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"Better" Regulation of Insolvency Practitioners: Cracking the Code

"You who are on the road, must have a code that you can live by"

(Crosby, Stills and Nash, 'Teach Your Children')

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Introduction

In most jurisdictions including Australia, insolvency practitioners ("IPs") are, as such, subject to some form of regulation (as distinct from their statutory and general law duties in relation to a particular insolvency appointment) and there is an easy case to justify such professional regulation. Of course, there is a spectrum of regulatory models and methods, which we discuss below.

In addition, over the last forty years insolvency practice locally and globally, has emerged out of accountancy as a separate profession, and with it have come the hallmarks of a profession, including professional bodies who, inter alia, set standards to govern or guide members' conduct. This paper will focus on Australia, (though with comparisons to the UK and New Zealand), and will ask whether the regulatory mix is currently appropriate and whether there are ways in which it could be improved in the light of the specialist , varied and complex nature of insolvency appointments. In particular, the place and nature of professional codes will be examined, using the example of remuneration to illustrate the tensions involved in ensuring that insolvency practitioners and their firms, driven by a profit motive, nevertheless provide transparency, fairness and accountability to diverse stakeholders .

It is an appropriate time to ask this question. First, the Senate, on 25 November 2009, launched an inquiry into the insolvency profession on very wide terms of reference:

"This inquiry will investigate the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business".

The inquiry is open for submissions until 12 February, with a reporting date of August this year.[1] It may have been initiated as a response to the increase in insolvency work during the financial crisis, and/or in response to the notorious case of Stuart Arif.[2] In the UK, insolvency practitioners have

[1] http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/index.htm
[2] Ariff was banned for life from acting as a registered liquidator on 18 August 2009, see http://www.asic.gov.au/asic/asic.nsf/byheadline/09-150AD+Liquidator+(Stuart+Ariff)+banned+for+life?openDocument

come under the spotlight yet again. In addition to a professional body's survey of the cost of insolvency services,[3] the Office of Fair Trading has recently launched a market study of the insolvency industry. [4] The study "will look at the structure of the market, the appointment process for insolvency practitioners and any features in the market which could result in harm, such as higher fees or lower recovery rates for certain groups of creditors". This follows on from a World Bank report on the cost of closing a business worldwide, including time in administration, percentage of fees in relation to asset recovery, and returns to creditors. [5]

The IPA in Australia has responded to the announcement of the Senate Inquiry by asserting that, particularly since the amendments to the Corporations Act in 2007 with regard to practitioner disclosure of interests, and the launch of the IPA's Code of Professional Practice in May 2008, insolvency practitioners' houses are in order and there is no need for such an inquiry, but predicts that it will show that Australia's insolvency practices are among 'the best in the world.'[6]

In this paper we do not analyse the IPA Code in detail, but we examine the role for self-regulation or co-regulation, and the place and status of Codes in the regulatory structure. We question whether some additional layer of independent review or complaints mechanism might be justified in terms of stakeholder confidence in the system, whether the licensing criteria can be more finely attuned to their objectives, whether the current disciplinary procedure for liquidators is optimal, and ask whether initiation of work towards international standardisation of a code of conduct for insolvency practitioners would, as it has done in the area of accounting and auditing standards, give added encouragement to domestic Government endorsement of best practice standards.

The Current Regulatory Framework for IPs.

Regulation of insolvency practitioners is already embedded in the Federal legislative framework and is here to stay. That is not of itself a justification for it, but it is worth outlining the current structures. ASIC licenses practitioners as 'registered liquidators' (or 'official liquidators', who are appointed from among registered liquidators), [7] and only registered liquidators can take appointments as liquidators, administrators, and receivers. [8] (We note that it seems somewhat archaic, in view of the popularity of Voluntary Administration and the rescue culture, that the

[3] R3 published a report called 'The Value of the Insolvency Industry', July 2008, which is available at www.r3.org.uk/publications/default.asp?dir=professional&pag=Thensolvencyindustry&i=475.
[4] http://www.oft.gov.uk, Press Release 12 November 2009
[5] This forms part of the World Bank's 'Doing Business' project assessing business regulation around the world on a number of criteria, see http://www.doingbusiness.org/documents/fullreport/2010/DB10-full-report.pdf
[6] IPA 25 November 2009 Media Release
[7] See generally sections 1282- 1298A Corporations Act 2001
[8] *Stocktaking exercise on regulation of professional services, overview of regulation in the EU Member states*, 2003, cited in *Regulation of legal and medical professions in the US and Europe, a Comparative Analysis*, Nuno Garoupa, Working Paper, 2006, FEDEA www.fedea.es

regulator still licenses 'liquidators' as the default insolvency office.[9]) The Insolvency and Trustee Service Australia ("ITSA") registers trustees in relation to bankruptcy, and also now licenses debt agreement administrators.[10] In both corporate and personal insolvency cases, there are educational, experiential and 'fit and proper' requirements to be satisfied.[11] Once licensed, ASIC monitors whether or not practitioners are adequately and properly performing their duties, and ITSA carries out inspections of practices. ASIC (and also APRA)can bring complaints before the Companies Auditors and Liquidators Disciplinary Board ("CALDB") under s1292, with appeals to the Administrative Appeals Tribunal, which can then go to court on matters of law.

Section 536 Corporations Act provides a role for ASIC or the courts in supervision and control of liquidators.[12] Additionally, s1321 provides the court with power to review any act, omission or decision of the liquidator.

CALDB

CALDB is an independent statutory body established under the ASIC Act 2001 (Cth). It has a public protective role by virtue of its jurisdiction to cancel or suspend the registration of a liquidator.[13]

The Board is required by the Corporations Act to determine whether a registered liquidator has contravened provisions of the Act, has failed to carry out their duties and functions adequately and properly, is not a fit and proper person to remain registered, is subject to disqualification or is otherwise ineligible to remain registered.

The history of CALDB can be traced to the States' Companies Act in the 1930s, and its present form was established under the Corporations Act 1989 and the ASIC Act 1989. It was substantially reformed in 2003.[14]

The role of the CALDB was described in *Dean-Willcocks v CALDB*.[15] It is interesting to note that there the judge saw the Board as : 'a representative specialist Board which is set up to take account the conduct standards formulated by relevant professional bodies..Both the constitution of the Board and the formulation of the standards provide a benchmark and specialist framework of reference for consideration of questions of adequacy and sufficiency of performance".

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[9] For example the European Bank for Reconstruction and Development ("EBRD") Insolvency Office Holder principles, 2007, EBRD; The Insolvency Practitioners Association's Code of Professional Practice distinguishes a class of 'practitioners', SIP 9 in the UK applies to 'Office holders'.

[10] Part IX Bankruptcy Act 1966, amended 2007. See Inspector-General Practice Statement No.4, *Guidelines and Processes for Registration of Debt Agreement Administrators*, March 2007, ITSA

[11] See the paper of Brand, Fitzpatrick and Symes at this conference , ""Fit and proper": an integrity requirement for liquidators in the Australian corporate legal framework " (Unpublished conference paper).

[12] Receivers and controllers are supervised by s423 of the Corporations Act, trustees in bankruptcy are similarly supervised by s179 of Bankruptcy Act 1966 (Cth).

[13] Magarey, "Law Reform and the CALDB" Jan –Mar 2007 *Australian Insolvency Journal* , 10.

[14] under Part 11 of the ASIC Act 2001 (Cth) and the Corporations Act 2001 (Cth) ss1292-1298, The CALDB presents an Annual Report to the Commonwealth Treasurer.

[15][2006]FCA 1438, Tamberlin J, at para 36.

Yet in the insolvency area, it can be seen below that the views of ASIC and some judges in relation to the role of the IPA Code have been more circumscribed. Historically, the Board's jurisdiction over liquidators was added to that over auditors, and certainly the judge's comments may reflect the role of the Board in relation to auditing and accounting standards, which are more embedded into the regulatory framework for auditors.

The CALDB when dealing with liquidators categorises matters into 'administrative' and 'conduct'. Each has different sanctions. The **administrative** category includes: failing to lodge a statement under s1288; [16] ceasing to be a resident in Australia;[17] failing to lodge a statement under s1288(5);[18] ceasing to be a resident in Australia (liquidator of specified body); [19] becoming disqualified from managing a corporation under Pt 2D.2; [20] becoming incapable because of mental infirmity of managing affairs.[21] Administrative breaches of s1292(7)(a) and (b) provide the CALDB with simple decision-making - they must cancel the registration, and for breaches of s1292(2) and (3) they may cancel or suspend registration.

