

OFFICE OF THE MINISTER OF COMMERCE

THE CHAIR
CABINET BUSINESS COMMITTEE

**PERSONAL INSOLVENCY AND COMPANIES (VOLUNTARY ADMINISTRATION)
REGULATIONS****PROPOSAL**

- 1 This paper seeks Cabinet approval for two sets of regulations to be made pursuant to the Insolvency Act 2006 and the Companies Amendment Act 2006, and changes to fees under the Companies Act 1993 Liquidation Regulations 1994. The new regulations prescribe various matters relating to bankruptcy and other personal insolvency proceedings, and two matters relating to the new voluntary administration procedure for companies. Approval is also sought for Orders-in-Council to bring the Insolvency Act and the changes made to the Companies Act by the Companies Amendment Act into force.

EXECUTIVE SUMMARY

- 2 The Insolvency Act and the Companies Amendment Act were passed in November 2006. Neither Act is yet in force.
- 3 The Insolvency Act will repeal and replace the Insolvency Act 1967 (which deals with personal insolvency). It updates that earlier Act, and introduces a new No Asset Procedure (NAP) for debtors. Regulations are needed under the new Act before it can be brought into force.
- 4 The proposed regulations incorporate a range of procedures and information requirements currently prescribed in the Insolvency Regulations 1970 and the Summary Instalment (District Court) Rules 1970, and also provide for additional measures required under the new Act. They are largely technical in nature, and deal with matters such as prescribed forms, fees, procedures for meeting with creditors, and information and process requirements.
- 5 The Companies Amendment Act 2006 amends the corporate insolvency provisions of the Companies Act 1993. It also introduces a new voluntary administration scheme as an alternative to liquidation. Regulations are required for two matters relating to the voluntary administration scheme before these provisions are brought into force.
- 6 The proposed changes to the Companies Act 1993 Liquidation Regulations 1994 increase the fees for the Official Assignee when acting as a liquidator in a company liquidation. It further proposes a change in the Official Assignee's charging methodology from a commission based remuneration to a time/cost remuneration.

BACKGROUND

- 7 The Insolvency Act and the Companies Amendment Act were passed in November 2006, following a review of personal and corporate insolvency law. The Acts were part of the Insolvency Law Reform Bill.

- 8 The Insolvency Act 2006 replaces the Insolvency Act 1967. It updates the existing bankruptcy procedure in that Act and the alternative proceedings, such as summary instalment orders, compromises with creditors and proposals. The new Act also introduces the NAP. This applies to first time debtors who have no assets and who cannot repay debts. It is less punitive than the normal personal bankruptcy proceedings.
- 9 The Companies Act 2006 makes some amendments to the corporate insolvency provisions in the Companies Act 1993. Most significantly, it introduces a new business administration regime along the lines of the Australian voluntary administration regime. The Companies Amendment Act also introduces provisions dealing with the appointment of liquidators, voidable transactions, and the use of phoenix companies. Some technical changes are also made to increase the accountability of liquidators to creditors.
- 10 Both the Insolvency Act and the Companies Amendment Act require regulations to be made in order for them to operate, particularly regulations to provide for forms for applications, notices, fees, and other procedural requirements.

COMMENT

REGULATIONS UNDER THE INSOLVENCY ACT 2006

Prescribed Forms and Notices

- 11 The Insolvency Act allows for the content, rather than the form, of prescribed forms and notices to be set out in regulations. Where possible, it is proposed that this approach be taken rather than including the specific form in the regulations.
- 12 It is further proposed that applications by a debtor for adjudication as a bankrupt, entry into the NAP and an application for a summary instalment order be able to be filed electronically. Where this is the case, the Insolvency and Trustee Services (ITS) will send a print-out of the application form to the applicant for his or her signature and return. Alternatively, applicants will be able to print out a form from the ITS website or obtain one from the ITS directly, and then submit it.
- 13 It is proposed that regulation 17 of the Insolvency Regulations 1970 be carried over to provide for the service of notices under the Act. This will ensure that the process under the High Court Rules will apply to the notice of bankruptcy under section 68 of the Act. The regulations should require the service of documents on the Official Assignee ("the Assignee"), which includes the Official Assignee and Deputy Assignees, at the office of the Official Assignee.

Manner of Advertising

- 14 It is proposed that advertising of all notices by the Assignee under the Insolvency Act (e.g. that a person is adjudged bankrupt) will be by publication on the ITS Website and in the *Gazette*. It is also proposed that notices advertising bankruptcy be able to refer to more than one matter or bankruptcy, as is currently provided for under regulation 13 of the Insolvency Regulations 1970.

- 15 These proposals are a change from the requirements under the Insolvency Act 1967, which requires publication in at least one newspaper published or generally circulating where the bankruptcy proceedings are filed. The reasons for dropping this requirement are cost savings for the Assignee; it will be easier to correct any errors in advertised information; it will avoid debtors filing for bankruptcy in a region other than which they live in; and that newspaper advertising is not very effective where there is more than one newspaper commonly read in a region.
- 16 The ITS website can be accessed and updated at almost any time. As most people have access to the internet, it is considered that advertising on the ITS website and the *Gazette* only will be as effective as the current system of advertising by newspaper. In terms of cost, the savings for ITS are estimated to be approximately \$185,000 per year. As some of these costs are recovered from insolvent estates, the proposal to only advertise on the website and in the *Gazette* will result in slightly more funds being returned to creditors.

Bankruptcy

- 17 An application by a debtor to be adjudged bankrupt must be filed with the Assignee. It is proposed that the regulations require each application to set out the full name of the applicant, address and contact details, occupation and date of birth.
- 18 If a person is adjudged bankrupt, the Insolvency Act requires the Assignee to send a notice in the prescribed form to the bankrupt. It is proposed that two forms be specified: one if a statement of affairs has already been filed (i.e. for a debtor's application) and a second form for where a statement of affairs still needs to be filed (e.g. where adjudication occurs on application of a creditor). The form will also contain the information specified in the Act for this form, namely that the bankrupt has been adjudicated bankrupt, that the bankrupt must file a statement of affairs (if applicable) and the time the statement of affairs must be filed. It will also refer to the ITS website, for any queries.
- 19 After a person is adjudged bankrupt, the process of creditors making claims against the bankrupt's estate begins. The Insolvency Act sets out the requirements for dealing with creditors' claims. It is proposed that the regulations require creditors' claims to include the name of the bankrupt, the contact details of the creditor, the name of the person completing the form, the amount of the claim, details of debt, date/s the debt was incurred, GST number of the creditor, whether or not security is held for the debt and if so, the details of the security and estimated value, signature (if completed manually), and the date the form is completed. It is also proposed that the regulations require evidence of the claim accompany the form.
- 20 An undischarged bankrupt must obtain the Assignee's consent to leave New Zealand. It is proposed that a bankrupt, or his or her authorised representative, must make an application in writing containing the particulars of the bankrupt's proposed departure, including the reasons for leaving New Zealand, whether the applicant is intending to return, and the approximate date of departure and return and other such particulars as the Assignee may require. It is also proposed that regulations permit the Assignee, having regard to the interests of the creditors and the bankrupt, to refuse any such application or grant it either unconditionally or upon or subject to such conditions as he or she thinks fit.

