REGULATORY FRAMEWORK

PURPOSE OF REGULATION

3.1. The description of the role of insolvency practitioners in the previous chapter demonstrates the considerable responsibilities held by those persons. Clearly, it is important to ensure that practitioners have high levels of competence, diligence and integrity,[1] so that returns are maximised and affected parties can rely on the expertise and judgement of the practitioners.[2]

3.2. The regulatory regime is intended to:

- ensure that practitioners have appropriate high levels of competence and skills;
- ensure the integrity and independence of practitioners; and
- provide a procedure for effectively dealing with complaints and discipline.

These aims must be balanced against the desirability of having the regulatory system operate at a reasonable cost and without unnecessarily interfering with the market for practitioners' services.

HISTORICAL SUMMARY

3.3. Before discussing the details of the regulatory framework for corporate insolvency practitioners, it is instructive to recount briefly the history of the current

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1 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 930.

2 Trade Practices Commission, *Study of the professions; Final report—July 1992, Accountancy*, p. 65.

classes and registration requirements. The summary below focuses on the law in New South Wales.[3]

3.4. The early position in Australia was that any 'suitably qualified' and disinterested person was eligible to be appointed as a liquidator.[4] The petitioning creditor nominated a person to act as liquidator and the court would generally appoint the nominated party unless the court was not satisfied the person could properly perform the role because of a lack of ability or independence. This was in accordance with the rule laid down in England in 1868 by Malins V.C. in *Re the General Provident Assurance Company*[5] who, in the course of his judgement, stated that:

> 'These discussions, which constantly occur, as to the appointment of liquidators, are perfectly wearying and disgusting. The time of the Court is occupied, and the most improper scenes take place in my chambers, in consequence of there being a contention as to who shall be appointed liquidator. I shall take this matter into my own hands, and lay down the rule that whoever is proposed to be appointed liquidator by the party having carriage of the order, if I feel that he is a respectable and fit and proper person, shall be sanctioned and appointed by the chief clerk.'

Persons with a possible conflict of interest, such as debtors[6] and shareholders[7] of the company concerned, were not usually eligible.

3.5. In New South Wales, this position changed in 1890 with the decision of Manning J. in the case of *In re The Wentworthville Estate Land and Building Co Ltd.*[8] In that case, the petitioners wished to have an accountant appointed as liquidator, but the company wished to have one of the official assignees appointed. Official assignees were the equivalent of today's official receivers. They were public officials appointed by the Governor and Executive Council at the request of a Judge pursuant to the bankruptcy legislation[9] and their primary role was to administer the bankrupt estates of individuals. The bankruptcy legislation provided for supervision and control by the Judge, who had powers to inquire into their conduct.[10]

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3 The summary is drawn in part from the judgments of Kirby P and McHugh JA in *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. v Attalex Pty. Ltd.* (1984) 2 ACLC 752.

4 *Re London & Australia Agency Corp.* (1874) 29 LT 417.

5 (1868) 19 LP 45.

6 *Re Provisional and Suburban Bank Ltd*. (1879) 5 VLR (E) 159.

7 *Re Northumberland & Durham District Banking* (1858) 2 De. G & J. 508.

8 (1890) 1 BC 50.

9 Section 86 *Bankruptcy Act 1887 (NSW).*

10 Sections 91–101 of the *Bankruptcy Act 1887 (NSW).*

3.6. Manning J. was asked by the company to consider once and for all whether it was appropriate for accountants in the private sector to be allowed to conduct company liquidations. His Honour gave the following judgement:

> 'I really cannot see the difference between the winding up of a company and of an [individual's] estate...It seems to me that *prima facie* the official assignees, who have devoted their time to winding up estates, often of a very large and complicated nature, and who have a staff of officers trained to deal with these matters, are better able to carry them out than private individuals, and I will now make it a rule that, *prima facie* an official assignee shall be appointed. If a person desires anyone else he must shew that there is some very good reason for it. The onus ought to rest on him to shew that it is more beneficial to the company that another person be appointed....I am of the opinion that companies would be wound up much more expeditiously and economically by the official assignees as liquidators than by those outside of the Court, and there being no special circumstances in this case why one of the official assignees should not be appointed official liquidator, I appoint Mr Morris, the person nominated by the company, official liquidator...'[11]

3.7. At the time of Manning J.'s judgement in *Wentworthville*, there were three official assignees in New South Wales. However, when they became only two, they made an arrangement between themselves for the sake of convenience which was accepted by the court whereby they would be appointed in rotation.[12] This arrangement continued until 1911 when one of the official assignees told the court they no longer wished the rotation system to continue. In the case of *In re General Motor Company Limited,*[13] Rich A.J., after consultation with the Chief Justice and the Chief Justice in Equity, ruled that, in the future, the rotation system would no longer operate because it was too great a limitation on the discretion of the court provided for in the Companies Act. However, the *Wentworthville* case would be followed in that appointments would still be made from within the ranks of the official assignees unless there were special circumstances which justified the appointment of some other person. In the course of his judgement, Rich A.J. remarked that:

> 'It is very desirable that a body of permanent official liquidators should be appointed...As the late Mr Justice Manning pointed out, '...companies would be wound up much more expeditiously and economically by the official assignees as liquidators by those outside the court.' In England, on the making of a winding up order the official receiver becomes *ipso facto* provisional liquidator, and he is the official liquidator unless and until a liquidator is appointed in his place. In Victoria, under

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11 (1890) 1 BC 50 at 51.