The **conduct** category includes: failing to carry out the duties of a liquidator;[22] failing to carry out the duties or functions required by an Australian law to be carried out by a registered liquidator;[23]) not being a fit and proper person to remain registered as a liquidator;[24]) failing to carry out the duties of a liquidator of a body corporate or otherwise not being a fit and proper person to remain registered as a liquidator of that corporation (liquidator of specified body).[25]

The conduct breaches of s 1292(2)(d) and (3)(d) can render IPs liable to cancellation of registration, suspension, admonishment, reprimand or can require undertakings. It is interesting to note that CALDB has no power to order recompense or mandatory remedial education, two areas that are incorporated into the EBRD/World Bank Principles on Insolvency Officeholders, which we discuss below.[26]

CALDB is not a court or even a tribunal, despite the quasi-judicial manner in which it conducts its hearings. The Board must make a subjective/evaluative determination of the adequacy of the performance of the insolvency practitioner. The decision-making of the Board is an exercise of their discretionary power, while continuously keeping in mind the protection of the public interest.

Appeals from CALDB have generally been unsuccessful , and the decision of the Board is not generally one with which the courts will intervene.[27]

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[16] S1292(2)(a)(i)
[17] S1292(2)(a)(ii)
[18] S1292(3)(a)(i)
[19] S1292(3)(a)(ii)
[20] S1292(7)(a)
[21] S1292(7)(b
[22] S1292(2)(d)(i)
[23] S1292(2)(d)(ii)
[24] S1292(2)(d)
[25] S1292(3)(d)
[26] Insolvency Officeholder Principles, June 2007, EBRD
[27] Though see *Gould v CALDB* discussed below, p20

The constitution of CALDB is 14 members. [28] It appears that there are two members who are IPs. It is usual for a panel to be constituted by five members, consisting of the chair or deputy with two business members and two accounting members.

The CALDB does provide an independent forum separate from the investigative and prosecutorial role of ASIC in relation to registered liquidators, but historically it emerged from the auditing discipline, and there is no reason why, given the emergence of insolvency as a specialist profession, it should remain bundled up with jurisdiction over auditors.

So we pose the question, is it time to remove CALDB in its present form? One option could be to replace it with two disciplinary boards, one for auditors and one for liquidators. The liquidators disciplinary board could then have a panel comprised of insolvency specialists (more than the present 2 liquidators on CALDB) and have representation from insolvency stakeholders and the regulator. Perhaps too there is a need for an insolvency investigative body which could concentrate its efforts on bringing matters before the liquidators disciplinary board.

Another option is to move both the investigative and disciplinary processes to the IPA. Currently the IPA, after a detailed review, is consulting its members and key stakeholders on major changes to its Member Discipline Regime. Given the high level of conformity between those who are registered liquidators and IPA membership, it could be possible to develop the IPA regime in future so that it regulates all insolvency officeholders, eliminating the need for CALDB.

Elsewhere in this paper we discuss calls for a separate agency for the handling of regulatory insolvency functions (such as hearing of complaints about, or assessment of, remuneration or other complaints from stakeholders), and that could have the task of hearing cases brought by ASIC against registered liquidators. The advantages would be the specialisation and insolvency focus of the agency, and its ability to comment regularly on, and endorse, a code or codes of practice due to familiarity with their enforcement. This suggestion could work in tandem with an enhanced self-regulatory role for the IPA as envisaged in the previous paragraph.

The Easy Case for Insolvency Practitioner ("IP") Regulation in Australia

Although the Australian regulatory regime is well-established, it is worth pausing to consider why insolvency practitioners should be subject to *any* regulation, given that a 'creditors' bargain' model of insolvency procedures [29] might be linked with a suggestion that IPs' services should also be governed purely by creditor choice .

In this section we consider the main justifications for regulation of an industry or profession , as they might apply to insolvency practitioners.

Characterisation as a 'profession'

[28] The present composition is listed in the Annual Report and on the website, www.caldb.gov.au

[29] Jackson, *The Logic and Limits of Bankruptcy Law* (Little Brown, 1986)

By self-defining, or being publicly identified, as a 'profession', the very hallmarks of a profession might lend weight to the case for regulation, even if only for self-regulation. For example, though there are many definitions, a European working party has defined a profession as an 'occupation requiring specialised skills partially or fully acquired by intellectual training; service provision calling for a high degree of integrity; involves direct or fiduciary relations with clients" .[30]

Market failure- information asymmetry.

Professional services are said to be public or credence goods, where consumers rely on expertise and trust the professional, either as to assessment of the problem (agency) or implementation of the solution (service) or both. Since this may generate a supplier-induced demand (such as being supplied a service which might not be needed), it is necessary to protect consumers. But not all consumers are in this position. Some are sophisticated, and/or repeat, purchasers of services; for example, banks in relation to insolvency services.

Attempting to relate this to insolvency practice, it can be suggested that IP's services as officeholders cannot be fitted neatly into a consumer model, because although creditors and other stakeholders could be said to be 'consumers' of practitioners' services, they certainly have difficulties in exercising choice, for example by substituting cheaper alternatives, or by litigation. Not all stakeholders are involved in the decision to appoint an insolvency practitioner.

Even if we focus on creditors, they are often a very large and heterogeneous group, not well-organised, and with different levels of sophistication or 'repeat business' with insolvency professionals.

"The most successful groups in obtaining wealth transfers are likely to be small, usually single oriented and extremely well organised. On the other side, those who bear the cost of paying rents are large fractions of the population, difficult to organise and with information problems. When these conditions are met, wealth transfers are expected to take place from the public as a whole to the very well-organised interest groups"[31]

This seems to be a fair description of most insolvency appointments, other than receiverships, and of itself might justify regulation. As the New Zealand High Court recently pointed out, [32] the public interest in the court reviewing remuneration is that creditors often have no financial means or incentive to complain about excessive remuneration, as the costs to them outweigh the impact and reduction of the bill would have on their dividends.

Thus, a regulatory channel should be available, initiated in the public interest, because the collective benefit to all creditors of the reduction of the bill, if appropriate, would be consistent with the objective of liquidator to maximise returns to creditors as a whole.

Further, in applying 'consumer protection' justifications for regulation, there is indeed a difficulty identifying who exactly are the 'consumers' of insolvency services, especially when the wider

[30] n8 above.
[31] See the European Bank for Reconstruction and Development Insolvency Office Holder Principles, June 2007, EBRD
[32] *Re Roslea Path Ltd. (in liq)* HC Tauranga, CIV 2005-470-611, 17/12/09, Heath and Venning JJ

stakeholder groups are brought into play, including the public interest as represented through the government and its regulatory or collection agencies.. With regard to creditors, whilst some may argue that legislative mechanisms for most insolvency procedures give creditors the opportunity to influence the appointment of an insolvency practitioner, to the extent that this does happen (it is limited in relation to court-appointed 'official liquidators'), it can hardly be said to be fully informed choice by all creditors about the market and rates for insolvency services.[33]

Thus, there clearly is information asymmetry between insolvency practitioners and stakeholders, and the case for regulation on that basis is stronger than when dealing with a more homogeneous group of traditional 'consumers'.

Adverse selection (the 'lemons problem')

Consumers have limited information, therefore licensing or certification might improve quality and value of service, and mandate provision of sufficient information about remuneration and other matters, thereby protecting consumers from harmful or sub-optimal choices. Externalities (e.g death, in the case of medical practices!) may result from low quality. This does however, presuppose that the solution, for example licensing, is able to improve quality. There is some doubt as to whether licensing can effectively control quality, certainly without the barriers to entry being set too high. There is widespread agreement that no amount of regulation, or codes of ethics, can protect against isolated cases of fraud or dishonesty. However, even educational and other restrictions to entry will have to be specifically aimed at the qualities and skills which are desired.

Regulation is said to be justified if the regulatory body has more information than average consumers. [34] To achieve that position requires adequate and appropriate resourcing and personnel within the regulatory agency, a sophisticated understanding of the industry and profession by the regulators, yet with a rigorous approach to avoidance of regulatory capture. This is something to bear in mind when assessing the role of ASIC and professional bodies in Australian insolvency services.

