



McCallum Petterson

Submission in respect to the  
Ministry of Economic Development's  
October 2006 discussion document

**"Insolvency Practitioner Regulation:  
Options for Change"**

Submission presented by  
**PPB McCallum Petterson Limited**

Prepared by:  
David Levin  
Bruce McCallum  
David Vance

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## About the submitting entity

PPB McCallum Petterson is an independent firm that has for the last 15 years specialised in company turnarounds, forensic accounting, corporate advisory and insolvency administrations. Our firm has a strong emphasis on, wherever possible, saving businesses to secure the best outcomes for suppliers, employee and other creditors, and shareholders. We currently have 18 full time equivalent professionals engaged in Turnaround and Insolvency work with another five professionals assisting on an 'as required' basis to provide specialist forensic investigative skills and experience to the Turnaround and Insolvency services. In addition to the turnaround assignments completed each year by our firm, our employees are responsible for over 200 current liquidations and receiverships nationally.

## Responses to Questions for Submission

- 1. Do you think that a competitive licensing system, in addition to the measures already contained within the Companies Amendment Act 2006, will effectively manage the risks associated with corporate insolvency in relation to the competence and professionalism of practitioners? If not, why not? What other factors should be considered?***

The answer depends on the design and management of the competitive licensing system. If the competitive licensing system is to have only the features described in the discussion document, we believe the answer to the first question is 'no'.

We believe that the following additions and changes should be made to the competitive licensing system described in the discussion document:

- A. It should apply to all receivers, liquidators, statutory managers, and administrators (including Official Assignees).

We do not believe that there is sufficient useful distinction between the qualifications, ethics or competence required by, or in the nature of the duties to stakeholders in, these roles to suggest that separate regulation is appropriate. In most cases these parties are the same people. It makes little sense to be licensed when a person acts as a liquidator, but not when the same person acts as a receiver.

- B. It should provide for the development and maintenance of the qualifications, ethics and competencies required for the role of Insolvency Practitioner.

Any system which achieves this will have remedied the problems with the present lack of regulation. We believe that any system which does not do this can only fail. The discussion document is largely silent on this crucial point.

The system described in the discussion document appears to suggest that any member of the New Zealand Institute of Chartered Accountants or of the New Zealand Law Society will have the attributes necessary to be an insolvency specialist, and that anyone who is not a member of either of these bodies would not have the attributes necessary to be an insolvency specialist. We believe that this has been proved to be false by the failures and successes of



insolvency specialists in the period since the passing of the Companies Act 1993. Some very good specialists are members of neither the New Zealand Institute of Chartered Accountants nor of the New Zealand Law Society. Our experience is also that being an accountant or lawyer does not make a specialist immune to breaches of duties, a lack of ethics or a failure of competency.

The professional bodies of accountants and lawyers have rules primarily designed and managed to secure the appropriate delivery of general accountancy and legal services to clients. We believe parties owed duties by insolvency specialists are entitled to see a system put in place which is primarily designed and managed to secure appropriate outcomes in liquidations, receiverships, statutory managements, and voluntary administrations.

Insolvency specialists who are not lawyers should take legal advice when they need it. Insolvency specialists who are not accountants should employ accountants if they require them. Similarly, directors, creditors, lawyers and accountants who are not insolvency specialists should employ insolvency specialists if they are required.

- C. A register of Insolvency Specialists should be kept, and only those on the register should be able to be appointed as liquidators, receivers, statutory managers, or administrators in a voluntary administration.

The system described in the discussion document does not distinguish between accountants and lawyers (or people who are neither) who are appropriately skilled and experienced, and those that are not. We cannot see how any system can work unless this distinction is made.

We believe having such a register is the only practical way of avoiding creditors having people without the necessary attributes imposed on them. Included in the list of people without the necessary attributes are the great majority of lawyers and accountants who have never demonstrated any competence in insolvency.

**2. *What impact (positive and negative) do you see might be associated with such a [competitive licensing] scheme?***

- A. The positive and negative impacts associated with a competitive licensing scheme will depend on the design and management of the scheme. As noted above, we believe that any scheme which does not provide for the development and maintenance of the qualifications, ethics and competencies required for the role cannot succeed.

Just as we believe the same qualifications, competencies and ethics are required for liquidators and receivers, we believe the same qualifications, competencies and ethics should be required of a specialist whether they are an accountant, a lawyer, or neither.



A problem we foresee with the competitive licensing regime described in the discussion document is that it would appear to require differing standards of competence and conduct to be applied depending on the professional body of which the specialist is a member. We do not believe this to be in anyone's interests.

The system described in the discussion document would appear to us to be likely to allow the New Zealand Law Society to admit as an insolvency specialist a member with little knowledge or experience in accounting or insolvency, and to allow the New Zealand Institute of Chartered Accountants to admit as an insolvency specialist a member with little knowledge or experience of insolvency or the law.

Accountants can belong to their professional body, NZICA. Within NZICA accountants have three possible designations

- Chartered Accountant
- Associate Chartered Accountant
- Accounting Technician

The proposed licensing regime does not specify what, if any, designation will be required, or how such a designation (or its admittance prerequisites) would be equally applied to lawyers and other non-accountants.