12 *In re General Motor Company Limited* (1911) 28 WN 77.

13 Note 12 above.

> the recent consolidating Act, provision is made for the appointment by the Governor in Council of a permanent body of official liquidators. Similar provisions might well be adopted here in the bill which I understand is being drafted to amend the Companies Act.'[14]

3.8. The practice of appointing only liquidators who were official assignees except in special circumstances was reconsidered in 1926 in *Re Austral Knitting Mills Ltd*.[15] Long Innes J., in deciding that case, made it clear that the court had an unfettered discretion in respect of appointment of liquidators and, in exercising that discretion, the pertinent consideration is: 'What do the interests of the parties concerned in the winding up require?', and the court should make every effort to make an order which will best serve those interests. His Honour went on to say:

> 'I should think that in no case would the Court be disregardful of those interests if it appointed any one of the official assignees. I am not, however, going to lay down that the official assignees have a monopoly in this Court of appointments to the position of official liquidator. Where a petitioner nominates one of the official assignees I should think, speaking for myself, that the appointment would go almost as a matter of course. Where the person having the carriage of the winding up order nominates a person to be the official liquidator, who is a properly qualified and fit and proper person, I do not think that in many cases the Court would have to inquire into the comparative qualifications of that person and of some other person who may be nominated by another party; but the Court may occasionally be called on to do so. Again speaking for myself, and with all respect to Malins V.C., I need only say that when the occasion does arise, I do not think that the fact that the task of making such a selection as will be in the best interests of the parties affected will in some ways be an unpleasant one, is a sufficient reason why the Court should adopt an arbitrary rule which may result in an order which will not be in the best interests of the parties concerned in the winding up. If in any particular case the dispute becomes disgusting, I shall hope to find means to confine it within proper limits; but if that prove impossible I shall not be the first judge who has been both wearied and disgusted when discharging judicial duties.'[16]

Companies Act 1936 (NSW)

3.9. Rich A.J.'s call in the 1911 *General Motors* case for the appointment of a body of official liquidators in New South Wales was finally answered with passage of the

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14 Note 12 above.

15 (1926) 23 WN 131.

16 (1926) 23 WN 131 at 132.

Companies Act 1936. Under that Act, no more than two official liquidators could be appointed by the Governor for the purpose of voluntary and court-appointed liquidations.[17] In 1938, Long Innes J. issued a practice note stating that he interpreted the relevant provision to mean that any person who accepted an appointment as official liquidator was bound to act in any winding up if appointed to do so by the court, and there was no need for a special consent to be obtained in each case.[18]

3.10. At this time, there was still no registration system for persons other than official liquidators and it was still possible for other persons to be appointed to conduct court-ordered liquidations. Occasionally 'one-off' appointments were made in cases where there had been special requests.[19]

Uniform Companies Acts

3.11. The Uniform *Companies Acts 1961* introduced the two-tiered regulatory framework upon which the existing system is based. Under that legislation, no person was permitted to be appointed liquidator of a company (except in the case of a members' voluntary winding up of an exempt proprietary company) unless they were a registered liquidator.[20] Registered liquidators were not eligible for appointment if they were related to the company by way of holding an office, employment, or were indebted to the company or a related company for more than a specified sum.[21] The registration function was performed by the Companies Auditors Board in each State and Territory.[22]

3.12. The registration requirements for liquidators differed slightly between jurisdictions.[23] In Victoria, a registered company auditor could be registered as a liquidator if the Board was satisfied as to the experience and ability of the applicant. The requirements for registration as a company auditor in Victoria were:

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17 Subsection 227(2) *Companies Act 1936 (NSW).*

18 (1938) 55 WN 112.

19 *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. v Attalex Pty. Ltd.* (1984) 2 ACLC 752 at 772.

20 Section 10 Uniform *Companies Acts*, re-enacted in 1971 as section 277A.

21 See note 20 above.

22 The Companies Auditors Board was established under section 6 of the Uniform *Companies Acts 1961*. In New South Wales and Queensland the existing Public Accountants Registration Boards were made to constitute the Companies Auditors Board.

23 The legislation included requirements not only for general registration but also registration for the purposes of a 'one-off' liquidation—subsection 9(5) of the Uniform *Companies Acts 1961*.