- 21 An undischarged bankrupt is prohibited from entering into or carrying on business without the consent of the Assignee. It is proposed that the regulations require an application in writing to be made by the bankrupt, or his or her authorised representative, for such consent, setting out the reasons for the application, whether the business is a new business, the capital of the business and such other particulars as the Assignee may require. This information will need to be verified by affidavit. The Assignee, having regard to the interests of the creditors and the bankrupt, may in his or her discretion refuse any such application or grant it either unconditionally or upon or subject to such conditions as he or she thinks fit including the interests of the bankrupt.
- 22 Persons may be summonsed to attend an examination by the Assignee or a District Court Judge. It is proposed that, given the examination can be before a District Court Judge, the regulations require that the District Court practice and procedure for issuing a summons be followed. Personal service would also be required.
- 23 Further, if the examination is before a District Court Judge, the regulations should require the Court to allocate a date, time and place of examination before the summons is sent.
- 24 Any person summonsed for a private examination, and any bankrupt who attends a public examination is entitled to the prescribed expenses. It is proposed that any person other than the bankrupt be paid the expenses provided for in the Witnesses and Interpreters' Fees Regulations. However, it is proposed that a bankrupt be only entitled to receive the travelling expenses provided for in regulation 8 of those regulations.
- 25 The Insolvency Regulations 1970 set out regulations relating to adjudication against a firm or partnership. It is proposed that the content of the regulations 27 and 29-32 be included in the proposed regulations.
- 26 A creditor must give notice to the Assignee and the bankrupt opposing the bankrupt's automatic discharge under section 292 of the Insolvency Act and discharge by a Court under section 297 of the Insolvency Act. It is proposed that the regulations provide for opposition to be notified not less than 5 working days before a hearing to avoid last minute objections and, further, to allow the bankrupt or his/her representative time to prepare and respond to the objections at the hearing.
- 27 It is proposed that regulation 63 of the Insolvency Regulations 1970 be included in the proposed regulations. The regulations provide that where a bankrupt has no available assets, the Assignee will not be required to incur any expense without a guarantee from the creditors.

Compositions

- 28 Compositions are able to be entered into during bankruptcy, as an alternative arrangement to the normal bankruptcy rules, with the agreement by 75% in value and number of creditors. They are approved by the Court, but some regulations are needed. It is proposed that the content of the following regulations set out in the Insolvency Regulations 1970, be carried over in the proposed regulations:
- regulation 28, which relates to the terms of a proposal for a composition; and
 - regulations 35 to 39, which relate to the manner in which payments under the composition are to be secured, the consequences of a debtor defaulting under a composition, disputes as to the amount of a claim that the Court may order and the requirement that a creditor be required to prove his or her debt before the debt becomes payable under a composition.

Proposals

- 29 Proposals are alternatives to a debtor being adjudged bankrupt. They are entered into with the agreement by a majority in number and 75% by value of creditors, and are approved by the High Court. The proposal sets out how a person's debts will be met, under the supervision of a trustee. Regulations are needed, largely dealing with meetings of creditors. It is proposed that the content of regulations 51 to 62 of the Insolvency Regulations be carried over except:
- actual form for notices of meeting not be prescribed;
 - regulation 52, relating to the quorum of 2 creditors to be present at a meeting in order for a proposal to be accepted by creditors, be modified to allow postal voting;
 - creditor's claims be required to be filed with the trustee in the same form as for bankruptcies; and
 - a trustee under a proposal be required to file a summary of receipts and payments in the same form as the summary required for a summary instalment order, as discussed in paragraph 39 below.
- 30 It is also proposed that the regulations set out a procedure for creditor's meetings under proposals to ensure they run smoothly and in a way that is not unfair to the debtor. These regulations will be similar to the procedure that applies in bankruptcy. Regulations are also needed to provide the procedure for the proving of creditor's claims. It is proposed that these be similar to the procedures that apply under summary instalment orders.
- 31 In addition, it is proposed to replicate regulation 20 of the Companies Act 1993 Liquidation Regulations 1994 to allow provisional trustees of a proposal to approve or reject creditor's claims, for the purposes of the creditor's meeting under a proposal. This will facilitate such meetings.

Summary Instalment Orders

- 32 Summary instalment orders are an alternative to bankruptcy, for persons with debts (excluding student loans) of \$40,000 or less. The order sets out the basis for payment of the debtor's debts. A change made by the Insolvency Act is that summary instalment orders will be made by the Assignee rather than the Court, given that it is an administrative process. The Official Assignee's will also be able to provide a range of options and services to debtors in financial difficulties.
- 33 An application for a summary instalment order must be filed with the Assignee by a debtor or creditor. Some information is already specified in the Act (e.g. the applicant's name). In addition, it is proposed that the regulations require the debtor's occupation and date of birth on the application form, and a statement of affairs (discussed further below).
- 34 Before making an order, the Assignee must allow a debtor or creditor to make representations. To facilitate this, it is proposed that the Assignee give notice of the application for the summary instalment order. The regulation should specify the contents of the notice, being details of the application and an explanation that the debtor or creditor may make representations in writing to the Assignee within 10 working days of the notice.

- 35 It is proposed that a notice of a summary instalment order be sent by the supervisor to every creditor within 15 working days of the date of issue of the order. Creditors will be required to prove the debt by submitting a creditor's claim form, in the same form as applies for bankruptcy, to the supervisor within 15 working days of receiving notice of the order from the supervisor. The supervisor will notify creditors within 15 working days of receiving the claim as to whether their claims have been accepted or rejected, the reasons for the decision and the right of creditors to appeal the supervisor's decision to the Assignee.
- 36 It is proposed that creditors be able to object to a rejection of their claim within 15 working days of receipt of the supervisor's decision. The Assignee will then be required to give notice to the supervisor, debtor and creditor inviting them to make representations to the Assignee within 15 working days of receiving the objection.
- 37 The Insolvency Act provides for an application to be made for a variation of an order. It is proposed that an application from a debtor, creditor or the supervisor to the Assignee to vary or discharge a order be in writing, that all affected parties be notified of the application (if the variation will detrimentally affect the interests of creditors) and the reasons for a decision to vary or discharge the order. It is also proposed that the supervisor notify creditors of all variations after the order is made.
- 38 The Insolvency Act requires a supervisor to notify the Assignee as soon as practicable of a default by a debtor. It is proposed that the supervisor also notify creditors as soon as practicable so they can begin any proceedings that were previously halted due to the summary instalment order.
- 39 It is proposed that a notice be given to the Assignee by the supervisor (if required by the Assignee) within 20 working days of the summary instalment order being discharged, together with a statement of account showing amounts received and paid under the order (if the supervisor is not using the Assignee's trust account). Any excess money at the completion of the order should be paid to the debtor.
- 40 The Insolvency Act provides for a suitable and willing person to supervise compliance by the debtor with the terms of a summary instalment order. It is proposed that prior to the appointment, a proposed supervisor may be required to provide credit and security checks to the Assignee, verified by statutory declaration, and the Assignee approve the appointment on the terms and conditions he or she thinks appropriate.
- 41 It is proposed that the payment of any money (i.e. dividends) to creditors by the supervisor be accompanied by a description identifying the payment. It is also proposed that the supervisor's and Assignee's remuneration costs be deducted before any payment of dividends is made to creditors. Where payments are made by a debtor to the Assignee, regulations will require these to be made electronically to the account specified by the Assignee.
- 42 The Insolvency Act provides for payment of part of a debtor's earnings to be made to the supervisor, and then remitted to the creditors. It is proposed that the supervisor should give a written direction specifying the date of commencement for the direction, and that such direction be served either personally or by post.

