



BDO Spicers
Chartered Accountants & Advisers

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**SUBMISSION IN RESPONSE TO
THE INSOLVENCY PRACTITIONER ("IP") DISCUSSION DOCUMENT
DATED 13 OCTOBER 2006**

BDO Spicers – General Commentary

It is the nature of corporate insolvency work that the unscrupulous company director will inevitably seek out the unscrupulous insolvency practitioner to assist him or her in winding up a business, acquiring the assets of a company without recourse and/or burying issues such as reckless trading.

Although the measures implemented under the Insolvency Law Reform Bill go some way towards settling current perceived problems within the profession, the introduction of the new Voluntary Administration regime also opens up new opportunities for the unscrupulous in terms of business sales as going-concerns and the voting and approval of DOCAs etc.. In addition, the new regime introduces a new insolvency process geared towards rehabilitation of businesses, through a relatively complex set of rules and regulations, compared to relatively simplistic receivership and liquidation processes.

The amended statutory framework does nothing to prevent incapable, inexperienced, associated or unscrupulous parties being appointed as an office holder, it being the expectation that creditor voting, market forces and/or eventual prohibition orders will be utilized to debar such practitioners from office, assuming that aggrieved creditors bother to complain and/or action is taken by the MED. The extent of the potential losses suffered by creditors and the damage done to the credibility of the insolvency profession whilst awaiting those actions could be substantial.

In addition, the perception of the “lax” regulatory framework in what is now a global market could also jeopardize international development of New Zealand enterprises and detract from the international perception that New Zealand is a “good place to do business with”.

Self-regulation of any profession, be it medical, legal, accounting or otherwise will always suffer from external criticism. Significantly for the insolvency profession, the more subtle breaches (i.e. sale of assets at an undervalue, commercial decisions made in favour of directors and the like) will only be uncovered following complaints by creditors, who in most cases are either too apathetic, too cynical or too busy recovering their losses to act.

Any regulatory framework implemented has to be seen to be, and proven to be open, independent, robust and user friendly, so that confidence of all stake holders is achieved which should assist in enhancing the status of the insolvency profession.

The regulatory framework has to be cost-effective, it must avoid over-compliance with breaches of statutory or regulatory minutiae, and it should be geared towards achieving and maintaining professional standards based on strict levels of competence, honesty, integrity and independence.

Accordingly, BDO Spicers submission is based on the premise that some form of regulation of the insolvency profession is required.

BDO Spicers employs two UK qualified insolvency practitioners, one of whom was licensed to accept formal insolvency appointments over the last 14 years and was a partner in a medium sized firm. He was initially licensed by the Insolvency Practitioners Association (IPA) and latterly by the Institute of Chartered Accountants in England & Wales.

Part of this submission is therefore based on their experiences of the UK insolvency profession.

Questions for Submission - Competitive Licensing

1. Do you think that a competitive licensing system, in addition to the measures already contained within the Insolvency Law Reform Bill will effectively manage the risks associated with corporate insolvency in relation to competence and professionalism of practitioners? If not, why not? What other factors should be considered?

Competitive Licensing – Comparison with the UK Model

Booklets produced by the Association of Business Recovery Professionals (“R3”) “*Making a Career as an Insolvency Practitioner*” and “*Starting Up in Practice*” which are available at www.R3.org.uk summarise the licensing responsibilities of the Recognised Professional Bodies (“RPBS”) within the UK, the key issues surrounding granting of a license and on-going obligations etc.

As denoted there is a requirement for all IPs to maintain an annual global bond together with a case based bond (calculated by value of assets) for all appointments. These are effectively fidelity bonds to protect stakeholders from potential loss arising from theft by the IP or his/her staff.

Subsequent to the publication of this brochure, both the ICAEW and the Chartered Association of Certified Accountants (“ACCA”) have implemented licensing for IPs from other RPBS who are then admitted as Affiliates, negating the need for full membership of that individual professional body. Details of the ICAEW Affiliate Rules & Regulations is available at <http://www.icaew.co.uk/index.cfm?route=141838>.