- membership of the Institute of Chartered Accountants in Australia ('the ICAA') or the Australian Society of Accountants (later to become the Australian Society of Certified Practising Accountants, 'the ASCPA'); or
- registration as an auditor in another jurisdiction or under a previous Victorian enactment; or
- successful completion of a three year course in accounting and a 2 year course in commercial law at an Australian University; or
- a certificate in accountancy from a prescribed Institute of Technology or Technical College; or
- demonstration to the Board's satisfaction of a thorough knowledge of accounts and auditing and the provisions of the companies legislation and other prescribed subjects; and
- satisfying the Board of general conduct and character and sufficient practical experience in accountancy and ability to act as a company auditor.[24]

3.13. In New South Wales, it was not necessary to be a registered auditor to gain registration as a liquidator, but applicants had to be registered public accountants under the *Public Accountants Registration Act 1945* and practising as a public accountant. Like the Victorian legislation, the New South Wales legislation provided for an additional requirement that the Board had to be satisfied as to experience and ability of applicants in respect of liquidations.[25]

3.14. Despite the differences in wording of the provisions between jurisdictions, the requirements were, in practice, very similar. A commentator on the provision imposing the requirements[26] remarked that:

> 'With the increasing sophistication in Australian commercial life during the past decade there has grown, and will continue to grow, a greater awareness of the need for proper and adequate experience and capacity in an applicant for registration as a company auditor or liquidator. This section does not define or indicate the nature and extent of experience and capacity necessary, except by reference to the Public Accountants Registration Act where that Act is in force...However, in practice, the several Boards have, by maintaining communication with each other operated—and do—operate upon substantially uniform requirements as to experience and capacity. These requirements have, very properly, included practical experience in accountancy, a knowledge of the uniform enactment and capacity to act as a company auditor or liquidator...The

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24 Subsection 9(1), *Companies Act 1961* (Vic).

25 Subsection 9(3), *Companies Act 1961* (NSW).

26 Section 9, Uniform *Companies Acts 1961*.

> Boards prefer the experience of involvement in actual liquidations as the best indication of probable capacity properly to perform liquidations; although the experience and capacity needed for registration as a liquidator is not necessarily practical experience of the conduct of liquidations, but such experience and capacity as will fit the applicant for the office of liquidator: see *White v Companies Auditors Board* [1964] VR 743.'[27]

3.15. It is notable that registration needed to be renewed annually.[28] The Boards were given powers to inquire into the 'conduct, character and ability' of registered liquidators and, upon finding that a registered liquidator had engaged in discreditable conduct or was incapable of performing the duties of a registered liquidator, were empowered to impose various punishments including cancellation or suspension of registration.[29]

3.16. In addition to the introduction of a registration system for liquidators, the Uniform *Companies Acts* allowed the Minister to appoint as many registered liquidators 'as he thinks fit' as official liquidators for the purpose of winding up companies and assisting the court in winding up proceedings. The Minister could require security for performance of an official liquidator's duties and could revoke the appointment at any time.[30] The Minister was the Attorney-General, who would be assisted in this responsibility by the relevant Corporate Affairs Commission ('the CAC').

3.17. Like the current legislation, there were no express requirements for appointment as an official liquidator. However, in practice, no registered liquidator would have been appointed an official liquidator unless they had significant experience in liquidations, including court-appointed liquidations, and an established capacity to properly conduct them. Applicants were required to be persons 'of some maturity and...on whom the court is able to rely.'[31]

3.18. In New South Wales a practice was established (not supported by the legislation) of dividing the list of official liquidators into the 'A' and 'B' lists. Official liquidators on the 'A' list were appointed in rotation. They were required to provide a general consent and had to 'take the good with the bad' and accept remunerative and unremunerative appointments. The need to limit the number of practitioners on the 'A'

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27 W.E. Paterson and H.H. Ednie, 1971, *Australian Company Law*, Vol 1, 2nd ed, Butterworths, Sydney, p. 1142.

28 Subsection 9(6), Uniform *Companies Acts 1961*.

29 Subsection 9(11), Uniform *Companies Acts 1961*.

30 Section 11, Uniform *Companies Acts 1961*, repealed and re-enacted as section 231 in 1971.

31 W.E. Paterson and H.H. Ednie, 1971, *Australian Company Law*, Vol 3, 2nd ed, Butterworths, Sydney, p. 2593.

list so as to ensure each received adequate remuneration appears to have been a factor in determining whether persons could be added to the list.[32] Practitioners on the 'B' list could only be appointed where they expressly consented and the court would not appoint them unless it were persuaded that there were special circumstances which warranted departure from the usual practice.[33]

The Companies Code

3.19. The Companies Code of 1981 made some formal changes to the scheme under the Uniform *Companies Acts*. The registration function was transferred from the various Companies Auditors Boards to the National Companies and Securities Commission ('the NCSC'),[34] as was the power to register official liquidators.[35] The various State and Territory CACs actually performed the roles as delegates of the NCSC. A person registered as a liquidator or an official liquidator in a State or Territory was deemed to be registered as such in all the other jurisdictions.[36]

3.20. The requirements for registration as a liquidator were set out in the Code. They were:

- membership of specified professional bodies (including the ICAA and the ASCPA) **or** a three year accounting course and a two year commercial law course (including company law) OR other qualifications and experience which, in the opinion of the NCSC, are equivalent to those professional memberships/tertiary qualifications;

- satisfying the NCSC as to the experience of the applicant in connection with the winding up of corporations; and

- satisfying the NCSC that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.

3.21. There were no express requirements for registration as an official liquidator and the NCSC could register as many official liquidators as it thought fit.[37] The NCSC was also given plenary powers to cancel or suspend registration as an official liquidator.[38]

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32 See note 19 above.

33 *Re Stewden Nominees No 4 Pty Limited* (1975) 1 ACLR 185; (1975–1976) ACLC ¶40-224.

