NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Report No.1: Insolvency practitioner regulation and voluntary liquidations

7 October 2016

NEW ZEALAND BANKERS ASSOCIATION
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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fifteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on Report No.1: Insolvency practitioner regulation and voluntary liquidations (**Insolvency Proposals**).

4. NZBA supports the recommendations made by the Insolvency Working Group. NZBA thanks the Working Group members for their thorough and considered analysis of the issues addressed in the Insolvency Proposals.

5. If you would like to discuss any aspect of the submission further, please contact:

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Executive summary

6. NZBA supports the introduction of a licensing regime for insolvency practitioners, coupled with minimum competency requirements and ongoing competency requirements.

7. NZBA's preferred model for occupational regulation of Insolvency Practitioners is the co-regulation model.

NZBA supports the introduction of a licensing regime for insolvency practitioners, coupled with minimum competency requirements and ongoing competency requirements

8. NZBA agrees with the introduction of licensing regime for insolvency practitioners. This regime should be supported by the requirement for practitioners to:

    a. satisfy minimum competency standards (i.e. are fit and proper persons and sufficiently skilled and qualified);

    b. be restricted to only members of an accredited professional body that meet the required standards; and

    c. satisfy standardised competency requirements on an ongoing basis.

9. NZBA's view is that the scope should be expanded to include practitioners managing compromises under Part 14 of the Companies Act 1993. However, NZBA agrees that more relaxed criteria for solvent liquidators are warranted.

NZBA's preferred model for occupational regulation of Insolvency Practitioners is the co-regulation model

10. NZBA supports a co-regulation model and agrees with the suggested division of functions as between the government regulator and accredited professional bodies put forward in the Working Group's paper. However, further consideration should be given as to whether there should be only one accredited professional body (as opposed to multiple bodies) as NZBA considers this approach would promote the most consistency and efficiency.

11. In principle however, NZBA does not object to having multiple professional bodies in the event the government regulator could ensure that consistent standards and processes are applied across the board.

Answers to specific questions posed in the Insolvency Proposals

Insolvency Practitioner Regulation

Do you agree with the Working Group's views on the problems with the status quo? (see paragraphs 39-77) What is the scale of harm being caused by these problems? If applicable, please describe the impact of the current insolvency practitioner regulation regime on your business.

12. Yes. In NZBA's view, the Working Group has accurately outlined the concerns and difficulties experienced by creditors when dealing with practitioners that are self-interested, debtor friendly and/or lack the requisite experience and skill level. The Working Group has also correctly identified the root causes of these problems.

13. Self-interested and debtor-friendly practitioners are of great concern to our members, as these individuals' lack of honesty and integrity lead to ethical boundaries being crossed. Their behaviour severely undermines creditor confidence in the insolvency process. NZBA fully supports legal reform that:

    a. prevents practitioners who do not meet a "fit and proper person test" from entering the market; and

    b. facilitates holding practitioners to account for their actions.

14. Although less morally culpable, unskilled and inexperienced practitioners may make poor judgement calls to the significant detriment of the debtor company and its creditors. NZBA also fully supports legal reform imposing a baseline skill requirement for practitioners, and empowering the Court with more effective supervisory powers. Continued education would also be favourably regarded.

15. The above comments apply not just to insolvency practitioners dealing with companies and their assets (including managers under Companies Act compromises) but equally to provisional trustees and trustees under Part 5, subpart 2 of the Insolvency Act 2006.

Do you agree with the listed objectives? (see paragraphs 78-81)

16. Yes.

Do you generally agree that changes proposed in the Insolvency Practitioners Bill that do not relate to the registration regime proposed in that Bill along with the additional related changes proposed by the Working Group should be progressed? Please include any comments you have on one, some or all of the proposals detailed in Annex 3.

17. Generally, NZBA supports legal reform resulting in:

    a. greater clarity on disqualification criteria for practitioners, including the Court's ability to make prohibition orders and the scope of such orders;

    b. reduction of unnecessary and unrecoverable legal spend – e.g. section 280(1)(ca) of the Companies Act 1993 – having to make Court applications to allow investigative accountants to be appointed as liquidators and administrators.

    c. greater clarity on roles and duties of practitioners, including:

        i. efficient transitions between practitioners;

        ii. independence of deed administrators;

        iii. prohibition orders;

iv. stricter laws regarding holding of funds – e.g. liquidators (in trust accounts and aligned with rules of relevant professional codes of practice), receivers (offences to prevent mischief in relation to money);

v. requirement of interests statements by all practitioners identifying material conflicts (including prior relationships in the last two years) and how they intend to manage any conflicts; and

vi. duty to report not just suspected offences but serious problems by all insolvency practitioners (including administrators).

d. enhanced transparency and accountability through reporting requirements on practitioners.

Do you agree with the proposed changes to the High Court supervision of liquidators? (see paragraphs 154-156)

18. Yes. In many circumstances, having to initiate Court action is a costly and time consuming exercise and therefore, is a decision not made lightly by creditors. In cases where it is considered necessary, NZBA supports greater clarity in the law and the Courts being empowered to exercise a more effective supervisory role – including enforcing liquidator's duties and allowing removal and prohibition orders. NZBA also supports licensing bodies being able to apply for orders under the proposed amended section 284 to enforce a liquidator's duties and seek removal / prohibition orders.

What are your views on the four occupational regulation options proposed by the Working Group? (see paragraphs 116-146)

19. *Registration as proposed in the Bill and negative licensing:* NZBA agrees that there is little point in a licensing regime with effectively no criteria (except for lack of criminality). Licensing by a government body will create a false impression of endorsement which could be abused by unscrupulous practitioners.