- 43 It is proposed that the supervisor be able to either use the trust account operated by the Official Assignee for bankruptcies or a joint account in own name and the name of debtor, or a trust account opened by the supervisor. If a supervisor elects not to use the Official Assignee's trust account, the regulations will require the supervisor to bear the cost of any bank fees. The reason for this is that the Assignee will be able to negotiate much lower bank fees than individual supervisors and, possibly, higher interest rate returns. Making supervisors liable to pay any bank fees they incur themselves will provide an incentive for them to utilise the bank account operated by the Assignee.
- 44 It is also proposed that the content of the following rules set out in the Summary Instalment Orders (District Court) Rules 1970 be included in the proposed regulations, with appropriate changes to reflect that summary instalment orders will be made by the Assignee, rather than the District Court:
- rule 19, which sets out the obligations of the supervisor, except that the regulations will also make it clear that, if the debtor is appointed as supervisor, the debtor must perform all the obligations applying to supervisors;
 - rules 20(5) and (6), which provide for the inspection and amendment of a creditor's claims by a creditor;
 - rule 22, which specifies the procedures to be followed if a proof of debt is received late but without the current reference to fault on the part of the claimant. The regulations should also provide for payment of a dividend only after creditors who became creditors of the debtor before the order was made have been paid;
 - rule 23, which specifies how the money received by a supervisor must be managed, with changes to reflect the proposals in paragraph 43 above relating to use of the trust account operated by the Official Assignee. In addition, the current thresholds for the liquidation of smaller debts will be updated from \$5 to \$200 and for the accumulation of dividends from \$2 to \$20 to make the process more cost effective;
 - rule 25, which provides for an application by the debtor or creditor to discharge the supervisor from his or her obligations and specifies the consequences of termination;
 - rule 26, which provides for the supervisor to render accounts at six monthly intervals if required by the Court; and
 - rule 29, which prohibits second applications for summary instalment orders within six months of the Court refusing to make a first order, or the setting aside, rescinding or discharge of the first order.

No Asset Procedure

- 45 An application must be filed with the Assignee for a debtor to apply to enter the NAP. It is proposed that the content of each application include the full name of the applicant, address and contact details, occupation and date of birth, as for applications for bankruptcy.
- 46 A debtor is admitted to the NAP when the Assignee sends the debtor a written notice in the prescribed form. It is proposed that the regulations require the written notice to include the name of the debtor, date of birth, address, date of admission to the NAP, and a statement of the statutory obligations of the person admitted to the NAP.

- 47 Section 363(1)(e) of the Insolvency Act refers to a prescribed means test for entry into the NAP. It is proposed that the regulations specify a test based on whether the applicant's income and income from any related persons, taking into account their and their dependents' living expenses, is sufficient to pay their debts.
- 48 It is proposed that a notice from the Assignee to the debtor terminating the debtor's participation in the NAP include the name of the debtor, date of birth, a unique identifying number, the date of admission to the NAP, date of termination of the NAP and a summary of the effect of the termination of the NAP.

Statement of Affairs

- 49 The Insolvency Act requires that debtor's applications for bankruptcy and applications for entry into the NAP be accompanied by a statement of affairs. The Act also requires a debtor who is adjudged bankrupt on the application of a creditor and in other situations, to file a statement of affairs within 10 working days of receiving notice of bankruptcy from the Assignee. For summary instalment orders, the Act allows regulations to prescribe the information that applications must contain. In addition to the information in paragraph 48 above, it is proposed that this include a statement of affairs.
- 50 It is proposed that a single statement of affairs be specified for all these processes. The details to be included on a statement of affairs will be the applicant's full name (and any aliases and/or other names used in the last 7 years), date of birth, gender, contact details, IRD number, passport number, employment details, income and expenditure details, details of assets, liabilities and contingent liabilities.

Public Registers

- 51 The Assignee is required to maintain a public register for all bankruptcies under section 62, summary instalment orders under section 354 and the NAP under section 368.
- 52 Section 449 of the Insolvency Act sets out the information that must be kept on the public registers. Section 449(1)(o) provides for any other prescribed information or documents to be kept on the public registers.
- 53 Given that there could be persons with similar first names and surnames, it is proposed that the regulations provide for the year of birth of persons to be included on the registers, in addition to the information specified in section 449. This will provide a unique identifier of that individual for search purposes. This will be especially important to distinguish between persons with the same or similar names. There are currently a number of examples of this on the existing register, including persons in the same family and living at the same address. Although disclosure of year of birth has some minor privacy implications, I consider that this is outweighed by the prejudice of someone being mistaken as a bankrupt, and by the cost savings in searching the register.
- 54 Section 447 states that a public register must be available for access and searching by members of the public during business hours. The Assignee has the discretion to refuse access to a public register, in whole or in part, if the Assignee considers that it is not practical to provide access to the register, or for any other reason that is prescribed by regulations. It is proposed that more particular grounds be set out in the regulations to permit the Assignee to refuse access to the register, namely:
- for maintenance of the register;

- in response to technical difficulties; and
- to ensure security or integrity of the Register.

Accounts and Records

55 It is proposed that the content of the following regulations set out in the Insolvency Regulations 1970 relating to the keeping of accounts and records by the Assignee on bankruptcy be included in the proposed regulations:

- regulation 6, which prescribes the accounting records to be kept by the Assignee, except for regulation 6(2)(b) (which provides for a register of claims and a register of unrealised assets);
- regulations 7, 9 and 10, which set out the details for estate ledger, and cash book;
- regulation 12, which provides for the Assignee to pay all money received by him or her into a bank account to his or her own credit as Assignee; and
- regulation 61, which permits the Registrar to order an audit of the trustee's accounts which relate to the debtor. The Court has the discretion to order the trustee to compensate for any loss through misfeasance, negligence, or wilful default of the trustee.

56 It is also proposed that equivalent regulations to regulations 6 to 10 of the Insolvency Regulations 1970 apply to trustees under proposals and supervisors under summary instalment orders. In addition, for summary instalment orders, it is proposed that the Assignee be able to appoint an external auditor. If the Assignee requests an external audit to be done because of apparent discrepancies in the financial records of the supervisor, the supervisor will be required to pay for the audit. Otherwise, the Assignee will bear the cost of an internal audit. As for trustees under proposals, the audit requirements are covered under the existing regulations which will be replicated in the new regulations.

57 Creditors who have proven their debts also need a right to inspect the summary of affairs, creditors' claims and application forms in respect of a summary instalment order. It is proposed that this be provided for, to allow monitoring by creditors.

58 Section 228 of the Act requires the Assignee to prepare and publish a final statement of receipts and payments in the prescribed manner, and advertise it in the prescribed manner. The statement of receipts and payments will be specified in regulations referred to in paragraph 55 above. It is proposed that the regulations provide for notification of the final statement of receipts and payments on the ITS website and in the *Gazette*, and that a notification that the final statement is published be placed on the ITS website.