Insolvency practice is becoming a highly specialised profession, especially with the modern emphasis on rescue and restructuring. Creditors and others dealing with insolvency practitioners, are not usually doing so on a regular basis and are therefore not in a position to make choices over time about quality. A one-off experience of poor quality, though perhaps not as drastic as the risks of one-off experiences of poor quality surgeons, can certainly have far-reaching financial and other

[33] In *Re Roslea Path Ltd (in liq)* n 32 above, a liquidator deposed that creditors choose the liquidator. The Court did not accept this. "At the stage of court appointment, other creditors (who may be larger in number and value) have no say in the appointed liquidator. They cannot be said to have made an informed choice about identity of the person to take control over assets in which they have an interest."

[34] Miller (1985) cited at p37, *Competition and Regulation in Auditing and Related Professions*, OECD, 2009

consequences for business and individuals on insolvency. Therefore some sort of regulation of quality is justified to keep out the lemons (or worse still, the 'bad apples'!)

Regulatory capture and rent-seeking

An assumption made by economists, though accepting the difficulty of verification, is that self-regulation will lead to rent-seeking ,[35] where the profession will restrict entry and information, and increase prices more than is justified by the so-called 'confidence premium' which can legitimately be charged for their credence services. [36] Even some form of licensing regime, or development of codes, will be subject to the danger of regulatory capture due to lobbying by interest groups. [37] Such a regime is not likely, either in the standards or their enforcement in practice, to put a heavy emphasis on discipline and sanctions. Furthermore, if the government leaves the profession to set its own standards, unchecked by any independent review or input from other agencies or outsiders, one assumption might be that initially the profession will merely reflect that what it already does is the standard, and/or over time, will also have no incentive to strive to improve standards.

"Professionals are expected to pursue an agenda of minimising costs. They will lobby for their own quality level and standards. A standard can be an effective mechanism to protect insiders from competitors by imposing their own quality standard thus reducing to zero compliance costs". [38]

This could be said to be an extremely cynical view, and even its authors concede that pure self-regulation is not necessarily incompatible with the public interest in all cases, but at the very least it can be said that self-regulation needs to be subject to independent or regulatory checks and balances.

Ultimately, even litigation will be skewed by the fact that expert witnesses are likely to be professionals and their supply may be restricted or hindered by the profession itself.[39] It is salutary to note, then, in this context, that the latest APESB Code of Conduct for public practice in Insolvency, APES 300, discussed below, has a section covering conduct as an expert witness. This is appropriate,

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[35] Posner, RA, "Theories of Economic Regulation", Journal of Economics and Management Science, 335-338 (1974).

[36] However, it is also argued that the reduction in costs of extracting information by professionals more than compensates for potential losses due to cartel-like behaviour- Ogus, A," Re-thinking self-regulation", [1995]OJLS 15, 97-108.

[37] OECD Competition and Regulation in Auditing and Related Professions, 2009, Policy Roundtables, DAF/COMP/(2009)19, 15 December 2009, www.oecd.org/competition, Appendix; see Maks J and Phillipsen N, 2002, 'An Economic Analysis of the Regulation of Professions', in *The Regulation of Architects*, Antwerp, cited at n10, Garoupa above. at n8

[38] Hau, H and Thum M, 2000, 'Lawyers, Legislation and Social Welfare', European Journal of Law and Economics 9, 231-254, cited at p21,n66 Garoupa above at n8

[39] OECD Competition and Regulation in Auditing and Related Professions, 2009, Policy Roundtables, DAF/COMP/(2009)19, 15 December 2009, www.oecd.org/competition

since courts and judges have from time to time cast doubts on the extent to which they should rely on expert witnesses in insolvency conduct matters.[40]

Public Interest

If insolvency professionals were only carrying out their duties in the interests of private parties, (largely creditors), the above justifications would alone probably be sufficient. However, one cannot ignore the increasing 'public purpose' aspects of insolvency appointments. Insolvency practitioners (aside from receivers) have investigative and reporting duties and powers, which arguably mean that they no longer (if they ever did) operate purely in the private sphere. This is marked, for example, by the fact that 'official liquidators' have to adopt a 'cab rank' undertaking to take on court-appointed liquidations irrespective of available assets. They, and other insolvency officeholders, are also 'officers of the court', which, as with barristers and solicitors, implies duties over and above those to any particular client, group of clients or 'consumers'. Irrespective of the other justifications for regulation dealt with above, the fact that, unlike some other areas of regulation in more consumer – oriented spheres, IPs are carrying out public services, provides a separate justification for the regulation of IPs.

IPs also handle large sums of money and control assets on behalf of other people- this is normally sufficient to trigger some form of regulation, in addition to any fiduciary obligations imposed in general law. In addition they often manage businesses and employ employees, and make crucial decisions within an often-short timeframe, which can have wide-ranging consequences for the employees, business and wider community. This requires a range of skills, which increasingly depends on specialisation within insolvency practice. This is particularly true of the emerging corporate rescue, or 'turnaround' specialisation,[41] which arguably requires a different skill-set from more traditional liquidation and receivership work. These aspects go to integrity, honesty, and to quality.

In summary, then, the reasons for regulation of IPs include information asymmetry, lack of organisation amongst creditors and other stakeholders (as contrasted with concentration of professional expertise), handling money and assets of others and balancing their interests, and carrying out public functions. These necessitate some form of regulation, particularly around qualifications, integrity, conflicts, and remuneration.

Having hopefully made out the easy case for regulation of the insolvency profession, we now turn to the models and method of regulation.

Models of Regulation

[40] See Doogue AJ, speaking extra-judicially, and note the comments of the Board and the Court in *Dean-Willcocks* [2006]FCA 1438

[41] There is a worldwide Turnaround Management Association, as well as several professional bodies which purport to specialise in restructuring (for example R3 in the UK, more formally known as the Association of Business Restructuring Professionals, see www.r3.org.uk)

As with any other regulation, regulation of insolvency practitioners is a question of balance. It is important to keep in mind that costs have to be borne (in varying degrees depending on the model), between the regulator, any professional body, and the users of services. These include costs of establishment and monitoring, and compliance costs. The public interest must be the ultimate guide as to whether any, and if so what balance of, regulation is required.

"In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and operation of a licensing system then, is a matter of public policy".[42]

Licensing

Licensing, through prescribing educational and experiential requirements, and a 'fit and proper' test, is the model used through ASIC for insolvency practitioners in Australia. At the other end of the spectrum is self-regulation, where the profession is left to control entry (that is, the government acquiesces or endorses the profession regulating itself). Various other models or a combination of approaches exist, such as certification rather than direct licensing, or a co-regulatory model between government (or its agencies) and the profession.[43]

A general principle of regulation is that it should be proportionate to the mischief which is sought to be addressed in the public interest. [44] Licensing inevitably imposes a barrier to entry, and restricts competition, even if there are 'grandfathering' provisions. [45] It may impose unnecessarily high compliance costs which are not warranted by the size of the profession, or by evidence or anecdotes about 'a few bad apples'. For this reason, the New Zealand government has rejected any form of licensing, or indeed any other 'positive regulation', in light of the small number of around

[42] Report of the Professional Organisations Committee (1980), p 25, Manitoba, cited in *Pearlman v Law Society of Manitoba*[1991]2 SCR 869

[43] See Johnson G, 'Towards International standards on insolvency: the catalytic role of the World Bank, Law in Transition, Spring 2000, World Bank, p73

[44] OECD, n37 above, at p38

[45] Svorny S, 'Licensing, Market Regulation' in Bouckaert B and de Geest G (eds), *Encyclopaedia of Law and Economics* Volume III, UK, pp.296-328 (1999), cites Rottenberg, (1980) for the argument that the fact that service providers actively promote and support licensing has led to suspicion that licensing benefits those groups at the expense of other providers or consumers. Whilst professional associations may prefer pure self-regulation, they will prefer licensing to the alternative of an unregulated but open market.