34 Section 17, Companies Code.

35 Section 21, Companies Code.

36 Section 29, Companies Code.

37 Section 21, Companies Code.

38 Section 30C, Companies Code.

In New South Wales, the 'A' and 'B' lists of official liquidators continued to operate under the Code, [39] although this was not the case in other jurisdictions.[40]

The Corporations Law

3.22. The two-tiered classification system of registered and official liquidators was retained under the Corporations Law which commenced in 1991.[41] Aside from some administrative changes substituting the ASC for the NCSC, the provisions under the Corporations Law regarding regulation of corporate insolvency practitioners are very similar to those which applied under the Companies Code.

REGULATORY STRUCTURE

3.23. The separate regulatory structures in place for personal and corporate insolvency practitioners are outlined in this part.

Corporate

3.24 The regulatory framework for corporate insolvency practitioners may be divided into those parts dealing with registration and those dealing with supervision and discipline.

Registration

3.25. There are currently two classes of liquidators; registered and official. A registered liquidator may perform a number of insolvency roles, not only that of a liquidator. As discussed above, to perform some roles it is necessary to be not only a registered liquidator, but also an official liquidator. The registration of liquidators and official liquidators is administered by the ASC.

Corporations Law

3.26. Under the Corporations Law, an application for registration as a (registered) liquidator may be approved by the ASC where:

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39 *Brian Cassidy Electrical Industries Pty. Ltd. (In prov. liq.) & Anor. V Attalex Pty. Ltd.* (1984) 2 ACLC 752 at 773.

40 See further the material on appointment in Chapter 9.

41 The entry requirements for each of the classes are discussed in detail later in this chapter.

- the applicant:
  - is a member of the ICAA, the ASCPA, or one of a number of comparable bodies in New Zealand, the United Kingdom and the United States;
  - holds tertiary qualifications in accounting and commercial law; or
  - has other qualifications and experience that in the opinion of the ASC are equivalent to the above qualifications; and
- the ASC is satisfied:
  - as to the experience of the applicant in connection with the winding up of bodies corporate; and
  - that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.[42]

3.27. The ASC is required to give an applicant an opportunity to be heard in relation to their application.[43] Where the ASC refuses registration, written reasons must be provided within 14 days.[44] The ASC's decision is reviewable by the Administrative Appeals Tribunal ('the AAT').[45]

3.28. While there are no specific provisions which deal with the criteria for registration as an official liquidator, the ASC has power to register a person who is a registered liquidator as an official liquidator.[46] The ASC has the discretion to register as many official liquidators as it thinks fit.[47] There is no right of appeal where the ASC declines to register a person as an official liquidator.[48]

3.29. It is possible for a person to apply to the ASC to be the liquidator of a specific body corporate for the purposes of a 'one-off' administration.[49] The ASC may approve such an application where it is satisfied that the applicant has sufficient experience and ability, and is a fit and proper person, to act as a liquidator of the body, having regard to the nature of the relevant insolvency administration.[50]

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42 Section 1282, Corporations Law.
43 Subsection 1282(10), Corporations Law.
44 Subsection 1282(11), Corporations Law.
45 Section 1317B, Corporations Law.
46 Subsection 1283(1), Corporations Law.
47 Subsection 1283(2), Corporations Law.
48 *Pipkin v Corporate Affairs Commission* (1987) 11 ACLR 433 per O'Loughlin J.
49 Paragraph 1279(c), Corporations Law.
50 Subsection 1282(3), Corporations Law.

3.30. The ASC is required to maintain a register of all persons who are registered liquidators, or liquidators of a specified body corporate.[51] The details which must be entered in the register for registered liquidators include:

- the name of the person;
- the day the person was registered;
- the address of the person's business;
- the name of the firm under which the person practices; and
- particulars of any suspension from registration.[52]

3.31. The ASC must also maintain a Register of Official Liquidators, containing the name of the persons so registered and any other details the ASC thinks appropriate.[53]

3.32. Once registered, a liquidator remains on the register until they die or the registration is cancelled by the ASC or the Companies Auditors and Liquidators Disciplinary Board ('the CALDB').[54] A person may request the ASC to have their registration as a registered or official liquidator cancelled voluntarily.[55] Compulsory suspensions and cancellations by the ASC and the CALDB are discussed later in this report.[56]

3.33. The Registers of Liquidators and Official Liquidators are available for inspection and members of the public may make copies of, or take extracts from, the registers.[57] The registers are maintained on the ASC's ASCOT database and the fee for inspection is currently $7.00.[58]

ASC Policy and Practice

3.34. The ASC has issued Policy Statements to explain the criteria it will apply in exercising its discretions under the above provisions in the Corporations Law.[59] The combined effect of these provisions in the Corporations Law and the ASC policies on the registration of liquidators and official liquidators has been that only:

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51 Subsection 1286(1), Corporations Law.
52 Subsection 1286(1), Corporations Law.
53 Subsection 1286(2), Corporations Law.
54 Subsection 1282(8), Corporations Law.
55 Section 1290, Corporations Law.
56 See Chapter 8.
57 Subsection 1286(4), Corporations Law.
58 Item 31, Corporations (Fees) Regulations.