From an on-going perspective the RPBS require each Member or Affiliate to adhere to its internal regulatory and disciplinary systems, best practice guidelines developed by the profession via R3, minimum requirements for on-going professional development, and implementation of a round of formal monitoring visits every few years, together with annual desk top reporting.

At one stage the monitoring of IPs was undertaken by a Joint Insolvency Monitoring Unit (“JIMU”) which was jointly set up by the ICAEW and IPA, which between them licensed the bulk of practitioners. This unit has now been disbanded, leaving each RPB with responsibility for monitoring its own IPs.

As a result of the new Affiliate status and the disbanding of JIMU, the profession has now become more fragmented, with significant variables arising in terms of the methods of monitoring and enforcement, the cost of licensing etc,. This has given rise to “forum shopping” amongst IPs for the purposes of paying less in terms of licensing fees and more worryingly, to move to an RPB with a reputation for lower standards of compliance or enforcement. In our opinion, these recent developments will damage the reputation of the insolvency profession within the UK and may ultimately lead to self regulation being withdrawn and statutory regulation imposed.

In our view this is not a model to replicate in New Zealand, and hence BDO Spicers is not in favor of a competitive licensing regime, unless the monitoring, disciplinary and appeals processes are consistent throughout.

BDO Spicers is in favor of licensing of IPs, where they can demonstrate honesty and integrity, minimum standards of academic and professional qualifications, experience at a high level, endorsement by a recognized practitioner, on-going adherence with professional standards, peer reviews, and are required to undertake on-going professional development, together with each IP being required to maintain mandatory professional indemnity and fidelity cover.

2. What impact (positive or negative) do you see might be associated with such a scheme?

As denoted in the last section, BDO Spicers do have concerns as to whether there should be a competitive licensing scheme for the reasons explained.

Any such scheme would lead to an increase of costs by way of recharge of the levy suffered by the licensing regime and the compliance costs inevitably ensuing from such a regime. However, on the basis that only competent IPs would then be in a position to take appointments, after acquiring appropriate levels of experience and training etc, it is possible that the costs of compliance would ultimately be off-set by greater returns to creditors in terms of net recoveries made by IPs, and/or rehabilitation of business entities, thereby preserving economic values.

Assuming that a licensing body would draft, implement and enforce appropriate standards of practice, and better represent or coordinate the industry, it would be hoped that over time, the status of IPs as quality professional providers of business recovery and insolvency solutions would help insolvent company directors and their advisers to seek help sooner, enhancing the potential for turnaround or salvage of the business entity, as opposed to insolvency being the only recourse.

3. In terms of entry requirements, what key features would you expect to see in the licensing systems of approved professional bodies and why?

On the basis of the number of IPs within the New Zealand industry, it would seem wholly inappropriate for an insolvency exam to be specifically devised, however there should be a requirement for a minimum level of academic results, together with basic exams in say accounts, tax and company law (similar to those utilized as a benchmark by the IPA in the UK).

We do not see the requirement for an IP to be a qualified Chartered Accountant or Lawyer, as to structure a system on that basis would restrict competent entrants from entering the profession from other avenues and who may be equally suited to the industry, such as business restructuring executives, company doctors and the like.

We would expect all new entrants to have a minimum of 3 years experience at the higher level of insolvency work (i.e. with senior level responsibility for assignments and team management), and the requirement for that work, together with the character of the individual, to be endorsed by two practicing IPs.

Special provisions should be put in place to ensure that IPs who have gained experience and have comparable qualifications in jurisdictions with similar corporate and insolvency laws as New Zealand should also be provided for, as a means of attracting new entrants to the market together with returning NZ citizens.

It would seem appropriate that convicted felons and discharged bankrupts should be debarred from holding office for an appropriate period after their conviction or discharge has lapsed. Voluntary disclosure of criminal offences or civil actions relating to financial status, including management leading up to the collapse of any insolvent entity should therefore be required prior to IPs being granted a license to practice and/or on renewal.