Fees and Remuneration of Assignee and Others

59 The Insolvency Act confers a number of new functions on the Assignee, for which fees need to be set. These are the receiving and processing of debtors' applications and annulments in bankruptcy; the receiving and processing of applications for summary instalment orders; and the administration of the summary instalment regime generally. The Assignee will also administer the new NAP regime, but as debtors eligible for the NAP will have no significant assets or income, no fees will be set.

- 60 Fees for existing procedures also need to be set under the new Act. In addition, the remuneration rates of the Assignee in carrying out company liquidations have not been reviewed since 1994, and are now out of date. I believe that it is timely to adjust these, concurrently with setting fees for the new functions to be carried out by the Assignee.
- 61 In December 2006, I directed my officials to release for targeted consultation a discussion paper on various fee proposals for the carrying out of insolvency administration under the Insolvency Act, and also for updating the rates of remuneration of the Assignee in bankruptcies and in company liquidations, when the Assignee is appointed as the liquidator, and for liquidators.
- 62 Feedback on the fees proposals was sought from a number of insolvency practitioners, a budget advisory agency, and a credit control agency. This feedback is discussed below.

Fees

- 63 It is proposed that the fee for filing an application to be adjudicated bankrupt, which is currently \$40, be increased to \$200 (GST inclusive) and that the fee be recovered as a first charge on assets received, if there are sufficient assets to meet the cost of the fee. The increase in the fee takes into account that under the Insolvency Act the Assignee will be required to receive and consider a complete statement of the debtor's affairs as a precondition to acceptance of the debtor's application for bankruptcy. This process goes considerably further than the requirements on the High Court to simply receive a debtor's petition, allocate a Court number and notify the Assignee.
- 64 It is proposed that a portion of the costs of the Assignee in dealing with summary instalment orders be recovered by way of an upfront fee of \$100 (GST inclusive) for an application for a summary instalment order. This would be recoverable as a first charge on assets received pursuant to the order.

Remuneration

- 65 Under the Insolvency Act, a summary instalment order supervisor may charge a debtor remuneration for carrying out his or her duties at an amount or rate fixed by regulation. The Act also allows regulations to prescribe the rates of remuneration that an Assignee may charge for carrying out his or her functions. It is proposed to charge a commission rate of 10% of assets recovered, with 7.5% going to the supervisor and the balance of 2.5% to be paid to the Assignee. Under current legislation, supervisors are entitled to receive commission at the rate of 7.5%. The Assignee's remuneration of 2.5% of assets recovered will be applied towards covering the shortfall of costs recovered by the application fee, and towards the Assignee's ongoing functions in relation to orders, such as maintaining the central trust account, the oversight of supervisors, audits of supervisors' financial statements and dealing with maintenance of the register of summary instalment order debtors, complaints, terminations of applications and management of enquiries.
- 66 Under the Insolvency Regulations 1970, in bankruptcy administrations the Assignee is entitled to recover remuneration calculated on a commission basis. It is proposed that the Assignee move from a commission-based remuneration basis to a time cost basis (with exception of summary instalment orders). This will bring the Assignee's practices into line with Treasury's "*Guidelines for Setting Charges in the Public Sector*".

- 67 The rates of the Assignee's remuneration in bankruptcies have not been reviewed since 1988. The rates for the Assignee when appointed as the liquidator under the Companies Act and for private liquidators appointed by the Court under the Companies Act 1993 Liquidation Regulations 1994 have not been reviewed since 1994. These rates now fall well below the actual cost of carrying out the work involved in insolvency administrations and in liquidations.
- 68 Further, in a large number of liquidations, private, court-appointed liquidators will seek applications to Court to fix their remuneration at a rate higher than that prescribed in the regulations. Substantial time and effort is spent by liquidators, their counsel and the Court to determine the appropriate level of remuneration. To reduce these costs, it is also proposed that the rates of remuneration for private, court-appointed liquidators be updated. At the present time, the default rate under the Companies Act 1993 Liquidation Regulations 1994 for private, court-appointed liquidators is the same as for the Assignee. It is proposed that this continue.
- 69 A remuneration review has been carried out by the Assignee to assess the appropriate level of remuneration for the functions carried out. The review was based on a time cost analysis of estates administered by the Assignee, and also took into account staff salaries and the cost of overheads, thus allowing for the calculation of the appropriate hourly rates. As with the existing regulations, the same hourly rates would apply to private, court-appointed liquidators. Based on the review, new hourly rates have been calculated as follows:

Position	Current hourly rate for liquidations (GST excl.)	Proposed hourly rate (GST exc.)
Official Assignee/Deputy Assignee/Liquidator	\$65	\$200 (GST exc.)
Legal and Accounting Staff employed by the Official Assignee or a liquidator	\$70	\$200 (GST exc.)
Insolvency Officers/other employees of a liquidator	\$40	\$140 (GST exc.)

Feedback from Consultation on Fees

- 70 All respondents supported the first proposal to introduce an application fee of \$200 (GST inclusive) for a debtor's application to be adjudicated bankrupt, to be recovered as a first charge.
- 71 Most respondents supported the proposal to introduce a fee of \$100 (GST inclusive) for an application for a summary instalment order. One submitter expressed concern that the increase in the fee may act as a disincentive to applicants. The submitter accepted, however, the need for the Assignee to recover costs associated with the process, but suggested that a higher rate of commission would be preferable. In my view, the disincentive effect of an increased fee will be addressed by it not being imposed as an upfront fee, but recoverable as a first charge.

- 72 All except one respondent agreed with the principles underlying the proposal to charge an all-up commission of 10% under summary instalment order, with 7.5% to be paid to the supervisor, and 2.5% to be paid to the Assignee. One submitter suggested that a minimum fee of \$500 was needed. I believe that, although this might go further towards meeting the true costs of the application, a minimum fee in the order of \$500 would act as a barrier. A second submitter suggested that the 2.5% commission for the Assignee may need to be modified for orders where the Assignee's services are not used. This submission does not recognise that, even where the Assignee's facilities are not used, the Assignee is obliged to carry out ongoing functions during the life of the order, such as audit functions.
- 73 On the proposal to change the method of charging in bankruptcies from a commission to a time/cost method, all except one respondent was supportive. It expressed doubts about the method, although it supported the proposed rates. Moving to a time/cost method of charging would bring the method of remuneration in bankruptcies into line with the method of charging remuneration where the Assignee acts as a liquidator. Further, the time/cost remuneration method would mean that the Assignee would only be charging for work actually done in recovering returns for creditors. It would not result in any reduction in the underlying incentive for the Assignee to carry out his functions, as the Assignee's office is a non-profit department which employs internal quality assurance guidelines to ensure that an appropriate level of work is undertaken to obtain the best return for creditors in a cost-effective manner.
- 74 Finally, all respondents agreed with the proposal to increase the rates of remuneration as proposed, although there was some comment as to the level of the increase. One submitter commented that the proposed rates are a little low, and another that they are a little high in the case of insolvency officers. One submitter suggested a minimum flat fee of \$5000 for liquidations. There are regional variations in the charging of remuneration by private liquidators, with liquidators in larger centres generally charging at higher rates than those in provincial centres. I believe that the proposed rates strike a balance between those rates, and represent the true cost of carrying out the work at appropriate levels by the Assignee and his or her staff.