- accountants with corporate insolvency experience under the direct supervision of an official liquidator can become registered liquidators and therefore be eligible to perform corporate insolvency work;

- official liquidators can perform court ordered liquidations; and

- registered liquidators working under the direct supervision of official liquidators can expect to gain the experience necessary to satisfy the ASC's criteria for registration as official liquidators.

Supervision and Discipline

3.35. Currently four bodies share responsibility for the supervision and discipline of corporate insolvency practitioners—the ASC, the court, the CALDB, and the professional bodies.

The ASC

3.36. Under the Corporations Law, the ASC has various obligations in relation to the supervision and discipline of corporate insolvency practitioners.

Triennial Statements

- Registered liquidators are required to lodge triennial statements with the ASC which contain information including:

- the name of the liquidator and the firm name or other name used in practice;

- the place(s) of practice;

- a statement regarding residency, disciplinary action, conviction of offences or other matters which may result in disqualification; and

- a list of liquidations conducted since registration or the date of registration, whichever is more recent.[60]

3.38. These statements must be lodged every three years from the date of registration unless the ASC grants an extension.[61] In addition, the ASC is empowered to require a registered liquidator to lodge a statement in respect of any specified period.[62]

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59 The details of the ASC's policy statements are discussed in detail in Chapter 6.

60 Form 908, Corporations Regulations.

61 Subsections 1288(3) and 1288(4), Corporations Law.

62 Subsection 1288(5), Corporations Law.

Inquiries

3.39. Where it appears to the ASC that a liquidator, or a provisional liquidator, is not faithfully performing their duties, or where a complaint is made to the ASC about the conduct of a liquidator, the ASC may inquire into the matter and take such action as it thinks fit.[63] The ASC has similar powers to inquire into the conduct of receivers and other controllers.[64]

Reports and Applications to the Court

3.40. Where the ASC considers that there has been misfeasance, neglect or omission on the part of a liquidator, provisional liquidator or controller, the ASC may report that matter to the court. The court may order the administrator concerned to make good any loss that the corporation has sustained because of the conduct, and may make such other orders as it thinks fit.[65]

3.41. It is also open to the ASC to use a general power to make an application to the court where it believes any person (including an external administrator) is guilty of fraud, negligence or breach of trust in relation to a corporation, where the corporation has, or is likely to, suffer loss or damage as a result.[66] On hearing the application (and giving the person an opportunity to present evidence), the court may make such orders as it thinks appropriate, including orders that the person concerned pay or transfer money to the corporation, or compensate the corporation.[67]

Applications to the CALDB

3.42. The ASC may apply to the CALDB to have the registration of a liquidator suspended or cancelled where the person has:

- failed to lodge triennial statements;
- ceased to be resident in Australia; or
- failed to carry out or perform adequately and properly the duties of a liquidator or any duties and functions required to be carried out or performed by a registered liquidator, or is otherwise not a fit and proper person to remain registered as a liquidator.[68]

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63 Subsection 536(1), Corporations Law.
64 Subsection 423(1), Corporations Law.
65 Subsections 423(2), 536(2), Corporations Law.
66 Subsection 598(2), Corporations Law.
67 Subsections 598(3), 598(4), Corporations Law.
68 Subsection 1292(2), Corporations Law.

Similar powers to make an application to the CALDB apply in relation to liquidators of a specified body corporate.[69] The powers of the CALDB in dealing with these applications by the ASC are discussed below.

Other Matters

3.43. The ASC also has comprehensive powers in relation to official liquidators. The registration of official liquidators is subject to suspension or cancellation by the ASC at any time.[70]

3.44. The ASC is responsible for administering a system of compensation by use of security deposits lodged by registered liquidators. A compliance-based surveillance program for registered liquidators was also administered by the ASC. However, that program recently ceased due to budgetary constraints. The ASC still responds to complaints against liquidators.

The CALDB

3.45. The CALDB is established under the ASC Law.[71] It holds hearings to determine whether or not auditors or liquidators appearing before it have committed breaches of the Corporations Law, have failed to properly carry out their duties as auditors and liquidators or are otherwise not fit and proper persons to be registered.

3.46. All applications to the CALDB must be brought by the ASC. If the CALDB determines that an auditor or liquidator is at fault, it can impose a penalty ranging from admonishment or reprimand to a suspension or cancellation of registration. The CALDB may also impose orders for costs, but it does not have power to make orders imposing pecuniary penalties.

3.47. The role of the CALDB is discussed in more detail in Chapter 8.

The Courts

3.48. Although lower courts have recently been given jurisdiction over certain aspects of insolvency matters,[72] the roles played by the courts in the supervision and discipline of insolvency practitioners is still the exclusive domain of the Supreme and Federal Courts. The powers of the court to discipline insolvency practitioners vary according to the type of administrator/administration concerned.

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69 Subsection 1292(3), Corporations Law.

70 Subsection 1291(1), Corporations Law.

71 Section 202, ASC Law.

72 See Schedule 1, *Corporate Law Reform Act 1994*.

Inquiries

3.49. Like the ASC, the court has powers to inquire into a matter where it appears to the court that a liquidator or a provisional liquidator is not faithfully performing his or her duties.[73] Such an inquiry may be carried out on the receipt of a complaint by *any person*,[74] but the court will only commence an inquiry where material is presented which suggests it is in the public interest to conduct an inquiry.[75] The court may at any time require a liquidator or a provisional liquidator to answer any inquiry in relation to a winding up.[76] Similar powers exist in relation to receivers and other controllers of corporate property,[77] but not in relation to voluntary administrations.

