report No. 1<br>Please provide reasons in support of your views for agreeing or disagreeing with the Working Group:</td></tr>
<tr><td colspan="2">Insolvency Practitioner regulation</td></tr>
<tr><td>1</td><td>Do you agree with the Working Group's views on the problems with the status quo? (see paragraphs 39-77) 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.<br>1.1. McGrathNicol agrees with the Working Group's view on the problems with the status quo. The Working Group has broadly categorised the problems with the status quo as relating to unprofessional conduct and incompetence. The absence of mandatory professional and ethical standards for insolvency practitioners in New Zealand is significantly out of step with international best practice. This has led to several examples of incompetent and unprofessional conduct, which undermines the confidence that creditors should be able to have in an Insolvency Practitioner. The scale of harm is difficult to assess accurately but this does not obviate the need for meaningful reform of insolvency law in this area.<br>1.2. McGrathNicol has observed several examples of insolvency practitioner conduct which is questionable and/or unethical, a number of which we have separately highlighted to MBIE. Comprehensive regulation of all insolvency practitioners is essential if these issues are to be effectively dealt with.</td></tr>
<tr><td>2</td><td>Do you agree with the listed objectives? (see paragraphs 78-81)<br>We agree with the objectives set out at paragraphs 78-81 of the report.</td></tr>
<tr><td>3</td><td>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.<br>3.1 McGrathNicol agrees that an interests statement should be prepared at the commencement of the assignment and if no creditors meeting is held we suggest that this should be filed with the Registrar of Companies. We do not consider that a further interests statement needs to be prepared during the assignment, but should a conflict of interest subsequently arise this should be disclosed in any reporting during the assignment and creditors advised whether or not the conflict has been adequately managed.<br>3.2 Duties to report serious problems should be the same for Administrators, Receivers and Liquidators, and similarly, protection given thereto should be the same for all appointees. However, practitioners should only be required to report if it appears to them that an offence has been committed, otherwise funds which would otherwise be distributed to creditors could be spent on unnecessary investigations and reporting.</td></tr>
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| | 3.3 Statements of receipts and payments. The proposal to require inclusion of individual payers and payees for transactions is unrealistic and would be an unnecessary expense ultimately borne by the creditors in an insolvency. Many assignments have a high volume of transactions and the numbers that would be required to report on would be significant and would be of no meaningful benefit to creditors. Totals of various categories of expense should be reported, as they are currently.<br>3.4 In the case of joint and several appointments we believe that as a minimum one of the appointees should be required to be domiciled in New Zealand. There is a requirement in New Zealand now that every company must have a New Zealand resident director. McGrathNicol has had considerable recent experience of New Zealand insolvency engagements where an overseas based firm has taken an appointment over a New Zealand entity. As a result, there have been significant additional costs incurred, numerous errors made by the overseas practitioners and inconveniences and costs caused to New Zealand creditors. It is McGrathNicol's understanding that, with good reason, no other significant jurisdiction allows an overseas based practitioner to take insolvency appointments in its own jurisdiction. This anomaly needs to be addressed as a matter of priority. McGrathNicol has already made separate representations to MBIE in this regard and is happy to expand on this if required. |
| 4 | ***Do you agree with the proposed changes to the High Court supervision of liquidators? (see paragraphs 154-156)***<br>We consider that if the entry requirement for practitioners is elevated, the need for High Court involvement may be reduced, however we still believe that the High Court supervision, when required, should be retained. We agree that the present provisions are difficult and expensive to implement. We agree with the Working Group's proposal to repeal section 286 and amend section 284 to make orders to enforce liquidator duties and to provide for removal and prohibition. |
| 5 | ***What are your views on the four occupational regulation options proposed by the Working Group? (see paragraphs 116-146)***<br>5.1 *Option A: Registration as proposed in the Insolvency Practitioners Bill.*<br>McGrathNicol considers this option is flawed and should be discarded.<br><br>5.2 *Option B: No statutory occupational regulation.*<br>McGrathNicol considers this option has significant limitations in that it remains voluntary. Currently only members of CAANZ/RITANZ would have any oversight and unscrupulous practitioners would escape effective regulation. |

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| | 5.3 *Option C: Co-regulation.*<br>McGrathNicol considers this is the most effective option in that it utilises the CAANZ/RITANZ model, backed by Government involvement to make it mandatory.<br><br>5.4 *Option D: Government licensing.*<br>McGrathNicol considers this option is unnecessary. Proficient and capable professional bodies (CAANZ/RITANZ) have the capability and systems in place already and these can be leveraged as noted in Option C. |