REGULATIONS UNDER THE COMPANIES AMENDMENT ACT 2006

Companies (Voluntary Administration) Regulations

- 75 The new voluntary administration regime will involve the appointment of an administrator who has control of the failing company's business and property. When a company is under administration there will be a stay on actions to recover money from the company. Within the period of the stay the administrator must convene a meeting of creditors to decide and vote on the company's future. One of the options is a deed of company arrangement. This is binding on all creditors and officers of the company and essentially sets out how the company will be managed, including the extent to which debts will be repaid.
- 76 New section 239ACN(3) of the Companies Act 1993 will provide for the deed of administration to include any prescribed provisions, except those provisions that the document expressly excludes. It is proposed that regulations provide for the following prescribed provisions:

- the deed administrator is deemed to act as agent for and on behalf of the company;
- the deed administrator has all the powers necessary to carry on the business of the company and the other specific powers of a liquidator in Schedule 6 of the Companies Act;
- the deed administrator may cease to carry on the business of the company if the deed administrator or the committee of inspection determines that it is no longer practicable to do so;
- the deed administrator may apply the property of the company in the same order of priority that a liquidator would apply if the company were in liquidation;
- creditors must accept their entitlements under the deed in full satisfaction and complete discharge of the debts or claim against the company;
- if the administrator has paid to the creditors their full entitlements under the deed, all debts or claims of the company are extinguished;
- the deed may be pleaded by the company against any creditor in bar of any debt or claim that is admissible under the deed and that a creditor must not, before termination of the deed, institute or prosecute any legal proceedings in relation to any debt incurred before the day when the administration began, exercise any right of set-off or cross-action, or commence or take any further step in any arbitration against the company;
- that the provisions of the Companies Act relating to creditors' claims, apply to the deed as if references to the liquidator were references to the administrator of the deed;
- that the provisions of the Companies Act relating to meetings of creditors, apply to meetings of creditors or of the committee of inspection, as if references to the liquidator were references to the administrator of the deed;
- rules relating to the appointment, membership and procedures of the committee of inspection;
- if the deed administrator has applied all of the proceeds of the realisation of the assets available for the payment of creditors, the deed administrator must certify to that effect in writing and lodge a notice of termination of the deed with the Registrar of the Companies Office; and
- the notice of termination of the deed.

77 These prescribed provisions will be largely drawn from the Australian Corporations Regulations 2001 ("the Australian Regulations"). However, the wording of similar sections applying to liquidators under the Companies Act will be used where appropriate and necessary for consistency. This will also mean that any case law under the Companies Act will apply. Also some matters in the Australian Regulations are already covered in the Companies Amendment Act, and will therefore not be repeated in the regulations.

78 New section 239ACZ of the Companies Act will require the administrator or deed administrator to prepare accounts in the prescribed form that must be filed with the Registrar of the Companies Office from time to time during the period of administration. It is proposed that regulations be made prescribing the form and content of the accounts to be filed, as follows:

- company details and contact details of the person filing the accounts;
- details of the appointment, including whether or not the accounts are final and the details of the administrator and date of appointment;
- the number and value of creditors as well as the payment of dividends;
- the professional fees recorded in the records, expenses and outlays paid to the administrator, and the estimated completion date;

- the total money received by the administrator for all periods;
- the total of all payments made prior to the current accounts, and during the current period, where dividends have been paid, the creditor's name and the nature of the dividend, any losses, the total of all payments for the whole administration, a bank reconciliation at the date of the current accounts; and
- the administrator's signature and verification of the accounts.

79 Again, these proposed requirements will be largely drawn from the Australian Regulations.

CONSULTATION

80 The following Government departments have been consulted on this paper: Treasury, Ministry of Justice, Ministry of Social Development, Ministry of Education, the Inland Revenue Department, Department of Labour, Ministry of Social Development, Te Puni Kokiri. Officials also consulted with the Reserve Bank of New Zealand.

The Department of Prime Minister and Cabinet has been informed.

81 The following parties were also consulted on the fee and remuneration proposals in this paper:

- New Zealand Federation of Family Budgeting Services
- Baycorp (NZ) Limited
- Grant Thornton (insolvency specialists)
- Crichton Horne & Associates (insolvency specialists)

The outcomes of this consultation are discussed above.

FINANCIAL IMPLICATIONS

82 The increase in revenue for the Insolvency and Trustee Service from the fees proposed in the Cabinet paper would be \$302,000 in the 2008/09 year, \$458,000 in 2009/2010 and the out-years.

83 There is a shortfall in funding to address the impact of the Insolvency law reform on the Insolvency and Trustee Service which conferred a number of new functions on the Official Assignee from 2008/09 and out-years. These changes reflect the additional fees which will be collected, but this revenue will only partially fund the shortfall. On 19 April 2007, Cabinet directed officials to investigate options to part or fully fund additional responsibilities for the Insolvency Trustee Service outputs through recovery methods beyond 2007/08, and report back on these options by 31 December 2007 [CAB Min (07) 12/1(8) refers].

BILL OF RIGHTS ACT CERTIFICATION

84 The proposals contained in this Cabinet paper are consistent with the New Zealand Bill of Rights Act 1990.

HUMAN RIGHTS

85 The proposals contained in this Cabinet paper are consistent with the Human Rights Act 1993.

LEGISLATIVE IMPLICATIONS

86 The proposals in this paper will require the drafting of regulations. A Commencement Order for the Insolvency Act 2006 and amendments to the Companies Act made by the Companies Amendment Act 2006 will also be required, to bring them into force together with the respective regulations.

REGULATORY IMPACT ANALYSIS

87 The Ministry confirms that the principles of the Code of Good Regulatory Practice and the regulatory impact analysis requirements, including consultation on RIS requirements, have been complied with.

88 A Regulatory Impact Statement that complies with Cabinet Office Circulars CO (07) 3 is attached as Appendix 1. The Regulatory Impact Statement was circulated with the Cabinet Paper for departmental consultation.

89 The Ministry of Economic Development considers that the RIS is adequate.

PUBLICITY

90 The regulations and the commencement of the Insolvency Act and the parts of the Companies Amendment Act to be brought into force will be publicised by the Ministry in the following ways:

- media statement;
- a mail-out to insolvency practitioners and other interested parties;
- publicity on the websites of the Ministry; and
- MED Newsletter

COMMENCEMENT DATE

91 The regulations, if approved, would come into force at least 28-days after they are made. It is currently proposed that:

- (a) the Companies (Voluntary Administration) Regulations, and the Commencement Order come into force in mid-October 2007; and
- (b) the Insolvency Regulations come into force in early December 2007.

92 It is also proposed that the Commencement Orders for the amendments to the Companies Act made by the Companies Amendment Act 2006 and for the Insolvency Act come into force on the same date as the respective regulations.