200 insolvency practitioners operating in New Zealand, and instead has decided to 'beef up' existing judicial and regulatory powers to remove delinquent officeholders.[46]

Moreover it is important that the criteria for entry are proportionate and appropriate for the services to be offered by the licensees. It is interesting to note in passing, that ASIC licenses 'registered liquidators', who can then practise as receivers, liquidators or administrators. The statutory provisions require applicants to provide evidence of experience of externally appointed administrations, [47] without discriminating between experience between different types of external administration under Part 5 Corporations Act. Whilst this statutory nomenclature might be dismissed as a mere matter of history and terminology, it suggests that the licensing criteria have not focused on the balance of modern insolvency practice, or evolved to keep pace with it. In terms of experience, it is argued that restructuring or turnaround management skills are different from those required to run a liquidation. Although ASIC monitors ongoing fitness to practice, there is no requirement to undertake or maintain any continuing professional development, albeit that this may be required by membership of professional bodies such as the ICAA.

It also seems somewhat ironic that in 2007, the Corporations Amendment (Insolvency) Act removed the need to show evidence of membership of a relevant professional body. [48] Being licensed as a registered liquidator does not require membership of a professional body, and therefore perhaps it was felt that requiring evidence of membership was unjustified, even though such membership can be prayed in aid by ASIC as evidence of subscription to a code of professional conduct relevant to the 'fit and proper' criterion. [49] Later in this paper we shall address whether in fact membership of a professional insolvency body or at least, subscription to the Code of such a body, should be an entry requirement.

Self- Regulation

The advantages of self-regulation are that a specialist professional body comprised of its members is best placed to set standards, rather than a generalist judge or government agency. [50] In addition, there are many positive advantages for recognition of a profession, such as aspirational development, and a sense of shared values and cohesion.

From the perspective of the professional body itself, self-regulation can be seen as a system of voluntary private provision of a public good in a world where private provision may later become

[46] See p 25 below.
[47] S1282(2)(b)
[48] Formerly in s1282(2)(a)(i) Corporations Act
[49] See Information Sheet 0034, 2005, PS186.72 (Although this information sheet is dated 2005, it is still on ASIC's website so therefore one must assume it still represents their current view of the position)
[50] *Pearlman v Law Society of Manitoba* [1991]2 SCR 869

mandatory. In other words, self-regulatory organisations often produce rules in order to minimise or anticipate greater regulation by government later.[51]

The dangers of pure self-regulation can be mitigated by a co-regulatory model, but even this is vulnerable to regulatory capture. Further layers of independence, such as an Ombudsman, or independent complaints mechanism, can be added, and regulatory competition amongst professional bodies, where possible, is also healthy. [52]Adding an international dimension in terms of incorporation of global or regional standards, can also serve to ameliorate the effects of local capture, provided the local situation is addressed. Later in this paper we suggest road-testing the IPA professional code against such standards.

If there are multiple professional bodies, this gives the government the option of a co-regulatory model whereby it licenses not the individual practitioners (or their firms), but the professional bodies, by ensuring that it is satisfied that they have the requisite codes, standards, resources and disciplinary structure. In the UK, since 1986, this has been the model adopted to deal with insolvency practitioners. The government approves (currently) seven different Regulatory Professional Bodies ("RPBs") to license IPs; these bodies are the main accountancy and law society bodies in England and Wales, and Scotland, and the Insolvency Practitioners Association. This approach has several advantages. First, it deals with the political difficulty which would be caused by recognising only some of the bodies (for example, excluding lawyers from insolvency practice); related to this, it does not unduly restrict entry to the profession to one route (for example, chartered accountants). Indeed, as the government (Business and Innovation Service, formerly the Department of Trade and Industry) can directly license individuals, it is possible for a practitioner to be licensed who does not belong to any of these bodies. Thirdly, it puts most of the cost of the regime onto the professional bodies rather than the government. Fourthly, it encourages a 'race to the top' as bodies compete to enhance their standards and enforcement regimes. Ultimately one would expect this to lead to convergence around the best practice drawn from the standards of all seven bodies.

The disadvantages of this approach (even if it were possible in a small jurisdiction) is that it can quickly become unwieldy. Since 1986, various steps and reviews have been necessary in the UK in order to rationalise the duplication inherent in this system. Thus, it has been necessary for the RPBs to co-operate in the area of entry examinations (the Joint Monitoring Board), and for a Joint Insolvency Committee consisting of representatives from those bodies (and also from R3, the Association of Restructuring Professionals) to make recommendations for Statements of Insolvency Practice [53] to a further body, the Insolvency Practices Council.

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[51] Heyes, AG, 'A signalling motive for self-regulation in the shadow of coercion', Journal of Economics and Business, (2005)57 238-246. The APES 300, insofar as it expressly aligns the standard with the IPA Code, can be seen as an example of this signalling effect, see pp 13-14 below.

[52] See Parker, C , "Regulation of the ethics of Australian legal practice: Autonomy and Responsiveness" [2002] UNSW Law Journal 38, 25(3) UNSWLJ 676 ; Garoupa above at n8

Statements of Insolvency Practice ("SIPs") are developed by a joint board (the Joint Insolvency Committee) of the self-regulatory insolvency professional organisations, and endorsed by the government.[54] The strength of these SIPs can be seen, not only in the New Zealand discussion of SIP 9 above in *re Roslea Path Ltd*, [55] but in the recent case of *Kayley Vending Ltd*, [56], the judge was asked , consequent on making an administration order, to give guidance to the profession on pre-packs, in administration, a highly controversial area at present. In January 2009, SIP 16 was promulgated by the profession in response to criticisms of pre-packs, and the launch of a government inquiry into them. The judge stated that SIP 16 "will act as a salutary reminder to IPs of their responsibilities, which may influence the way in which they and directors act, although it does not provide creditors with any direct input into the decisions they take. It will provide creditors with information on the basis of which they may ask questions and possibly seek redress after the fact.

"it seems to me likely that in most cases the information required by SIP 16, insofar as it is known or ascertainable at the date of application, would fall within the requirement I have referred to and so ought to be included in the application..

"27 I emphasise that nothing in what I say is intended to add to the requirements of schedule B1 and the Rules, and it remains a matter for each judge presented with an administration application whether he or she is satisfied that sufficient information has been presented for the purpose of deciding it. Nevertheless I hope that these observations will be of some assistance to the profession in at least minimising the possibility that applications will be adjourned for the provision of additional information which the court identifies as required."

However, it is important to note that the SIPs are part and parcel of the co-regulatory UK model by which the government delegates the regulatory functions to the recognised professional bodies. They are more embedded in the regulatory structure imposed by Parliament, than is the case with ASIC's licensing and monitoring controls in Australia, and more so than the voluntary IPA Code of Professional Practice.

Another co-regulatory approach is for the government or its appropriate agency, to endorse the standards set by the profession, as has happened with the so-called 'confirmed guidance' model in the UK financial services sector. [57] FSA has used guidance statements, prepared by professional

[54] Note that these SIPs should be distinguished from Practice Statements, which are issued from time to time by the Court (see for example the 2004 Practice Statement of Registrar Baister discussed in, and arguably applied, in *re Roslea Path Ltd*, see above n34,by the New Zealand High Court)

[55] The Court noted criticism of SIP 9 by Registrar Baister in *Re Cabletel Installations Ltd. (in liq)* (2005) BPIR 28 "Whilst SIP 9 produces guidelines that may be of assistance to the profession and is helpful as to the manner of presenting information when claiming remuneration, it is of little assistance at the level of contested litigation as it largely consists of statements of the law which can be readily found elsewhere and avoids dealing with the difficult problems such as the way in which charge-out rates are established'

[56] 15/5/09 High Court, Birmingham, HHJ David Cooke

[57] Julia Black, *Forms and Paradoxes of Principles Based Regulation*, LSW Working paper, 13/2008, ssrn.com/abstract=1267722

bodies or groups of bodies, thereby reducing its own rules and guidelines accordingly. These guidelines can be used as a defence, but will not be used by the FSA as the basis for alleging breaches of duties (i. e. a shield not a sword).