- B. The most significant positive impact of the scheme described by the discussion document is not in relation to ensuring only those possessing the required competence, qualification or ethics are able to practice as insolvency specialists (as we do not believe it can do this in the form described in the discussion document); but in the hearing of complaints against specialists. We agree that the 'Court' option for the hearing of complaints effectively disempowers most complainants because of the costs involved.

In our view, the effective hearing of complaints is not a skill restricted to the professional bodies of accountants or lawyers, although we do believe that the New Zealand Institute of Chartered Accountants has developed the best presently available expertise in dealing with complaints against insolvency specialists who are also chartered accountants. We note that the National Enforcement Unit of the Companies Office fulfils a similar role with the investigation into complaints against delinquent directors, sometimes resulting in their banning.



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

- A. It should provide for the development and maintenance of the qualifications, ethics and competencies required for the role of receiver, liquidator, administrator or statutory manager irrespective of the particular role undertaken by the specialist or the professional body of which he or she is a member.

We believe that the major issue preventing the system described by the discussion document attaining this goal is that there appears to be no acceptance that the role of an insolvency specialist is not the same as that of an accountant or a lawyer and that the qualifications, ethics and competencies required for insolvency specialists have not been defined.

If the licensing system was to be that described in the discussion document, we foresee problems in the inclusion of accountants without the necessary legal competencies, in the inclusion of lawyers without the necessary accounting competencies and in the exclusion of those who are competent in every respect but who are not members of the New Zealand Institute of Chartered Accountants or of the New Zealand Law Society.

- B. It should apply to all liquidators, receivers, administrators and statutory managers in the same way.

We believe that neither the Law Society nor the New Zealand Institute of Chartered Accountants will be able to develop systems requiring the gaining and maintenance of qualifications and competencies for insolvency specialists that have equal applicability to those who are accountants, those who are lawyers, and those who are neither.

In the first instance it appears inevitable the differing professional bodies will set differing admission standards depending on whether the specialist is an accountant, a lawyer, or neither.

**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?**

- A. We believe that on-going professional development should be a mandatory feature of any approved body's systems and processes, but also that it must be recognised that professional development appropriate for accountants and lawyers will be more relevant to accountants and lawyers than to insolvency specialists.



Insolvency is, like most fields, constantly developing. A specialist who stays wedded to the past will not be able to properly fulfil his or her duties. Most of New Zealand's senior insolvency specialists have demonstrated a commitment to developing with the field. They have done this in the absence of a professional development programme for the profession of insolvency specialists (as distinct from accountants or lawyers). They have developed with the completion of a very large number of individual assignments each year, almost invariably with each assignment bringing something new to the specialist.

We therefore suggest that specialists be required to either engage in a certain number of hours each year in approved professional development activities for insolvency specialists (as distinct from accountants or lawyers), or to have spent a certain number of hours each year on the conduct of a certain number of insolvency assignments, or both.

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

**A. Views on the risks that the proposals are designed to manage.**

In our view the biggest problem is that directors have appointed to insolvent companies, and will continue to appoint to insolvent companies, liquidators or administrators who do not have as their first priority the interests of the company and its creditors.

Since the passing of the Companies Act 1993, directors (in the usual circumstances where directors or their families own most of the company's shares) have been able to appoint liquidators of their choice even if the company is insolvent. This right of directors is about to be extended to the appointment of administrators in voluntary administrations.

This creates predictable problems as one of the liquidator's roles is to review the actions of the directors prior to liquidation, and to take action in respect to issues disclosed by that review for the benefit of creditors. The administrator is required to conduct a similar exercise when he or she advises creditors on whether they would get a better outcome from administration than from liquidation.

the appointee has put his or her interests (in securing the assignment in question and other assignments from like-minded directors) ahead of creditors' and shareholders' interests.

A liquidator well known for consistently carefully investigating a company's activities and, if appropriate, taking action against directors for recovery of creditors' losses is unlikely to get many director appointments.



We foresee the potential for similar issues with administrators known to carefully review the company's affairs with respect to the conduct of directors and related parties, and to consistently present to creditors the options for recoveries arising from the same if creditors wished the administration to be brought to an end and for a liquidator to be appointed.

B. Options for managing these risks.

Given the difficulties noted above, we believe the best way to manage the risks associated with present unsatisfactory appointees is to strengthen creditors' rights to replace liquidators and administrators of insolvent companies. The amendments to the Companies Act 1993 in the Companies Amendment Act 2006 could have gone significantly further in this regard. Options include:

- Extending the time in which creditors can require a meeting for the replacement of liquidators.
- Preventing creditors related to the directors or shareholders from voting at such a meeting.
- Removing the requirement for a majority of creditors by number to vote in favour of the replacement of liquidator (leaving the majority of creditors by value having the decision).
- Providing for a smaller majority of creditors by value to have the power to designate the liquidator.
- Preventing the incumbent liquidator acting as proxy for any creditors.

The equivalent provisions in relation to the Voluntary Administration regime could also be strengthened. The most straight forward options would be to reduce the majority required for a change in administrators, to prevent administrators exercising proxies, and to prevent parties related to directors from voting on a possible change in administrator.