FINANCIAL SERVICES FEDERATION

Submission of the Financial Services Federation (Inc) to the Ministry of Economic Development on Insolvency practitioner regulation: Options for change

Introduction

1 The FSF is an industry organisation representing the major grouping of non bank financial institutions in New Zealand. A list of members is available from the FSF website at the address shown at the foot of this page. Insolvency Law is an area of interest to members and the FSF has been actively involved in the legislative review process.

General Submissions

2 As well as responding to questions on which the Ministry has sought responses, the FSF would like first to make some preliminary comments, wider in nature than the Ministry's questions, but which the FSF considers important.

3 First, the subject of insolvency practitioner regulation is not a new one. Possible licensing of insolvency practitioners was considered as recently as 2004 in the papers leading to the Insolvency Law Reform Bill. The absence from that Bill of provisions regulating insolvency practitioners presumably means that then, as previously, it was decided that regulation of insolvency practitioners was not required.

Financial Services Federation (Inc)
6th Floor, Wakefield House, 90 The Terrace, P O Box 10-053
Telephone (04) 472 1731, Fax (04) 472 1732, Wellington 6143, New Zealand
http://www.fsf.org.nz

4 If licensing of insolvency practitioners is again being considered so soon, it can only be because of a perception that the voluntary administration regime envisaged by that Bill requires a higher level of qualification than is required of liquidators or receivers. (The latter of whom seem scarcely to be mentioned in the Ministry's Discussion Document).

5 The FSF accepts that a different skill set may be required for voluntary administrators than is required of liquidators or receivers, with a greater emphasis on financial skills of a "reconstructive" kind, in particular.

6 That may be a factor in favour of provisions that define quite precisely the qualifications required of voluntary administrators – but is not necessarily in favour of a wider regime involving licensing of insolvency practitioners generally which, as noted above, appears only recently to have been rejected by Government.

7 As regards other of the factors mentioned in the Ministry's Discussion Document

- The FSF does not consider that an "information deficiency" of the kind referred to in para 4 of the Discussion Document is a present problem: those involved in appointing liquidators or receivers are well aware of the insolvency practitioners that have the skills required;
- The FSF does not see the lack in New Zealand of a registration system similar to that required in Australia as being a significant barrier to efficient Trans-Tasman insolvency administrations, whether in terms of the Trans-Tasman Mutual Recognition Act 1997, or otherwise: Trans-Tasman insolvencies are already being quite effectively managed. For example, the HIH insurance group;
- The FSF accepts that there may be a minority of "debtor-friendly practitioners" acting inappropriately in some insolvency administrations at present. This too is not new, but the FSF tends to think that this problem may be overstated in the Discussion Document. However, it is accepted that some form of insolvency practitioner regulation might "weed out" such persons.

8 Those factors seem to the FSF at most only slightly to favour insolvency practitioner regulation, if they favour it at all.

9 In that regard, the FSF agrees with the Ministry that the small benefits to be obtained from an insolvency practitioner registration regime similar to that applicable in

Australia would be significantly outweighed by the costs of such a system, especially if accompanied by specialist tribunals etc as in Australia.

10 As regards the alternative "competitive licensing" system identified in the Discussion Document, under which the suitability of insolvency practitioners would essentially be assessed by the New Zealand Law Society or ICANZ, that could have some benefit in that it might help "weed out" any undesirable "debtor-friendly practitioners". However -

- What the Discussion Document describes here is not greatly different from what is already occurring, with the New Zealand Law Society and ICANZ exercising some degree of quality control over their members;
- The description of this alternative as "competitive" may be a misnomer: it could in fact have the undesirable effect of excluding desirable insolvency practitioners from the market. It is worth noting that the principal statutory manager of one of New Zealand's largest insolvencies, DFC, was neither an accountant nor a lawyer;
- While that latter point might be met in legislation by including a catch all "other fit and proper person" criteria as in the Australian legislation, that would necessarily entail establishing a potentially costly structure to assess fitness etc. Further, as mentioned above it seems to the FSF that those involved in appointing liquidators or receivers are already making this type of assessment for themselves, in quite a satisfactory manner. This suggests that legislating for such a test, and for insolvency practitioner regulation generally, simply may not be necessary.

11 Overall, while the FSF recognises that the advent of voluntary administration and the enhanced skill set it may require are factors that may make it desirable to reconsider insolvency practitioner regulation, the FSF is not satisfied that there is in a fact a present need to legislate for it.

Questions for Submission

Q1. *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?*

12 As above, the FSF is not satisfied that there is a present need to legislate for any form of licensing of insolvency practitioners. That in turn reflects that the FSF is not satisfied that there are presently any major issues regarding the competence and professionalism of practitioners.

13 However, if a competitive licensing system of the kind proposed by the Discussion Document were adopted, then it is realistic to expect that (so long as the New Zealand Law Society and ICANZ set appropriate criteria for qualification) the results could include –

1. A decrease in the number of undesirable "debtor-friendly practitioners";
2. Only those insolvency practitioners with appropriate financial skills becoming administrators of companies in voluntary administration. In practice this may favour the accountancy profession over the legal profession in an area where they presently compete to some degree. That said, such an effect would probably result from the judgements of the market, even in an unregulated environment, and may be justified.

Q2. ***What impact (positive and negative) do you see might be associated with such a scheme?***

14 The observations noted above about a decrease in the number of undesirable "debtor-friendly practitioners", and an increase in the skill level required of administrators, are probably each "positives."

15 As noted in the above comments, a negative effect could be to exclude competent insolvency practitioners from the market, if they are neither lawyers nor accountants.

Q3. ***In terms of entry requirements, what key features would you expect to see in the licensing systems of approved professional bodies and why?***

16 An assessment of technical competence is obviously an essential, while concerns regarding undesirable "debtor-friendly practitioners" may require a "good character" element, which in turn could be supported by a requirement for referees, and tested by public notification of applications, giving the opportunity (at least within the relevant professions) for objections.

Q4. ***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?***

17 ICANZ already runs quite a sophisticated ongoing training programme, and the FSF can see no reason why that should not be adapted to the type of system proposed by the Discussion Document.

Q5. ***Do you have any other views on variations to the proposals that could be used to manage risks effectively?***

18 No. As already noted above, the FSF is not convinced that what is proposed by the Discussion Document is in fact needed.

February 2007

Questions about any matter raised in this submission should be directed in the first instance to Justin Kerr, Executive Director, Financial Services Federation Inc jkerr@fsf.org.nz .