| 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)***<br>McGrathNicol agrees broadly with the recommendation put forward by the Insolvency Working Group. In particular, we make the following comments:<br>6.1 The insolvency of New Zealand entities should be undertaken by insolvency practitioners domiciled in New Zealand. We do not consider that insolvency practitioners should be taking insolvency appointments in New Zealand based on an overseas licensing system. Our recent experience has demonstrated significant issues with this approach.<br>6.2 Compromises – we believe that the same standard and requirement to license should apply to practitioners involved with compromises, both for companies and individuals. We refer to the judgment in the recent Trends Publishing case, where the judge referred to an "abuse of process" in regard to the calling of a creditors' meeting and also referred to creditors being "unfairly prejudiced". A review of this case supports our view that compromises should be included in the insolvency practitioner licensing regime. |
| 7 | ***Are there other feasible options to address the problems identified by the Working Group with the provision of insolvency services?***<br>McGrathNicol supports the submissions separately made by RITANZ in relation to this question. |
| 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?***<br>McGrathNicol considers this would ultimately be more cost effective since there would be no external regulator involvement. It would be important to ensure the professional body has the requisite ability to manage this regulation effectively. |

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<tr><td>9</td><td>Should insolvency services be restricted to only certain members of an accredited professional body, as opposed to all members of the accredited professional body?  If so, what criteria should be applied to determine which members of the accredited professional body would be permitted to provide insolvency services?<br>McGrathNicol considers that all insolvency practitioners should be accredited.  We understand that CAANZ will be making a rule change which will restrict its members from taking Regulated Insolvency Engagements unless they have been accredited.  McGrathNicol considers it is essential that members of a professional body should only be permitted to undertake insolvency engagements if they can demonstrate that they have the requisite skills and experience and are capable and competent to act, as well as being fit and proper persons.</td></tr>
<tr><td>10</td><td>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?<br>10.1 The accreditation standards promulgated by CAANZ are not onerous and should be regarded as a minimum benchmark.  If the implementation of the accreditation standards results in a lessening of competition (which we doubt), then that is a natural consequence of reinforcing the integrity of the insolvency marketplace in New Zealand.  Improving standards and bringing New Zealand into line with international best practice should not be sacrificed to maintain "competition" in the marketplace.  We should be focusing on raising the standards of practice for all practitioners and supporting them to do so.  This will result in effective market competition.<br>10.2 In particular, we consider that there are more than sufficient capable and reputable insolvency practitioners nationally for the current level of work.  It seems unlikely that regulating insolvency practitioners will result in an inability of companies to access such services and/or a lessening of competition.  In relation to insolvency services outside of the main centres of New Zealand, we note that most practitioners (including ourselves) regularly travel to and undertake insolvency services for businesses outside of the main centres.</td></tr>
<tr><td colspan="2">Voluntary liquidations</td></tr>
<tr><td>11</td><td>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 174-174, 201)<br>In our view the licensing would significantly reduce the harm presently being caused through aspects of the voluntary liquidation process.  Currently the bar is set so low that harm caused is likely to continue.  It is essential a licensing regime is implemented to bring New Zealand into line with international best practice.</td></tr>
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| 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 18-79-186) If not, what would you suggest:***<br>In our view, issues in this sector should be covered by appropriate legislation within this industry, such as the Building Act. |
| 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)***<br>**Measure 1: Remove the ability to appoint a liquidator after service of a liquidation application**<br>We believe that if the licensing regime is implemented effectively, reforms in this area should not be required. A shareholder appointed liquidator can have cost saving benefits for creditors of the company and is not necessarily a problem.<br><br>**Measure 2: Avoid transfers of assets after service of a liquidation application**<br>McGrathNicol considers the focus should be on getting a practitioner licensing system in place. Once this is operating effectively, problems such as this could be revisited if they are still an issue. A bona fide purchaser may have no knowledge that a liquidation application has been lodged. Timing of the transfer of assets can, in some cases, have significant impact on their value. To delay the transfer could significantly affect the value received, and accordingly the funds available for creditors. For example, liquidation could cause an event of default in key contracts that could otherwise have been assigned prior to the appointment of a liquidator. We would urge caution here before prohibiting asset transfers as envisaged. |
| 14 | ***Do you agree with the benefits of a unique identification number for directors?***<br>McGrathNicol considers that a unique director identification number would be a useful way of providing confirmation as to a director's identity. |
| 15 | ***Do you have any other comments on Report No 1?***<br>No. |