3.50. As officers of the corporation, receivers, receiver and managers, administrators, deed administrators, liquidators and provisional liquidators are all subject to summons by the court to attend mandatory examinations on oath about any matter relating to the management, administration, winding up or other affairs of the company which they administer.[78] The court is required to issue a summons for examination only where an 'eligible applicant' applies for the summons. Eligible applicants include the ASC and persons authorised by the ASC, liquidators, provisional liquidators, administrators and deed administrators.[79]

Orders for Removal

3.51. Upon completion of an inquiry in relation to a liquidator, receiver or other controller the court may take such action as it thinks fit.[80] This may include the removal of the insolvency practitioner from office where it is considered in the best interests of the administration to do so.[81]

3.52. In cases of voluntary winding up, the court has express power to remove a liquidator and appoint another liquidator 'on cause shown'.[82] A similar position exists in relation to liquidators appointed by the court.[83]

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73 Subsection 536(1), Corporations Law.

74 The phrase 'any person' is to be interpreted literally—see *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 1 ACSR 79 at 83.

75 *Burns Philp Investments Pty Ltd v Dickens* (1993) 11 ACLC 272.

76 Subsection 536(3), Corporations Law.

77 Section 423, Corporations Law.

78 Section 596A, Corporations Law.

79 Section 9, Corporations Law.

80 Subsection 536(1), Corporations Law.

81 *Re Timberlands Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq)* (1979) 4 ACLR 259 at 286.

82 Section 503, Corporations Law.

83 Subsection 473(1), Corporations Law.

3.53. A corporation may apply to the court for the removal of a receiver or other controller. An order may be made where the court is satisfied that the controller has been guilty of misconduct in connection with performing or exercising the controller's functions or powers.[84]

3.54. The court may remove an administrator, or a deed administrator, and appoint someone else as administrator on the application of a creditor or the ASC.[85]

Other Orders

3.55. Members or creditors of a company, or the liquidator of a company, may apply to the court for orders requiring a controller to comply with statutory obligations to lodge returns, accounts or other documents.[86] Members or creditors of a company, or the ASC, may make similar applications to the court in relation to a liquidator or a provisional liquidator.[87]

3.56. The court has a general power to make orders on the application of a creditor, member or the ASC in circumstances where it is satisfied that an administrator or deed administrator has done, is doing, or proposes to do, some act, or make some omission, that would be prejudicial to the interests of some or all of the company's creditors.[88]

3.57. A person aggrieved by an act, omission or decision of a receiver, receiver and manager, liquidator, provisional liquidator, administrator, deed administrator, or person administering a compromise or scheme of arrangement may appeal to the court. The court may make such orders and give such directions as it thinks fit, in order to modify the act or decision, or remedy the omission.[89]

3.58. As mentioned in the previous chapter, the court also has powers to review the remuneration of insolvency practitioners.

3.59. Finally, on the application of an 'eligible applicant' (as described above), the court may exercise its general powers to make orders against any person (including insolvency practitioners) where it is satisfied that the person is guilty of fraud, negligence or breach of trust in relation to a corporation and where the corporation has, or is likely to, suffer loss or damage as a result.[90] On hearing the application (and giving the person an opportunity to present evidence), the court may make such orders

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84 Section 434A, Corporations Law.
85 Section 449B, Corporations Law.
86 Section 434, Corporations Law.
87 Section 540, Corporations Law.
88 Section 447E, Corporations Law.
89 Section 1321, Corporations Law.
90 Subsection 598(2), Corporations Law.

as it thinks appropriate, including orders that the person concerned pay or transfer money to the corporation, or compensate the corporation.[91]

The Professional Bodies

3.60. The vast majority of corporate insolvency practitioners are members of a professional body such as the IPAA and/or the ICAA and the ASCPA. These bodies also play a role in the supervision and discipline of practitioners through codes of conduct and ethics, investigative and disciplinary committees, professional development activities and ongoing supervision through Quality Assurance Programs. The role of the professional bodies in the regulatory framework is discussed in detail later in this report.

Personal

3.61. The vast majority (about 93 per cent) of recently commenced bankruptcies are administered by Official Receivers, rather than registered trustees.[92] However, Part X administrations are administered almost exclusively by registered trustees. Debt agreements, which are now found in Part IX of the *Bankruptcy Act*, have not been in place long enough to determine the extent to which registered trustees will be involved in this form of personal insolvency administration. The discussion here will focus on the aspects of the regulatory scheme governing private insolvency practitioners, who must be registered under the *Bankruptcy Act* as trustees in bankruptcy in order to administer bankruptcies, Part X arrangements and debt agreements.

Registration Procedure

3.62. The *Bankruptcy Act* has recently been amended and significant changes have been effected to the procedure for registering trustees.[93] Individuals may apply to the Inspector-General to be registered as a trustee.[94] The application for registration must be in the approved form and be accompanied by information or documents prescribed in the regulations.[95] The application must also be accompanied by the prescribed fee.[96]

3.63. Upon receiving an application, the Inspector-General must convene a committee consisting of the Inspector-General, an officer of the Attorney-General's Department and a registered trustee chosen by the IPAA, to consider the application and interview

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91 Subsections 598(3), (4), Corporations Law.