RECOMMENDATIONS

93 It is recommended that the Committee:

General

- 1 **agree** that the regulations under the Insolvency Act 2006 provide for advertising of notices to be by publication on the Insolvency and Trustee Service Website and in the *Gazette*, and permit notices to refer to more than one matter or bankruptcy;

- 2 **agree** that the regulations under the Insolvency Act 2006 contain the contents of regulation 17 of the Insolvency Regulations 1970, in relation to the services of notices, and require notices served on the Assignee be served at the Assignee's office;

Bankruptcy

- 3 **agree** that the regulations under the Insolvency Act 2006 prescribe the information to be provided in debtor's applications for adjudication as a bankrupt, creditor's claim forms, applications by a bankrupt for consent to leave New Zealand, and applications by a bankrupt to enter into or carry on business, and notices sent by the Assignee to a person adjudged bankrupt;
- 4 **agree** that the regulations under the Insolvency Act 2006 provide that the Assignee may, having regard to the interests of creditors and the bankrupt, refuse any application from an undischarged bankrupt to leave New Zealand or to carry on business, or grant such consent unconditionally or subject to any conditions he or she thinks fit;
- 5 **agree** that the regulations under the Insolvency Act 2006 set out the procedure for giving summons for private examinations of bankrupts;
- 6 **agree** that the regulations under the Insolvency Act 2006 provide for expenses to be paid to a person who is summonsed to a private examination or a public examination of a bankrupt, as provided for in the Witnesses and Interpreters' Fees Regulations, but that the bankrupt's expenses be limited to travelling expenses;
- 7 **agree** that the regulations under the Insolvency Act 2006 include the contents of regulations 27 and 29-32 of the Insolvency Regulations 1970, relating to firms or partnerships to be adjudicated bankrupt, and the contents of regulation 63 of the Insolvency Regulations 1970, which permit the Assignee not to incur expenses without guarantees from creditors;
- 8 **agree** that the regulations under the Insolvency Act 2006 provide for creditors to notify the Assignee of any opposition to discharge of a bankrupt 5 working days before the final hearing or automatic discharge;

Compositions

- 9 **agree** that the regulations under the Insolvency Act 2006 include the contents of regulations 28 and 35-39 of the Insolvency Regulations 1970 relating to compositions;

Proposals

- 10 **agree** that the regulations under the Insolvency Act 2006 include the contents of regulations 51 to 62 of the Insolvency Regulations 1970 relating to proposals with minor variations, and set out the procedure for creditor's meetings in proposals and for the proving of debts;

Summary Instalment Orders

- 11 **agree** that the regulations under the Insolvency Act 2006 specify the information to be provided in applications for summary instalment orders, variations or discharges of summary instalment orders and in notices of applications for summary instalment orders;

- 12 **agree** that the regulations under the Insolvency Act 2006 require supervisors to give notice of the making of the summary instalment order, any variation, or any default by the debtor to creditors and (where appropriate) the debtor;
- 13 **agree** that the regulations under the Insolvency Act 2006 set out the procedures for approval of creditor's claims, and for objections to supervisor's decisions on creditor's claims to be lodged with the Official Assignee;
- 14 **agree** that the regulations under the Insolvency Act 2006 provide for the supervisor to give the Official Assignee (if required by the Official Assignee) notice within 20 working days of a summary instalment order being discharged, together with a statement of account where the Official Assignee's trust account was not used to facilitate payments to the creditors;
- 15 **agree** that the regulations under the Insolvency Act 2006 set out requirements for the payments of dividends and for any excess money at the completion of a summary instalment order to be paid to the debtor;
- 16 **agree** that the regulations under the Insolvency Act 2006 allow the Official Assignee to require proposed supervisors to provide credit and security checks verified by statutory declaration and for the Assignee to approve the appointment of a supervisor on any terms and conditions he or she thinks appropriate;
- 17 **agree** that the regulations under the Insolvency Act 2006 provide that a supervisor give a written direction to employers specifying the date by which the employer must comply with a direction for payment of part of a debtor's earning to the supervisor's account, and require the direction to be given by post or personally;
- 18 **agree** that the regulations under the Insolvency Act 2006 permit a supervisor under a summary instalment order to use the trust account operated by the Official Assignee for bankruptcies, and, if a supervisor elects not to use the Official Assignee's trust account, require the supervisor to bear the cost of any bank fees;
- 19 **agree** that the threshold for liquidating smaller debts, rather than paying them by instalments, be increased from \$5.00 to \$200.00 and the threshold for accumulating dividends increased from \$2.00 to \$20.00;
- 20 **agree** that the regulations under the Insolvency Act 2006 provide for the content of rules 19, 20(5), 20(6), 22 to 23, 25, 26 and 29 of the Summary Instalment Orders (District Court rules) 1970 with variations to reflect that summary instalment orders will be made by the Assignee and other changes to be consistent with the Insolvency Act and recommendation 18 and 19 above;

No Asset Procedure

- 21 **agree** that the regulations under the Insolvency Act 2006 set out the information required in an application for entry into the No Asset Procedure, the information required in a notice from the Official Assignee to a person admitted into the No Asset Procedure, and a notice terminating the No Asset Procedure;

- 22 **agree** that the regulations under the Insolvency Act 2006 provide a means test for admission into the No Asset Procedure based on whether the applicant's income and income from any related persons, taking into account their and their dependents' living expenses, is sufficient to pay their debts;

Statement of Affairs

- 23 **agree** that the regulations under the Insolvency Act 2006 require the statement of affairs in relation to bankruptcy, an application for a summary instalment order, and an application for entry into the No Asset Procedure to contain the applicant's full name (and any aliases and/or other names used in the last 7 years), date of birth, gender, contact details, IRD number, passport number, employment details, income and expenditure details, details of assets, liability and contingent liabilities;

Public registers

- 24 **agree** that the regulations under the Insolvency Act 2006 provide for the year of birth of bankrupts, persons subject to summary instalment orders and the No Asset Procedure to be disclosed on the relevant public registers;
- 25 **agree** that the regulations under the Insolvency Act 2006 provide for the Assignee to refuse access to the public registers where necessary for maintenance of the register, in response to technical difficulties, or to ensure security or integrity of the register;

Accounts and records

- 26 **agree** that the regulations under the Insolvency Act 2006 provide for accounting and records to be kept by the Assignee containing the information set out in regulations 6, 7, 9, 10 and 12 of the Insolvency Regulations 1970, except for regulation 6(2)(b);
- 27 **agree** that the regulations under the Insolvency Act 2006 provide for the keeping of the same records by the supervisor under a summary instalment order or trustee under a proposal as required by the Assignee in bankruptcy;
- 28 **agree** that the regulations under the Insolvency Act 2006 contain the content of regulation 61 of the Insolvency Regulations 1970, which allows the Court Registrar to order an audit of a trustee's accounts under a proposal;
- 29 **agree** that the regulations under the Insolvency Act 2006 allow a proven creditor to inspect the summary of affairs, creditor's claims and application forms in relation to a summary instalment order;
- 30 **agree** that the regulations under the Insolvency Act 2006 provide for publication of the final statement of receipts and payments by the Assignee on the ITS website and in the *Gazette* with notification on the ITS website;

Fees and remuneration

- 31 **agree** that the regulations under the Insolvency Act 2006 provide for a \$200 (GST inclusive) fee for an application for a debtor's petition and a \$100 (GST inclusive) fee for a summary instalment order, recoverable as a first charge on the assets in the insolvent estate;

- 32 **agree** that the regulations under the Insolvency Act 2006 provide for the rates of remuneration of supervisors of summary instalment orders and Assignees in relation to summary instalment orders and bankruptcies set out in the table below;

Rates of Remuneration under Summary Instalment Orders

	Supervisors	Official Assignee
Fees (as a percentage of the recovered assets) under Summary Instalment Orders	7.5%	2.5%

Rates of Remuneration in Bankruptcy

Position	Current hourly rate (excluding GST)	Proposed hourly rate (excluding GST)
Official Assignee/Deputy Assignee	\$65	\$200
Legal and Accounting Staff employed by the Official Assignee	\$70	\$200
Insolvency Officers	\$40	\$140

- 33 **agree** to amend the Companies Act 1993 Liquidations Relations 1994 to provide for the rates of remuneration for the Assignee, when acting as a liquidator, and for private, Court appointed liquidators, set out in the table below.