The Insolvency Profession in Australia and Codes of Practice

The Insolvency Practitioners Association of Australia (formerly known as IPAA, now IPA) is the specialist professional body. Many or most of its members belong to other professional bodies, most notably the ICAA or CPA. This means that they may be governed by more than one code of conduct and/or ethics, but that is not in itself unusual. [58] In addition, the Accounting Professional Ethical Standards Board produces a relevant code. Both the ICAA and CPA Australia have adopted the Code of Ethics for Professional Accountants as issued by APESB and known as APES 110. APES110 is materially consistent with the International Federation of Accountants (IFAC) Code of Ethics for Professional Accountants issued by the International Ethics Standards Board for Accountants. APESB issued APES 330 in September 2009 and the standard will be effective from 1 April 2010. APES 330 is entitled 'Insolvency Services' and it sets standards for members in public practice.[59]

APES 330 states that it is not intended to detract from any responsibilities which may be imposed by law or regulation and in applying the standard it is the "spirit" and not merely the words that guide members.

The standard addresses fundamental responsibilities including public interest, capacity and resources, personal competence and due care, confidentiality, and marketing. It then mandates aspects of professional independence, professional engagement, dealing with property and other assets, documentation and quality control, and also expert witness obligations. There is a section dedicated to remuneration titled "professional fees and expenses".

APES 330 requires members to be remunerated in accordance with section 240 of the Code of Ethics for Professional Accountants "Fees and other Types of Remuneration". The standard then requires that a member only claim fees that are "necessary and proper". The member in public practice is to use the same care as a reasonable person when incurring expenses for the insolvency administration. Some subsections mirror the CPP. For example ss8.10 of the APES Code states:

"A Member in Public Practice who has accepted an Appointment, other than an Appointment as a Controller, shall provide the following in the first communication to the creditors:

- The methods that may be used to calculate Professional Fees;

[58] The CPP deals with conflict between Codes and states that if the CPP imposes a higher standard, it will prevail on practitioners

[59] "member" is defined as a member of a professional body that has adopted this standard as applicable to their membership, as defined by that professional body and "member in public practice" is defined as "member irrespective of classification in a firm that provides professional services".

- The basis upon which Professional Fees will be charged for the Administration; and
- Why the Member considers that the chosen method is suitable for the Administration.

This is closely aligned with the provisions in Part B, Section 13.2, and the Remuneration Report at C, Section 20 of the IPA CPP.

APES 330 also requires members using time-based fees to provide additional information on scale of rates and best estimates of costs. Where members seek approval for fees they must provide sufficient information to allow the approving body to make an informed assessment as to whether the remuneration is reasonable. The member shall provide details of how the fees are computed, a description of the services performed broken down into broad categories and costs of each, terms of the approval sought from the approving body, total previous amounts determined and whether future approvals for additional fees will be sought, and when the fees will be drawn for along with a summary of receipts and payments of the administration's bank account.

The Standard permits members to draw fees only after a proper resolution, order or authority has been obtained and only then in strict accordance with the terms of approval. The standard also requires members wanting prospective fee approval to specify the maximum amount that may be drawn before requiring further approval and mandates that any monies received prior to acceptance of an appointment to meet the costs of the proposed administration are held in trust without conditions and with full disclosure being made in the DIRRI and that they are only taken from trust after approval.

The benefit of having APES 300 is not so much that there is regulatory competition, given that it now aligns with the IPA CPP, but that coverage of the combined codes is extensive in terms of percentage of insolvency practitioners. There may be a few insolvency practitioners who can become registered liquidators even though they are not current members of either the ICAA or CPA. We regard it as unacceptable , and contrary to international best practice, that such people could be licensed without being bound by any enforceable code of conduct. The alignment of the APES standard in April this year, will strengthen the argument put by the IPA to the Senate Inquiry that there is nothing broken which needs fixing insofar as the professional bodies have already voluntarily set out professional benchmarks.[60] ASIC's view that it will take account of the IPA Code insofar as it regards it as a benchmark of professional practice in a particular area, will now have to take account of the extension of that benchmark's applicability under the APES 300 standard.

The IPA Code of Professional Conduct

History and Purpose of Code

A Code of Professional Conduct was promulgated by the IPA during the 1990's and amended in May 2001. During the last 10 years the IPA has also issued Statements of Best Practice on Independence,

[60] Heyes, AG, 'A signalling motive for self-regulation in the shadow of coercion' ,Journal of Economics and Business, (2005)57 238-246

Calling and Conducting Creditors' Meetings, Competition and Promotion and an earlier one on Remuneration.

The present Code is entitled Code of Professional Practice for Insolvency Practitioners (hereafter "CPP"). Sections of the CPP dealing with Independence and Remuneration were effective from 31 December 2007, and the balance of CPP effective from 21 May 2008. All previous codes and statements of best practice were repealed.

The scope of the CPP is purposefully wide. The CPP applies to all members of IPA insofar as they conduct or are involved with the administration of formal and informal insolvencies. This has consequences for liquidators, administrators, lawyers, accountants, financiers, academics and others who are members of the IPA. However, in various detailed respects, 'practitioners' (i.e officeholder) are distinguished from 'members'.

The Advantages of the Codes

According to Dal Pont, professional rules serve as a standard of conduct in disciplinary proceedings, as a guide for action in a specific case, and as a demonstration of the profession's commitment to integrity and public service.[61] These are all features of the approach taken in Australia to the IPA's Code and the APES Code.

However, it is important to heed the words of Benson, that the privileged status of a profession is justified by setting standards for itself which are higher than those that would be externally imposed.[62]

An example of the scope for voluntary codes to influence regulatory practice is found in the Trade Practices Act 1974 (Cth), in relation to unconscionable conduct. The ACCC has power to take account of industry codes of conduct in determining whether conduct is unconscionable under **s**51AC, which governs supply of goods or services by corporations or persons in trade or commerce. The ACCC can, by Regulations, prescribe mandatory industry codes, such as the recently-reviewed Franchising Code of Conduct.[63] However, Regulations can also declare a code to be a voluntary industry code. Whilst ASIC, CALDB and the courts do consider the CPP and its predecessors, there is no express statutory imperative to do so, so that the Code cannot be said to have been endorsed by the legislature or regulators in the same way.

In this respect, the Guidelines issued by the ACCC in 2005, [64] assist in the drafting of codes which , if they follow the guidelines, are likely to be endorsed by the Commission. The ACCC lists some of the benefits of voluntary industry codes as including: (p3)

(a) Greater transparency of the industry to which signatories to the code belong;
(b) Greater stakeholder or investor confidence in the industry/business;

[61] Dal Pont, 'What are Rules of Professional Conduct for?" [1996]NZLJ 254 at 256-266, cited in Dal Pont, *Lawyers' Professional Responsibility*, 3ed, Thomson,2006
[62] The Profession of the Future (1979) 53 ALJ 497 at 500
[63] see *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38 for the effect of the Code
[64] *Guidelines for Developing and Endorsing Effective Voluntary Industry Codes*, ACCC, 2005

(c) Ensuring compliance with the Act to significantly minimise breaches;
(d) A competitive marketing advantage;
(e) It is more flexible and responsive than government legislation;
(f) It is less intrusive; Industry participants have a greater sense of ownership of the code leading to a stronger commitment to comply;
(g) The code acts as a quality control within an industry;
(h) Complaint handling procedures are generally more cost effective, time efficient and user-friendly than government bodies.

However, two pertinent aspects of a successful voluntary code which are also identified by the ACCC, which arenot a feature of the IPA Code at present, are:

Where the self-regulatory body comprises representatives of key stakeholders, including consumers, government and community groups

Wide coverage of those bound by the code, an effective complaints handling system, commercially significant sanctions for non-compliance, and dissemination of information and training about the Code.

The Status of the CPP

The IPA states its own view of the role of the Code , and that largely reflects how such professional codes are perceived by courts and others:

"It is expected that the Code will be used by all stakeholders to better understand the role, powers and obligations of IPs. The Code is a living document. It will be amended form time to time.' "The Code is the fundamental building block upon which the insolvency profession sets and manages standards of professional conduct".[65]

ASIC's published view in response to queries as to how it views the Code is that ASIC [66] is "entitled to refer to the Code if we find that it is a good benchmark of industry practice", but then immediately goes on to say that they cannot enforce the code and they recognise it is only mandatory for members of the IPA. Quite dispassionately they conclude "[T]he Code provides guidance and a recommended way to comply with the law"

In October 2006 Austin J, extra-judicially, had some critical remarks to make about the Code of Professional Conduct that had been promulgated by the IPA in May 2001, and the Statements of Best Practice relevant to the duty of loyalty, such as the statement on Independence (July 2003). He urged the adoption of clearer, more principles-oriented guidelines, which distinguished between what was desirable and what was obligatory.