Disclosure of all disciplinary action taken in relation to insolvency appointments or action for negligence taken against the applicant should also be disclosed at the time of application or renewal of a license.

As denoted previously, it should be mandatory for an IP to have continuing professional indemnity and fidelity cover, set at a minimum level, and in the event of that cover being revoked for whatever reason, an automatic loss of license.

4. Should on-going professional development or on-going competency testing be a mandatory feature of an approved body's systems and processes? If so, do you have any views on the form this requirement should take?

An IP should be required to undertake a minimum number of structured hours training per year by attendance at formal courses and seminars, together with technical reading or other such related activities.

In addition, an IP should carry out a minimum number of hours per year dedicated to higher insolvency work, to include solvency business reviews, business recovery strategies and formal insolvency appointments.

In addition, where the firm employing the IP is of a suitable size, an internal peer review system should be implemented on a 2-3 year basis, and the results there from should be made available to the licensing body. Where the firm is not of significant size or the individual is a sole practitioner, an external risk management review should be undertaken by the licensing body or an external provider who would be required to make their findings available to the licensing body.

Renewal of a license on a 1, 2 or 3 year basis should be given once the relevant obligations have been completed to a satisfactory level.

5. Do you have any other views on variations to the proposals that could be used to manage risks effectively?

Consideration should be given as to whether the scope of INSOL New Zealand as a representative body of the profession could be enhanced to include licensing and regulatory responsibilities for IPs. Clearly this would be subject to amendments of its constitution and approval by members, together with the funding implications for the organisation.

Alternatively, consideration should be given as to whether jointly the NZICA and the Law Society could create some form of Affiliate status, similar to that operated by the ICAEW, thereby allowing non-member IPs to practice within a structured licensing system with adherence to minimum standards of conduct. For the purposes of ensuring consistent treatment of members and affiliates of NZICA, appointment of lay members to any disciplinary and/or appeals committee for IPs may be appropriate.

Alternatively licensing of IPs by the Registrar of Companies, NZICA and the Law Society should be considered however that situation could lead to disparity between costs, compliance and discipline to which BDO Spicers is opposed.

Questions for Submission – Transitional Arrangements

1. What would be the appropriate lead-in time that would ensure a smooth transition to the new regime?

Transition from a non-regulated system to a regulated system will inevitably be painful to certain parties, unless the system accepts all that all existing IPs be accepted without exception, which is the easy option adopted by the UK regime back in 1986. Many years expired before the known “unscrupulous” IPs were eventually weeded out via the monitoring process which was not an ideal scenario.

BDO Spicers view is that all candidates for licenses should be vetted by an appropriately appointed membership committee or panel.

Details of experience at the “higher level of insolvency work”, academic and professional qualifications should be tabled, together with a summary of historical appointments with arbitrary reports etc being selected and reviewed from a compliance perspective. Details of defaults with filing returns could be provided by the Registrar of Companies, and /or representations from interested parties heard (i.e. IRD, Bank’s and the like). A public notice advertising the application for a license could also be required to be given so that third parties would have the opportunity of raising concern about individual practitioners.

The membership committee may be empowered to provide a full license with no restrictions on existing or future cases, or a restricted license pending further review and/or compliance with certain key issues by the IP, or alternatively a license issued specifically pending completion of the IPs existing case load, as appropriate.

An Appeals Tribunal or Appeals Committee should be established to review the decisions of the Membership Committee with the IP being enabled to retain appointments over existing cases until such time as any Appeal was upheld or over-turned, as appropriate.

The time-scale for implementation of a new licensing regime would be dependent on the speed with which a licensing body can be properly incorporated, or arrangements made for changes to the constitutions of INSOL New Zealand, NZICA or the Law Society. Once the structure had been established and the Regulations imposed by legislation, we would suggest a deadline of no more than three months should be imposed.

2. Are there any other factors that you consider to be relevant to the transitional arrangements?

None

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