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Insolvency Practitioner Regulation
Competition
Trade and Investment Branch
Ministry of Economic Development
PO Box 1473
WELLINGTON

INSOLVENCY PRACTITIONER REGULATION - SUBMISSIONS

Please find **attached** my submissions in respect of the review of Insolvency Practitioner Regulation. An electronic copy will be sent separately.

Please call if you wish to discuss any aspect of my submissions.



DAVID BLANCHETT
Beattie Rickman

Direct Dial: 07 838 7419
Email: dblanchett@beattie.co.nz

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INSOLVENCY PRACTITIONER REGULATION SUBMISSIONS

Background

The following is taken from my covering letter to The Commerce Committee dated 6 April 2006 (amended where appropriate).

It became apparent to me while compiling my submissions on the Insolvency Law Reform Bill 2005 that the area of insolvency practitioner ("IP") regulation is critical. Competence and integrity should provide an IP with a competitive advantage. Instead we find the opposite. The amendments in the Bill will not rectify this widespread problem.

IPs who are prepared to compromise their integrity will remain in demand with both director/shareholders and creditors who have a position to protect. You are probably familiar with the director/shareholder problem but you may not be aware of the creditor problem. We have been informed by a major bank that a particular IP firm does not bring voidable transaction claims against it. This firm also has "arrangements" with a number of large creditors. This firm is apparently not prepared to 'bite the hand that feeds it'.

In another example, an IP who had been censured by the New Zealand Institute of Chartered Accountants for lack of independence on a previous appointment was appointed liquidator to a construction company by creditors. We subsequently learned that the IP's partner was a director of the largest creditor. That in itself would probably breach independence, but what made it more disturbing was that the creditor had, in the days prior to the liquidation, illegally removed a large amount of joinery from the construction project. The liquidator's reports make no mention of that, and there is no evidence of any attempted recovery for the benefit of the other creditors.

My submissions on the draft bill listed a number of examples of IPs failing to exhibit the requisite competence or integrity. Since then I have learned of (a) the above example, (b) an IP who has been given diversion by the Police for conversion of assets in a liquidation or receivership, and (c) an IP who was appointed liquidator of a grossly insolvent company and shortly afterwards appeared as a trustee in the director's family trust. In the latter case it would be untenable for the trustee, in his capacity as liquidator, to sue his fellow trustee, the director, for reckless trading or recovery of any transactions.

It is a mistake to think this is not a major problem.

Creditors or the marketplace cannot resolve this problem. Virtually every other developed country has determined that regulation of IPs is necessary. You cannot legislate for integrity. IPs either have it or they don't. Regrettably, in New Zealand most don't. We need to take this opportunity to progress from the growing "wild west" culture to protect the reputation of our economy.

Questions for Submission

1 Competitive Licensing Effective?

I do not have a detailed knowledge of the Law Society's regulatory regime but I am familiar with NZICA's regime. In my experience it will not, in its current form, be effective to regulate the competence and integrity of practitioners.

The Professional Conduct Committee of NZICA failed to recognise the conflict in example (c) above and the appeal/review provisions could not be used as they apply only to the process. The decision itself cannot be appealed/reviewed under the current rules.

However, as NZICA is likely to be the primary source of practitioners, I would expect it would undertake a review of its current regulatory regime in order to provide the requisite rules, investigation, hearing and appeal processes. I would expect the proposed review body to insist on a robust structure in each of the approved bodies.

In that case the competitive licensing system should be effective in managing competence and integrity of the approved body's members.

2 Impact of Scheme

If implemented properly the scheme should reduce the number of incompetent and/or unethical practitioners operating. It may take some time to weed out the inappropriate practitioners but I would expect confidence to be restored domestically within a couple of years. International confidence may take longer to recover.

Cost will be an impact. Government should bear the cost of the Approval Body on behalf of society. The various approved bodies should bear the cost of their administration. Those bodies should decide themselves how to allocate that cost among members. I do not see a relatively large annual fee being a deterring factor for competent and ethical practitioners.

Practitioners who are not currently members of a body that is likely to be approved will be unable to take on new formal insolvency appointments. The few (I know of one, and will give the benefit of the doubt to a couple of others) in this category who are both competent and ethical are sufficiently skilled to replace the lost insolvency engagements with other work.

The other consideration is that the suitable practitioners will make the effort, and have the ability, to gain the necessary entry requirements to an approved body.

There will be a perception that the newly licensed practitioners will make the process more expensive by comparison. That will probably be the case because the competent and ethical practitioners are generally more highly qualified, have ongoing training, and have quality control procedures. Additionally, they will in most cases have professional indemnity insurance. However, that should be weighed against the very significant cost to the economy of the status quo.

3 *Entry Requirements*

Entry should be on the basis of having gained the requisite experience and submitting a supporting reference from at least two senior independent licensed practitioners. I am not satisfied an insolvency specific exam will add any additional comfort over and above the examination process required to gain full membership in the case of NZICA when combined with the experience requirement. The competence question may be more relevant for the Law Society and any other prospective body as they do not have the same entry requirements as NZICA.

4 *Training & Testing*

A specified level of ongoing professional development should be mandatory (as it already is for NZICA). However, ongoing competency testing should be unnecessary if the disciplinary process is robust. Sufficient training opportunity is available through conferences from Conferenz, LexisNexis, and INSOL, along with regular INSOL local seminars, and firms provide in-house training.

5 *Managing Risks*

The Registrar of Companies may not have the resources, time, or competence to adequately oversee the approved bodies. I would suggest this task be delegated by the Registrar to a panel of respected senior insolvency practitioners (there are so few that the panel would probably comprise all of them).

The importance of this oversight role should not be underestimated. Both the Law Society and NZICA have demonstrated a willingness to protect their members in the past. Objectivity will be critical to the integrity of the practitioner regulation regime.

6 *Transition*

There should be no transition period in respect of Administrations. These should be conducted by licensed practitioners only.

In respect of liquidations and receiverships, a period of one year before limiting new appointments to licensed practitioners only, should be sufficient to enable unlicensed practitioners to rearrange their activities or apply for entry into membership of an approved body.

David Blanchett
Beattie Rickman
PO Box 191
HAMILTON

Ph: 07 838 3838
Fax: 07 839 4178
Email: dblanchett@beattie.co.nz