[65] Foreword, p.5, Code of Professional Practice for Insolvency Practitioners (IPA, 2008,Sydney)
[66] April 2008 ASIC Insolvency Update
www.asic.gov.au/asic/asic.nsf/byheadliine/Insolvency+update+April+2008?

In a paper entitled 'The Legal Standard of Loyalty and Professional Guidelines' delivered in Sydney, and also at the IPA Conference in Brisbane in 2006, he stated, referring to the then IPA Code, that since the IPA Code was not the law, it should not be mandatory in relation to general matters, and not too specific in relation to other matters. It should only provide guidelines, and then give practical illustrations.[67].

He warned that the biggest risk for IPs was that a scandal would emerge causing the Government to react as they had done for auditors, and pass full-blown technical legislation, unless the government could be persuaded that the professional body was addressing the problem.

Two years later, in launching the new CPP in Sydney at the IPA conference, in May 2008, Austin J though understandably hesitant to say too much about his views of the new Code, in case it came before him judicially, made it clear that his earlier criticisms of the design of the Code had been dealt with.

"Now the IPA has produced a handsome and detailed new Code of Professional Practice,. having had the opportunity to review self-regulatory codes in various professional contexts over the years, that this Code is very impressive for its structure, clarity and practicality.

The importance of a clear and simple articulation of governing principles must not be underestimated…. But life in any profession is not always simple and straightforward, and professionals need guidance as to how to apply the principles of their code of conduct to the complexities of real situations. And so the Code goes beyond the statement of principles and presents detailed guidance and examples, as well as templates and practice notes…. Thepresent version runs for over 100 pages. It may be possible further to simplify andreduce the document in future, but not, I suspect, by much. There is no avoiding theinevitable: insolvency practitioners will have to read and then master this document; indeed it will be a mark of their professional status that they do so."

However, it is not enough to have a Code, if it is not understood by those bound by it, and monitored for compliance. Thus he said:

"What is needed, therefore, is for insolvency practitioners both to master the Code themselves, and to take appropriate steps to ensure that it is a living instrument governing their conduct and the conduct of everyone in their firm. This can only be done if steps are taken, structured around the adoption of the new Code, to inject into the firm a culture of compliance. Those steps would include tuition, discussion, and leading by example. If the firm is of significant size, they would include the establishment of a compliance system, with regularly tested protocols for identifying issues and ensuring they are dealt with at the right level within the organisation."

It would be interesting to discover what, if anything, is being done in the light of these words, to encourage a culture of Code compliance in insolvency practices of varying size throughout the country.

[67] He compared the ASX Code, as accepted by the Court in *ASIC v Rich* (2003) 44 ACSR 341 as a benchmark for community standards

At the same conference in 2008, the Federal Attorney-General congratulated the IPA on its 'astute investment in the development of the CPP and stated that he understood the IPA was 'now considering a suitable quality assurance and disciplinary framework to support the Code'. He stated, perhaps hinting at future development of a co-regulatory model, that 'the development of proper professional standards and the implementation of some form of self-regulation, within a licensing regime, will require sustained effort on your part'.[68]

Cases referring to the IPA Code

Generally the stance adopted by courts in relation to the IPA Code is consistent with judicial approaches in Australia and elsewhere, to the role of professional rules and codes. They are not law, and cannot supplant judicial decisions[69] but can serve as a useful indicator of the accepted opinion and standards of the profession. [70]

We summarise below key decisions of Australian courts where the Code has been considered.[71]

In *Bovis Lend Lease v Wily*[72] Austin J in considering a case for removal of an administrator on grounds of independence, state that it was permissible to " In my opinion it is a useful guide to the common practice in such matters and the profession's own view of the proper professional standards. It is permissible for the court to take the Code into account to that extent, in applying the law concerning independence and impartiality to the case before it-[73] In that case, the practitioner in question was a member of the IPA and therefore should not have accepted appointment due to a conflict arising from relationship with a director.

Dean-Willcocks v CALDB [74]

Following a CALDB decision suspending a registered liquidator, Dean-Willcocks for 12 months as liquidator under s1292(2) there was an application for judicial review made to the Federal Court. Amongst the grounds the applicant claimed that CALDB applied the wrong test to interpret professional standards.

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[68] Speech to open the IPA conference, Sydney, 22 May 2008.
[69] *Canada Southern Petroleum v Amoco Canada* (1997) 144 DLR (4th) 30 at 38 (CA(Alta))
[70] *Black v Taylor* [1993] 3 NZLR 403, *Chamberlain v ACT Law Society* (1993) 118 ALR 54 at 60, Black CJ.

[71] There are other decisions where the Code has been noted or referred to, but we have concentrated on those where explicit comment has been made about the Code and its status; for example see *ASIC v Edge* [2007]VSC 170
[72] (2003) NSWSC 467
[73] Citing earlier cases where professional codes had been considered, *NRMA Ltd. v Geeson* (2001)NSWSC 832, *Permanent Trustee Australia Ltd v Boulton and Lynjoe* (1994) 33 NSWLR 735.
[74] [2006]FCA 1438

The CALDB had found that Dean-Willcocks had accepted appointments despite a continuing professional relationship during the previous two years, displaying a lack of professional independence and actual or apparent conflict within para 4 of the IPA code, and para 22 of the ICAA Code. The CALDB also found that Dean-Willcocks did not adequately disclose his relationship with other companies and a joint venture company within para 21 F1 of ICAA Code and para 3 of the IPA Code. It also found that Dean-Willcocks had a conflict of interest within para 3 IPAA Code and para 21 ICAA Code.

The CALDB concluded they could take account of professional standards in deciding whether the office has been 'adequately and properly' carried out or performed.[75] It had considered that the standards provided guidance and accepted that they did not override the law.

Tamberlin J decided, inter alia, that the CALDB did not apply the wrong test. It had considered professional standards, and given appropriate weight to expert evidence. He said that the CALDB was 'set up' to take account of professional standards. As commented elsewhere when discussing the CALDB, this seems to be going too far as a description of its role in relation to liquidators, and is probably a historical reference to its role in relation to auditors, who do of course have binding national and international standards built into domestic legislation.

Gould v CALDB [76]

Gould was a liquidator who had been suspended for three months by CALDB on grounds that he failed to adequately and properly carry out his duties.[77] The AAT had affirmed the CALDB decision to suspend and Gould appealed to the Federal Court.

The matter in dispute was the existence of the professional standard aspect focusing on 'capping' remuneration recommendation in IPA Code. ASIC argued that he had failed to cap his remuneration, and relied on the 1997 IPAA Guide and a IPA Statement of Best Practice on remuneration in 2000..

Gould argued that the IPA documents at the time were not mandatory and therefore could not give rise to a 'duty' or 'function' within s1292(d)(ii). The IPA 1997 Guide provided hourly rates and classifications, and was not intended to fix rates This Guide contemplated capping of remuneration, suggesting a resolution should include a specified amount and where approved prospectively an upper limit must be included and if this was to vary then further approval was needed. The IPA Statement of Best Practice in 2000 incorporated all the existing principles that are set out in the current IPAA Guidelines and Explanatory notes ,but gave no scale of rates or staff classifications.

Not surprisingly perhaps, Gould argued that IPAA guidelines were just guidelines and not mandatory and such matters as capping would depend on circumstances of each case. Gould would obtain creditors consent to the basis of fees at an early stage, without providing an estimate of total fees if it were not then practicable to do so. Gould suggested that this was widely accepted among competent fellow professionals.

[75] *Wylie and CALDB* (1998)54 ALD 523; *Goodman v ASIC* [2004] FCA 1000
[76] [2009] FCA 475
[77] Corporations Act 2001 (Cth) s1292(d)

Lindgren J [at 104] stated that "whether the capping provisions in the Guide and Statement were professional standards of kind referred to in *Dean-Willcocks*, depends on whether they purported to establish levels of adequate and proper performance that a registered liquidator must attain within s1292(d)-a serious matter. I do not think they did. First, neither capping provision was contained in a document that purported to lay down standards of professional conduct of that kind. Second, the ambiguous and loose language of the capping provisions is not what one would expect of such a standard. The Guide purported to provide guidance, and stated that it was not to be used in every instance. These features characterised the guide as a whole".