92 *Bankruptcy Act 1966* — Annual Report 1995-96, AGPS, Canberra, 1996, p. 12.

93 The changes were implemented in the *Bankruptcy Legislation Amendment Act 1996*.

94 Subsection 154A(1), *Bankruptcy Act 1966*.

95 Subsections 154A(2) and 154A(3), *Bankruptcy Act 1966*.

96 Paragraph 154A(3)(b), *Bankruptcy Act 1966*.

the applicant.[97] Within 60 days of the interview, the committee must make a decision whether or not to register the applicant.[98] The committee must register the applicant if it is satisfied that the applicant:

- has relevant qualifications, experience, knowledge and abilities prescribed by the regulations;
- takes out insurance against liabilities that the applicant may incur working as a registered trustee;
- does not have any convictions for an offence involving fraud or dishonesty in the ten years prior to making the application;
- has not been a bankrupt or a party (as debtor) to a debt agreement or Part X administration within 10 years before making the application; and
- has not had his or her registration as trustee cancelled within 10 years before making the application on the grounds that he or she:
  - contravened conditions imposed by the committee on his or her practice as trustee;
  - failed to exercise the powers of a registered trustee properly; or
  - failed to carry out the duties of a registered trustee properly.[99]

3.64. If the applicant does not have the requisite qualifications, experience, knowledge and abilities prescribed by the regulations, the committee still has the discretion to decide in favour of registration.[100] However, if the applicant does not satisfy any of the criteria other than this one, the committee **must not** register the applicant.[101]

3.65. The committee may approve registration on conditions.[102] The *Bankruptcy Act* requires the committee to give the applicant and the Inspector-General a report outlining the committee's decisions and reasons for them.[103]

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97 Section 155, *Bankruptcy Act 1966*.
98 Subsection 155A(1), *Bankruptcy Act 1966*.
99 Subsection 155A(2), *Bankruptcy Act 1966*.
100 Subsection 155A(3), *Bankruptcy Act 1966*.
101 Subsection 155A(4), *Bankruptcy Act 1966*.
102 Subsection 155A(5), *Bankruptcy Act 1966*.
103 Subsection 155A(6), *Bankruptcy Act 1966*.

3.66. The Inspector-General must give effect to the decision of the committee to register the applicant, subject to the applicant paying the prescribed fee.[104] Registration is effected by the Inspector-General entering prescribed details in the National Personal Insolvency Index.[105]

3.67. Registration remains effective for three years.[106] An extension of the period must be granted by the Inspector-General if the person applies to the Inspector-General for an extension of time before the person's registration expires and the person pays the registration fee specified in the regulations.[107]

Qualifications

3.68. There have been recent changes to the prescribed qualifications. Previously, one of the alternative registration requirements was membership of a 'prescribed body'.[108] The bodies prescribed under the Bankruptcy Rules were:

- the ASCPA;
- the ICAA; and
- a number of comparable bodies in New Zealand, Canada, the United Kingdom and the United States of America.[109]

3.69. Membership of a 'prescribed body' is no longer a registration criterion. The regulations now specify that the applicant must have the following qualifications, experience, knowledge and abilities in order to be registered as a trustee:

- completion of a degree or diploma or similar qualification from an Australian university, college of advanced education or other Australian tertiary university of an equivalent standard in which the person completed an accountancy course of not less than two years or a course of study in commercial law of not less than two years;
- employment in a relevant field for a period of not less than two years in the preceding five years; and

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104 Section 155C, *Bankruptcy Act 1966*.

105 Subsection 155C (2), *Bankruptcy Act 1966*.

106 Subsection 155C(4), *Bankruptcy Act 1966*.

107 Section 155D, *Bankruptcy Act 1966*.

108 Subparagraph 155(3A)(a)(i), *Bankruptcy Act 1966*, repealed by the *Bankruptcy Legislation Amendment Act 1996.*

109 Former paragraph 61A(a) and Part 1 of Schedule 2, Bankruptcy Rules.

- the ability to perform satisfactorily the duties of a registered trustee.[110]

3.70. Employment in a relevant field includes:

- assisting a liquidator or trustee in the performance of their duties;
- providing advice in relation to bankruptcy matters; or
- experience in insolvency administrations outside bankruptcy.[111]

Supervision and Discipline

3.71. This section deals with matters of general supervision and control relating to possible misconduct by registered trustees.

Safeguards Against Misconduct by Trustees

3.72. Division 4A, Part VIII of the *Bankruptcy Act* previously contained a number of rules governing the compulsory examination of registered trustees before the Registrar. This Division was recently repealed[112] and no alternative procedure was introduced as other supervisory and registration mechanisms regarding trustees were considered adequate safeguards against misconduct by trustees.[113]

3.73. The *Bankruptcy Act* allows the Inspector-General to request that the registered trustee provide a written explanation why the trustee should continue to be registered where the Inspector-General believes that the trustee:

- no longer possesses a qualification or ability prescribed by the regulations as one necessary for registration;
- has been convicted of an offence involving dishonesty;
- is not insured against liabilities that he/she may incur, or has incurred, working as a registered trustee;
- is no longer practicing as a registered trustee;
- has contravened conditions imposed on the trustee by the committee; or

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110 Regulation 8.02(1), Bankruptcy Regulations.

