

## **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:

<b>Position</b>	<b>Current hourly rate for liquidations (GST excl.)</b>	<b>Proposed hourly rate (GST inc.)</b>	<b>Proposed hourly rate (GST exc.)</b>
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.