Lindgren J decided that neither the Guide nor the Statement were intended to be a professional standard, in part, due to their ambiguity. He held that the ATT erred in law in concluding that s1292(2)(d)(i) and (ii) were satisfied, and also held that the ATT should not have concluded that Gould was in breach without any expert evidence .

Brisconnections Management Company Ltd, in re Thames Blund Holdings Pty Ltd (In Liq) [78]

In this case the court considered the exercise of a casting vote held by a liquidator in favour of a resolution to remove and appoint new liquidators.

The judgement of Gordon J makes reference to section 21.7.4 of the IPA Code (Use of the Casting Vote). His Honour used the Code to test performance of liquidator and found that he did not properly comply with it because he did not turn his mind to how a casting vote is to be exercised in terms of the matters in Code.

The strongest endorsement of the role of the IPA Code has come recently in *Re Monarch Gold Mining Co Ltd. ex p Hughes*[79], by Master Sanderson in chambers.

In this case the plaintiff administrators sought a direction that Declaration of Independence, Relevant Relationships and Indemnities ("DIRRI ") was in compliance with s439A, and in accordance with clause 6 of IPA Code, and a consequent direction that they continue in office. The administrators gave undertakings to a creditors meeting that they would seek court directions in this regard due to concerns by some creditors and ASIC over their independence.[80]

In his judgment Master Sanderson noted the Code's expressed purposes. He highlighted clause 6 of the CPP, which is a statement of the mandatory principle of independence. He noted that in clause 6.5 trivial relationships were featured and that these are not required to be listed in the DIRRI. He further noted that the administrators had tabled a DIRRI which was compliant with clause 6.

Sanderson M stated that : "A code of conduct such as this has no legal status. That is to say, a failure to comply with the terms of the code would not render a practitioner liable for prosecution under the Corporations Act or any other statute." He observed that a failure might lead to the professional body taking disciplinary actions. He further mused that in respect to this area even non-compliance with the code would not necessarily mean that the DIRRI was incomplete.

[78] [2009] FCA 626., Gordon J, Melbourne
[79] [2008] WASC 201
[80] Ibid para 6.

Sanderson M observed that codes such as this should not be underestimated as the court's ability to supervise insolvency practitioners is "in a very real and practical sense, limited" and stakeholders need the comfort that ASIC is contributing to the supervision and that practitioners themselves are adhering to this code.

In his penultimate paragraph Master Sanderson seems to give the code even greater importance that he had already expressed throughout his judgment,

> 40 "It is also important that the administrators paid close attention to their obligations under the code of practice. It shows that the code is something more than a public relations exercise designed to assuage the concerns of those involved with insolvency practitioners. That being so, it seems to me that it is appropriate to make the directions sought. It emphasises the importance to be attached to adherence to the code. It must necessarily add to the status of the code and assure the public generally that the courts regard adherence to its terms as a matter of the utmost importance."

The Master established that the orders sought fell under ss447A and 447D and so they were issues calling for the exercise of legal judgment. Despite some discomfort that the court could make a declaration that the DIRRI was tabled in accordance with the Code, he made the order.[81]

The IPA has commented that this statement supports the approach taken by the IPA, when issuing its code, of setting high standards of conduct for members, and guidance by which the standards may be achieved. This was done with some expectation that the code would be referred to by the courts in determining whether the legal obligations of insolvency practitioners had been met.

Cracks in the Code?

Benchmarking the Code

Gould v CALDB , in which criticisms were made of the IPA Statement and Guide, was a case interpreting the previous version of the IPA Code on remuneration and capping. Nevertheless, despite the improvements to the IPA Code launched as the CPP in 2008, which were welcomed by Austin J and the Attorney-General, there are still some problems with using the IPA Code as a benchmark of IP standards. When tested against the benchmark of the EBRD Principles, The IPA Code , and the regulatory regime, [82] can be found wanting in the following respects .

The CPP can be road- tested against local guidelines such as the ACCC Guide referred to above, and more pertinently to insolvency, international guidelines such as the EBRD Insolvency Officeholder

[81] Ibid para 13.

[82] It would be wrong to suggest that these divergences from an international benchmark are matters which could all be within the control of the IPA alone, for example delivery of mandatory membership or a CPD regime.

Principles. [83] There are 12 Principles in the EBRD document. Of those that are relevant to standards and licensing, it is to be noted that Principle 1(e) is a requirement for continuing education, 1(f) requires renewal of registration subject to various factors including continuing education, and 1(f) is licensing of a corporate body where the principals are licensed, and accountable for the body.

Under Principle 6, Standards of Professional and Commercial Conduct, suggests (a) that primary legislation should prescribe basic standards for all officeholders, with a subset of professional standards being made by regulations, or by a recognised professional body that requires member officeholders to comply. Under Principle 8, governing Regulatory and Disciplinary Functions, the Principles state that a government or professional body should have appropriate regulatory, investigative and disciplinary functions, though each jurisdiction should decide the appropriate body. Among remedies, 8(d) includes the power to require compensation of third parties, and require the officeholder to undergo further education and training.

Under Principle 12, a Code of Ethics, the EBRD state that the law should encourage and facilitate a professional body to develop a code of ethics for officeholders, and the law could compel the application of a code of ethics, either by setting that code or requiring that a code established by a professional body be recognised as binding on officeholders.

Looking at the ACCC Guidelines, whilst the IPA is not a self-regulatory body, it would no doubt benefit from the input of stakeholders into designing and amending the CPP. Secondly, whilst the CPP does recommend that practitioners themselves have a Complaints Management policy, the IPA itself does not have any apparent mechanism for encouraging or dealing with complaints from stakeholders.

Compliance Culture

We have already noted the comments of Austin J, extra-judicially, in 2008 to the effect that the Code will not to be bolstered by a rigorous culture of compliance and training about the Code.[84]

Coverage

Only IPA members are bound by the Code. IPA membership covers approximately 80% of registered liquidators. However, the 'signalling' move of alignment of the APES standard certainly extends coverage and pre-empts any government suggestion in the forthcoming inquiry that there is a 'wild west' of practitioners who, albeit licensed for their weapons, are shooting from the hip.

Enforcement

The IPA's disciplinary enforcement mechanisms have been largely reactive to findings by ASIC and CALDB or the court. IPA is currently reviewing its discipline regime- proposed changes, to be voted on at a special general meeting in February, will strengthen the IPA's ability to suspend or remove

[83] n31 above
[84] See 16 above.

membership in circumstances where action is commenced by an external agency, or if criminal action, possibly unrelated to insolvency, is commenced against a member. Further, if serious complaints are raised with the IPA, the IPA will have power to suspend pending the outcome of the complaint, and also if the IPA receives a confirmed serious complaint about breach of the Code, its powers will be widened. As stated in *Pearlman v Manitoba Law Society*,[85] and by the Federal Attorney-General, the disciplinary function is an essential plank of self-regulation, giving teeth to any code or standards.

Architecture

There is still room for disagreement as to the form of a successful code of conduct which is to be used, and preferably endorsed by regulators, as a benchmark for conduct in cases of dispute and litigation. Dal Pont [86] sets out the debate as to whether professional codes should be rule- based, broad guidelines, or go down the road of a rule-commentary approach. The latter has the advantage that 'it combines the brief and the complex, the aspirational and the prescriptive'.[87] Such an approach seems to be that taken by the new PCC, and it is gratifying to see that although only in place since May 2008, a review of the Code is already in progress, because it is emphasised as a 'living document', and a rule-commentary approach can only be successful if the commentary is consistent with the rules, and if there is regular review and updating where necessary. Many Codes as with the APES 300 standard, state that the 'spirit' of the Code should be followed, and the revised IPA Code eschews any attempt to be too prescriptive.

Professional bodies may be reluctant to be too prescriptive lest they encroach on members' autonomy. After all, professionals are also competitors in the marketplace. Nevertheless, the drafting of codes of conduct and practice requires a weather eye on the purposes and the use to which it is intended the code should be put, and in particular, the regulator may wish the code to be rule-based in order that it can reduce its own rule-making in a given area.[88] However, it is possible that there will be loopholes in the CPP and the less scrupulous will exploit them.

Remuneration- the toughest nut to crack

Lastly, although the IPA and similar codes set out principles for remuneration, including the bases of remuneration and requirements for transparency and disclosure to creditors, courts over the world have struggled to deal appropriately with IP remuneration. The success of the IPA's CPP may be in part judged by its ability to lay down workable and effective guidelines on remuneration. We now turn to this issue.