111 Regulation 8.02(2), Bankruptcy Regulations.

112 Schedule 1, *Bankruptcy Legislation Amendment Act 1996*.

113 *Explanatory Memorandum* to the Bankruptcy Legislation Amendment Bill 1996 (Senate), paragraph 130.1.

- has failed to exercise the powers or carry out his/her duties as trustee properly.[114]

3.74. The Inspector-General must convene a meeting of the committee where the registered trustee does not provide an explanation within a reasonable time or the Inspector-General is not satisfied by the reasons given by the trustee. The committee must have regard to the factors outlined above.[115]

3.75. If the committee decides that the trustee should continue to be registered, it may impose conditions on the registration or modify any existing conditions. Alternatively, the trustee's registration may be unconditional.[116]

3.76. The *Bankruptcy Act* previously required registered trustees to give the Registrar a triennial statement which contained prescribed information. This requirement has been abolished and has been replaced with a requirement for a registered trustee who is convicted of an offence involving fraud or dishonesty to give the Inspector-General written notice of the conviction and the nature of the offence as soon as practicable.[117] In addition, where a registered trustee becomes bankrupt or enters as a debtor into an insolvency administration under the law of a foreign country, notice must be given to the Inspector-General as soon as possible.[118]

3.77. The *Bankruptcy Act* also provides for the automatic cancellation of a trustee's registration without the need for an application to be made to the court or consideration by a committee where the trustee becomes a bankrupt or executes an authority for a controlling trustee to call a meeting of the debtor's creditors to take control of the debtor's property.

3.78. Furthermore, the court may make one of the following orders where an application is made by the Inspector-General or a creditor and the court believes that the trustee is guilty of a breach of duty in relation to a bankrupt's estate or affairs:

- that the trustee make good any loss sustained as a result of the breach;
- that the Inspector-General cancel the person's registration as trustee; or
- any other order the court considers just and equitable in the circumstances.[119]

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114 Section 155H, *Bankruptcy Act 1966*.
115 Subsections 155H(2)-(4), *Bankruptcy Act 1966*.
116 Subsections 155I(2), (3), *Bankruptcy Act 1966*.
117 Subsection 161A(1), *Bankruptcy Act 1966*.
118 Subsection 161A(2), *Bankruptcy Act 1966*.
119 Subsections 176(1), (2), *Bankruptcy Act 1966*.

3.79. On the application of the Inspector-General, a creditor or the bankrupt (or debtor), the court may inquire into the conduct of a trustee and may do one or both of the following:

- remove the trustee from office; or
- make such other order at it thinks proper.[120]

Accounts and Audit

3.80. Under the *Bankruptcy Act*, a registered trustee must keep accounts and records sufficient to exhibit a correct account of the administration of the estate, and creditors may inspect the accounts and records at any reasonable time.[121] The Inspector-General in Bankruptcy may, on his or her own motion or at the request of a creditor or the debtor, audit or cause the accounts to be audited and the trustee must cooperate in the audit.[122] The cost of the audit is borne by the estate.[123]

3.81. In practice, registered trustees are subject to two types of audit*:* routine and special. Routine audits are programmed visits to trustees by officers of the Insolvency and Trustee Service Australia ('ITSA'). The officers conduct random financial and compliance audits of the administrations under the trustee's control. An inspection of each registered trustee with active estates is conducted every two years, and at least 10 per cent of the trustee's active administrations are examined.

3.82. Special audits are conducted in response to complaints received by ITSA in relation to particular administrations from creditors or debtors. The complaints mechanism is discussed immediately below.

Complaints

3.83. Complaints about the activities of registered trustees are usually dealt with in the first instance by ITSA, but the court also has various powers under the *Bankruptcy Act*.

3.84. Complaints received by, or referred by Ministers to, ITSA would usually be examined by ITSA's trustee regulation unit or ITSA's Secretariat Branch. If a less than satisfactory standard of administration is identified, there are basically three levels of remedial action which may be taken:

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120 Subsections 179(1), *Bankruptcy Act 1966*.
121 Section 173, *Bankruptcy Act 1966*.
122 Subsections 175(1), (5), *Bankruptcy Act 1966*.
123 Subsection 175(6), *Bankruptcy Act 1966*.

- counselling of the trustee by ITSA officers or the Official Receiver with a view to improvement of practice and procedure in the trustee's office;

- counselling by the Inspector-General in Bankruptcy personally about the expected level of improvement in administration; or

- making an application to the court seeking, for example, restitution of funds or deregistration of the trustee.

Professional Bodies

3.85. The above discussion has focussed on the supervision and disciplinary procedures available under the *Bankruptcy Act*. The vast majority of registered trustees would also be subject to the disciplinary procedures in place under the rules of one or more professional bodies such as the ASCPA or the ICAA. Those procedures are the same as those discussed above in the context of the regulatory structure for corporate insolvency practitioners.