Position	Current hourly rate (excluding GST)	Proposed hourly rate (excluding GST)
Liquidator	\$65	\$200
Legal and Accounting Staff employed by the liquidator	\$70	\$200
Other employees of a liquidator	\$40	\$140

- 34 **Note** that the increase in revenue for the Insolvency and Trustee Service from the fees proposed in the Cabinet paper would be \$302,000 in the 2008/09 year, \$458,000 in 2009/2010 and the out-years.

- 35 **Note** that Cabinet directed Ministry of Economic Development officials to investigate and report back by 31 December 2007 on options to part or fully fund the additional responsibilities for the Insolvency and Trustee Service outputs through recovery methods beyond 2007/08 [CAB Min (07) 12/1/(8) refers].

Deed of company administration

- 36 **agree** that the regulations under the Companies Act 1993 provide that the terms of a deed of administration contain prescribed default terms similar to those set out in the Australian Corporation Regulations 2001;
- 37 **agree** that the regulations under the Companies Act 1993 set out the information required in the accounts to be filed with the Registrar of Companies under a deed of administration;

Drafting instructions

- 38 **invite** the Minister of Commerce to instruct Parliamentary Counsel to draft regulations pursuant to the Insolvency Act 2006 and to the Companies Act 1993, and changes to the Companies Act 1993 Regulations 1994, prescribing the matters referred to in this paper and such other matters that may be necessary for or incidental for the administration and implementation of the Insolvency Act 2006 and the Companies Amendment Act 2006;
- 39 **invite** the Minister of Commerce to instruct Parliamentary Counsel to draft Commencement Orders bringing the Insolvency Act 2006 and the changes to the Companies Act 1993 set out in the Companies Amendment Act 2006 into force on the same day as the respective regulations come into force; and
- 40 **agree** to the release of this paper on the Ministry of Economic Development website.

Hon Lianne Dalziel
Minister of Commerce

Regulatory Impact Statement – Insolvency Regulations and Companies (Voluntary Administration) Regulations

EXECUTIVE SUMMARY

In November 2006, the Insolvency Act 2006 and the Companies Amendment Act 2006 were passed. Neither Act is yet in force.

The Insolvency Act will repeal and replace the Insolvency Act 1967 (which deals with personal insolvency). It updates the earlier Act, and introduces a new No Asset Procedure for debtors. The regulations proposed in the paper are needed under the new Act before it can be brought into force. The proposed regulations incorporate a range of procedures and information requirements currently prescribed in the Insolvency Regulations 1970 and the Summary Instalment (District Court) Rules 1970, and also provide for additional measures required under the Act.

The Companies Amendment Act 2006 amends the corporate insolvency provisions of the Companies Act 1993, including adding a new voluntary administration scheme as an alternative to liquidation. The aim of this scheme is to rehabilitate companies, where appropriate, rather than result in their liquidation. Regulations are needed for two matters relating to voluntary administration, in order to bring that scheme, and other important changes to the corporate insolvency provisions of the Companies Act into force.

Regulations relating to fees for debtor applications for bankruptcy and for summary instalment order, to rates of remuneration for supervisors under summary instalment orders and the Official Assignee in relation to summary instalment orders, bankruptcies and liquidations, and to the remuneration of other liquidators are also proposed. The new fees, and the regulations relating to rates of remuneration under summary instalment orders, are needed as a result of new processes undertaken by the Official Assignee. The other revised rates of remuneration update the existing rates of remuneration to recover the costs of administering bankruptcies and liquidations.

ADEQUACY STATEMENT

The Ministry of Economic Development has prepared this RIS and considers that it is adequate.

STATUS QUO AND PROBLEM

The Insolvency Act 1967, the Insolvency Regulations 1970 and the Summary Instalment (District Courts) Rules 1970 currently set out the rules for bankruptcies, summary instalment orders, compromises with creditors and proposals.

The Insolvency Act 2006, not yet in force, is intended to repeal and update the Insolvency Act 1967. Importantly it will also introduce a new No Asset Procedure for first time debtors, as an alternative to bankruptcy and the other existing insolvency procedures. It will be relatively low cost, and is not intended to attract the same stigma as bankruptcy.

The Companies Act 1993 currently sets out the rules for the liquidation of companies. The Companies Amendment Act 2006, not yet in force, is intended to amend these rules. It provides for a new voluntary administration scheme as an alternative to liquidation. This is intended to facilitate the rehabilitation of companies, rather than necessarily result in their dissolution as often happens under liquidation. The Companies Amendment Act also introduces provisions dealing with the appointment of liquidators, voidable transactions, and the use of phoenix companies.

Both the Insolvency Act 2006 and the Companies Amendment Act 2006 require regulations to be made before they can be brought into force. Under the Insolvency Act 2006 this includes regulations to provide for forms for applications and notices, fees, and other procedural matters required for various provisions of the Act. Under the Companies Amendment Act 2006, regulations are required to deal with two matters in relation to the new voluntary administration regime, before this regime can be introduced.

This paper also sets out proposals relating to the fees for bankruptcy applications by debtors and applications for summary instalment orders. It also makes proposals for remuneration of supervisors under summary instalment orders, the Official Assignee in relation to summary instalment orders, bankruptcies and liquidations, and the remuneration for other liquidators. At present:

- the fee for bankruptcy applications is only \$40 (GST inclusive), but the processing undertaken by the Court is much less than will be required from the Official Assignee;
- there is no fee for summary instalment orders, and the process is currently carried out by the Court rather than the Official Assignee; and
- the rates of remuneration of the Official Assignee, and liquidators have not been reviewed since 1994, and no longer reflect current costs.

OBJECTIVES

The objectives are to:

- provide processes for dealing with personal and corporate insolvency that can be administered quickly and efficiently, pose the minimum necessary compliance and regulatory costs on its users, and do not stifle innovation, responsible risk taking and entrepreneurialism by excessively penalising failure;
- distribute the proceeds in insolvency to creditors in accordance with the relative pre-insolvency entitlements;
- maximise the returns to creditors by providing flexible and effective methods of insolvency administration and enforcement; and
- enable individuals in bankruptcy to participate again fully in the economic life of the community.

In accordance with these objectives the regulations under the Insolvency Act 2006 are intended to:

- streamline and simplify existing procedures and requirements prescribed under the Insolvency Regulations 1970 and the Summary Instalment (District Courts) Rules 1970;
- take into account new measures introduced in the 2006 Act; and
- take into account technological advances, such as the development of the internet, for processing applications and advertising notices under the 2006 Act.

The regulations relating to Companies Amendment Act 2006 provide for two procedural matters relating to administration of companies.