20. *No statutory occupational regulation*: NZBA agrees with the Working Group's comments.

21. *Co-regulation*: This is NZBA's preferred option. NZBA agrees with the suggested division of functions as between the government regulator and accredited professional bodies. However, further consideration should be given as to whether there should be only one accredited professional body (as opposed to multiple bodies). Refer to our response at paragraph 23 below.

22. *Government licensing*: NZBA agrees that co-regulation is preferable due to the market knowledge of professional bodies. The professional bodies' industry knowledge also makes them better placed to implement relevant and effective continuing education programmes to help ensure that practitioners maintain an appropriate skill level.

Do you agree with the details of the co-regulation system recommended by the Working Group? (see Recommendations 3-8 on pages 5 and6)

23. *Recommendation 3:* NZBA agrees with the Working Group's proposed functions and powers, but suggests that further consideration be given to whether simply having one well-resourced accredited professional body would meet the aims of the reform. In principle however, NZBA does not object to having multiple professional bodies in the event the government regulator could ensure that consistent standards and processes are applied across the board.

24. *Recommendation 4:* NZBA's view is that the scope should be to include practitioners managing compromises under Part 14 of the Companies Act 1993. These practitioners should not be excluded, particularly in light of the inclusion of trustees of an insolvent's proposal under the Insolvency Act 2006. Unprofessional conduct and incompetence by compromise managers and proposal trustees would both have a detrimental effect on creditors.

25. *Recommendation 5:* If the reforms suggested by the Working group are implemented, NZBA agrees that more a relaxed criteria for solvent liquidators is warranted. However, NZBA's view is that eligible practitioners should be able to demonstrate relevant finance qualifications, experience and business acumen to ensure that they are able to recognise if a company in a solvent liquidation is not in fact insolvent. Simply being registered with a professional body (e.g. NZLS) may not be sufficient.

26. *Recommendation 7*: Agree.

27. *Recommendation 8:* Agree.

Are there other feasible options to address the problems identified by the Working Group with the provision of insolvency services?

28. Generally, NZBA has found the Working Group's recommendations to be well thought out and comprehensive.

29. Given that the costs expended in recovering amounts advanced from insolvent entities can often be unrecoverable, creditors are usually cost conscious. Accordingly, NZBA supports law reform that would result in a more cost-effective means of enforcing practitioners' rights and duties.

An alternative option for regulating insolvency practice would be to only require the practitioner to be a member of a professional body, such as CAANZ or RITANZ, without any oversight from an independent government regulator. Would this option provide a more cost effective model for regulating insolvency practitioners?

30. NZBA's view is that a system overseen by a government regulator is necessary for objectivity, to ensure that consistent standards and processes are applied by professional bodies, and to help engender confidence in the system.

Should insolvency services be restricted to only certain members of an accredited professional body, as opposed to all members of the accredited professional body? If so, what criteria should be applied to determine which members of the accredited professional body would be permitted to provide insolvency services?

31. Insolvency services should be restricted to only members of an accredited professional body that meet the required standards – i.e. are fit and proper persons and sufficiently skilled and qualified. Depending on criteria of membership of the accredited professional body, it may be that not all members should be able to provide insolvency services.

How might the different options impact on competition within the insolvency services sector? How would the different options impact on the availability of insolvency services to businesses and creditors outside the main centres of New Zealand?

32. In NZBA's view, if there are enough sufficiently skilled practitioners in the market, there should still be a healthy market and participants should have increased confidence in light of the required competence/fit and proper requirements.

33. NZBA submits there should be no barriers to practitioners outside the main centres to be licenced if they meet the required standard. In NZBA's members' experience, they have not had many dealings with practitioners that specialise in specific regions outside the main centres – most practitioners' specialisations are based on industry rather than by regions. Regional practitioners can similarly seek to be accredited.

Voluntary liquidations

Do you agree that introducing a licensing regime for insolvency practitioners would reduce much of the harm raised by aspects of the voluntary liquidation process? (see paragraphs 174-178, 201)

34. Yes.

Do you agree that the latent defect problems in the building and construction sector are issues best solved by building and construction sector law and should not be directly addressed by changing insolvency law? (see paragraphs 179-186) If not, what would you suggest?

35. Yes. NZBA's view is that it is difficult to isolate the treatment of one particular industry in a principled manner and without giving rise to an uncertain position.

Do you agree that one, some or all of the three measures proposed by the Working Group will address the harm of some voluntary liquidations? (see paragraphs 187-200)

36. *Measure 1:* Removal of ability to appoint liquidator (or deed administrator) after service of a liquidation application should be subject to the petitioning creditor being

able to consent to a voluntary appointment. This measure may not be necessary in the event an effective licensing regime is implemented.

37. *Measure 2:* This measure may be too onerous. Companies often intend to effect genuine sales of assets at market value in order to reduce debt. These genuine sales to bona fide purchasers, and where proceeds are correctly distributed should not be affected. Our members suggest that the automatic prohibition should only apply to the transfer of assets to associated parties and transfers of assets in full/partial satisfaction of debt. It is further agreed that liquidators should be able to subsequently ratify genuine assets sales for proper value.

38. Measure 3: Agree. However, there has to be an effective and strict identification verification process. Otherwise, the system will be abused by those who deliberately create multiple identification numbers.

Do you agree with the benefits of a unique identification number for directors?

39. Refer to our response at paragraph 38 above.

Do you have any other comments on Report No. 1?

40. No.