Regulation changes are also proposed to provide for fees and rates of remuneration that appropriately recover the costs of bankruptcy, summary instalment orders and liquidations, while not acting as a barrier to debtors applying for these processes.

ALTERNATIVE OPTIONS

If the regulations are not made, the Insolvency Act 2006 and the Companies Amendment Act 2006 cannot be brought into force. There are, therefore, no alternative options.

PREFERRED OPTION

There are no other feasible options to bring the Insolvency Act 2006 and the Companies Amendment Act 2006 into force or to increase the fees under the Companies Act 1993 Liquidation Regulations 1994. The proposed regulations are therefore the preferred option.

The proposed regulations under the Insolvency Act 2006 would incorporate a range of procedures and information requirements currently prescribed in the Insolvency Regulations 1970 and the Summary Instalment (District Court) Rules 1970, but would incorporate additional measures designed to meet the policy objectives for the proposed regulations. The key features of these regulations include provisions relating to:

- applications, notices and other documents can be filed electronically, and the formatting of applications, notice and other documents will be flexible by specifying the required information for each type of application, notice and document;
- advertising of applications and notices can be made on the Insolvency and Trustee Service website and in the *Gazette*;
- the content of applications, notices and other documents;
- the process for claims to be made by creditors;
- application by a bankrupt to leave New Zealand;
- application by a bankrupt to carry on business;
- summoning of persons to be examined by the Assignee, and payment of those persons;
- investing of money by the Assignee;
- meetings of creditors;
- proposals for compositions;
- proposals for approval by the High Court;
- appointment of supervisor under a summary instalment order;
- deduction of supervisor and Assignee remuneration costs from dividends;
- means test for entry into the No Asset Procedure;
- maintenance of, and access to, a public register;
- content of accounts and records; and
- fees payable to an Assignee.

In developing these recommendations, officials have aimed to provide for processes that are as streamlined and will involve the lowest possible compliance costs as possible, consistent with the overall purpose of the Insolvency Act. This has included, where possible, making use of internet-based application processes and standardising the documents used across all the different kinds of insolvency proceedings.

The proposed regulations under the Companies Amendment Act 2006:

- prescribe the terms of deeds of administration; and
- prescribe the form and content of the accounts to be filed under a deed of administration.

These regulations therefore do not extend the regulation of companies, but instead provide for matters already contemplated for by the Companies Amendment Act 2006.

The purpose of prescribing the terms of deeds of administration is to provide a basic set of terms to facilitate the preparation of deeds of administration and that balance the interests of creditors and the company in administration. To provide flexibility, the Companies Amendment Act allows creditors to agree that any or all of these terms do not apply.

The purpose of prescribing the form and content of the accounts to be filed under a deed of administration is to prescribe a standard set of accounts for disclosure on the Companies Register. This will facilitate transparency, making it easier for creditors to monitor companies that are in administration.

The proposed regulations in relation to fees and remuneration would:

- set a fee of \$200 (GST inclusive) for a debtor’s application for bankruptcy;
- set an upfront fee of \$100 (GST inclusive) for applications for summary instalment orders to partly recover the Official Assignee’s costs;
- Set the remuneration for the supervisor and the Official Assignee under a summary instalment order at 10% of assets recovered, with 7.5% going to the supervisor and the balance of 2.5% to the Official Assignee;
- provide for the rates of remuneration of Assignees in relation to bankruptcies and when acting as a liquidator, and for other liquidators, as follows:

Position	Current hourly rate for liquidations (GST excl.)	Proposed hourly rate (GST inc.)	Proposed hourly rate (GST exc.)
Official Assignee/Deputy Assignee/Liquidator	\$65	\$225 (GST inc.)	\$200 (GST exc.)
Legal and Accounting Staff employed by the Official Assignee or a liquidator	\$70	\$225.00 (GST inc.)	\$200 (GST exc.)
Insolvency Officers/other employees of a liquidator	\$40	\$157.50 (GST inc.)	\$140 (GST exc.)

The fees for applications for bankruptcy and summary instalment orders, and the rates of remuneration relating to summary instalment orders, are aimed at recovering the costs of new processes required to be undertaken by the Official Assignee. The other changes update the current rates of remuneration to reflect costs. A remuneration review has been carried out by the Official Assignee to assess the appropriate level of remuneration for the functions undertaken. The review was based on a time cost analysis of estates administered by the Assignee, and also took into account staff salaries and the cost of overheads, thus allowing for the calculation of the appropriate hourly rates.

While a significant increase in hourly rates is proposed, this is considered justified in order to recover the costs of dealing with bankruptcies and liquidations. The staff involved have expertise in dealing with bankruptcy procedures. The remuneration rates reflect that expertise, and are generally lower than would be charged for similar services provided by the private sector. If the remuneration rates are not increased, more of the costs of dealing with bankruptcies will need to be met from general taxation.

The increased remuneration rates under the regulations for private, court-appointed liquidators should result in fewer applications to Court to fix remuneration at a rate higher than that prescribed in the regulations. This will reduce costs for liquidators, their counsel and the court. These reduced costs will flow through to higher returns for creditors in liquidations.

IMPLEMENTATION AND REVIEW

The Insolvency and Trustee Service's web-based case management system (known as "OASIS") is being enhanced in anticipation of the new functions that the Insolvency Act confers on the Official Assignee. The changes will enable debtors, creditors and key stakeholders, such as summary instalment order supervisors, to access a real-time, centralised and integrated source of information. It is expected that all IT work on this system will be completed at the beginning of December, for the coming into force of these regulations.

In addition, the staff of the Insolvency and Trustee Service will hold a series of workshops throughout New Zealand for interested parties on the law reform generally, and more specifically on the new summary instalment orders process. Posters and information cards are being published for display at such locations as WINZ offices, citizens' advice bureaus, courts offices and other places likely to reach interested parties. Finally through the Assignee's website and other publications, the Assignee is publishing guidelines on the law reform and how to access the new processes.

The Assignee and Registrar of Companies will enforce any breaches of the requirements of the legislation for which they are responsible in the same way as they currently do for the Insolvency Act 1967 and the Companies Act 1993. That is by way of an initial monitoring and compliance process, and then by way of referrals through to the National Enforcement Unit for possible prosecution action where necessary. The National Enforcement Agency is a business unit of the Ministry of Economic Development which investigates and, where appropriate, prosecutes offences under a number of Acts on behalf of the Official Assignee, as well as the Registrar of Companies and the Registrar of Motor Vehicle Traders. The National Enforcement Unit also prepares banned director reports on behalf of the Registrar of Companies.

CONSULTATION

The following Government departments have been consulted on the proposed regulations: Treasury, Ministry of Justice, Ministry of Social Development, Ministry of Education, the Inland Revenue Department, Department of Labour, Ministry of Social Development, Te Puni Kokiri. Officials also consulted with the Reserve Bank of New Zealand.

The Department of Prime Minister and Cabinet has been informed.

The following parties were consulted on the fee and remuneration proposals:

- New Zealand Federation of Family Budgeting Services
- Baycorp (NZ) Limited
- Grant Thornton (insolvency specialists)
- Crichton Horne & Associates (insolvency specialists)

These parties were generally very supportive of the fee and remuneration proposals. The Ministry considers that most of the issues that were raised are minor and are already addressed by the proposals.