Remuneration and the Regulatory Gap

In most major jurisdictions, courts, exercising their ultimate powers to review remuneration or to supervise insolvency practitioners, have expressed concern about the level and/or the method of

[85] [1991]2 SCR 869
[86] Lawyers Professional Responsibility, 3rd ed, 2006, Thomson, pages 19-22
[87] Ibid.
[88] Cranston,' Legal Ethics and Professional Responsibility' in Cranston(ed), *Legal Ethics and Professional Responsibility* (Clarendon, 1995), p31 cited in Dal Pont op cit at p21

remuneration of insolvency officeholders, or about deficiencies in the information supplied to creditors. [89]

Insolvency is a situation where there is not enough money to go around, and many creditors have limited understanding, and low tolerance, for practitioners who seem to them to run up large bills at excessive charge-out rates. Approval may be obtained from creditors meetings and/or any creditors committee (or committee of inspection), but in some situations recourse will be required to the courts. It is in the area of remuneration that the most obvious conflict between the commercial interests of the practitioner and his or her firm, and the interests of the creditors and the wider public interest is manifest. For that reason, it constitutes a large part of insolvency professional bodies' codes of conduct. Thus, in the IPA CPP, three broad 'remuneration principles' are set out,[90] which take up over twenty pages of the Code, and then a further template of a remuneration report.

Nevertheless, ultimately, unless there are to be restrictions or caps on the rate or total amount of fees chargeable, it is very difficult for a court as final arbiter to assess or fix 'reasonable' remuneration. The court will invariably look at the information provided as to activities, seniority of staff and time spent, but courts have not been keen to take on this role beyond that. [91] If expert evidence is used in order to justify rates and work, the problem of regulatory capture extends to expert witnesses,[92] who invariably will be reluctant to express a strong view that rates are unreasonable. Courts have expressed the view that this is not really a judicial role, and is more akin to the taxing or assessment of lawyers' bills which is traditionally performed by court masters or registrars, and is a quasi-administrative exercise.

New Zealand experience

A recent example of the impact of, and the absence of, regulation in the area of remuneration came from New Zealand. First it is necessary to set out some background about the New Zealand insolvency profession. Anecdotally there are around 200 insolvency practitioners, and there are no positive requirements for them to be licensed. Bankruptcy is handled by a state official, the Official Assignee's office, but corporate insolvency is in the hands of private practitioners. There is no professional IP body in New Zealand, though the Institute of Chartered Accountants does issue a Statement of Insolvency Engagements, SES 1, which provides a rudimentary code of ethics for its members. There is a branch of INSOL, the worldwide federation of insolvency practitioners, and although INSOL NZ (particularly its Auckland branch) has made some submissions to government, it has no separate code of conduct or disciplinary structure, and cannot presently be said to be much more than an interest group which also holds seminars. In order to become a self-regulatory or co-regulatory body it would have to develop significantly from its present form. Legislation currently prohibits certain categories from acting as an insolvency practitioner, such as undischarged bankrupts or those who have been convicted of relevant offences.[93]

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[89] *Mirror Group Newspapers PLC v Maxwell (No.2)* [1998]1 BCLC 638 and *re Peregrine Investments Holdings Ltd*. [1998] 2 HKLRD 670

[9090] These are (i) Necessary and Proper; (ii) Meaningful disclosure and (iii) Approval before drawing, see Part B 12-14, and also Part C, 20 for template report.

[91] See *re Stockford*,[2004] *Conlan v Adams*[2008] WASC 201

[92] See n above

[93] S280 Companies Act 1993

In 2006 the Government began a review of practitioner regulation, [94] but having canvassed the options, decided that in view of the size of New Zealand and the current constitution of its practitioner body, there was no economic or other case for direct licensing, and no possibility of self or co-regulation. Interestingly, they did suggest that one option might be accreditation of the Australian IPA, so that New Zealand practitioners could become members and thus be governed by its Code. The IPA Code has been reproduced in a New Zealand insolvency looseleaf, [95] and it is to be hoped that this will encourage its absorption as a benchmark for NZ practitioners irrespective of whether it binds them. In addition, the IPA Code (and the looseleaf) have been referred to in the latest case, *re Roslea Path Ltd .(in liq.)*[96]

The New Zealand Government concluded[97] that though there was no case for positive regulation, there was a case to strengthen existing remedies available to the court and the Registrar of Companies to deal with delinquent liquidators or administrators, where complaints had been made about their conduct. This so-called 'negative licensing' is problematic, in that so far, the government has not identified the criteria for removal or prohibition of such persons acting as insolvency officeholders. Whilst discipline can be argued to be a substitute for licensing,[98] the problem with that view is that in the absence of any standards against which to discipline, there is a risk of arbitrary power being exercised to remove, or otherwise discipline , practitioners. No legislative proposals have been forthcoming at the present time, though 2010 has been stated as the year when it will happen.

In 2007, New Zealand introduced many aspects of substantive Australian insolvency law, and in particular the voluntary administration procedure, and although it took the opportunity to incorporate many of the changes recommended by CAMAC and others on VAs, it did not introduce the requirement for a Declaration of Relevant Relationships and Interests, or other aspects of the Australian 2007 amendments.

There is a danger that such lack of Trans-Tasman harmonisation in regulation of IPs could be a barrier to closer harmonisation of insolvency laws and procedures between the two countries, for example the proposals to develop a closer cross-border insolvency agreement supplemental on the UNCITRAL Model Law, which has now been enacted in both countries. Furthermore, the issue of occupational regulation is affected the Trans-Tasman Mutual Recognition Act 1997. As that Act prescribes automatic recognition on the basis of registered occupations, New Zealand IPs cannot take advantage of it as they are not registered in New Zealand. In addition, s1282 Corporations Act 2001 includes a requirement that ordinarily, a registered liquidator must be resident in Australia.

Turning to remuneration and the problems faced by the New Zealand courts, ultimately they stem from the fact that it is a small jurisdiction with no regulation of practitioners. In *re Roslea Path Ltd.*

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[94] Insolvency Practitioner Regulation, Options for Change, 2006, http://www.med.govt.nz/templates/MultipageDocumentTOC____22651.aspx

[95] Heath and Whale, Lexis Nexis, 2009, with kind permission of the IPA

[96] *Roslea Path Ltd. (In Liq)*, HC Tauranga, CIV 2005-470-611, 17/12/09, Heath and Venning JJ

[97] August 2008, Media Statement, http://www.beehive.govt.nz/release/quotnegative+licensingquot+insolvency+practitioners+sought

[98] Svorny, S, see n above.

(In Liquidation) [99] the applicant shareholders sought an order requiring the liquidators to refund remuneration deducted from realisation of assets of the company, the Full Court convened to take the opportunity to reconsider two earlier decisions in the case of *Medforce Healthcare Services Ltd. (in liq)*[100], a case which had been cited with approval by Finkelstein J in *Re Stockford*. Whilst *Roslea Path* was a liquidation case, the Court noted that similar issues arose in the context of receivers and administrators' fees. Remuneration claimed was $275000 which the shareholders said should be no more than $200 000.

The New Zealand legislation provides that liquidators are entitled to charge 'reasonable remuneration'.[101] Section 277 allows for prescribed rates for Official Assignee or court-appointed liquidators. Regulations prescribe these rates from time to time. The court may review or fix remuneration at level which reasonable in circumstances (on application of liquidator, committee creditor shareholder or any other person). [102] Private voluntary liquidators do not need court approval to fix remuneration under s276 but it can be reviewed under s284. The relevant Regulations 1994, changed in 2007 after criticism of the default rates in *Medforce*. Post-2007, the rates are $2000, or hourly rate of $200 per hour, or $140 per employees.

The Court noted the important policy change to hourly rates since 2007. In *Gallagher v Dobson* Barker ACJ [103]criticised the abolition of lawyers' scale rates in favour of hourly rates. The scale 'penalised the tardy and rewarded the efficient. Hourly rates are imprecise as to weighting for skill and complexity. Individual judgment on a proper level of fees is still required.'

The Court noted that the Law Commission draft legislation which led to the Companies Act 1993 included an intention to reduce the Court's protective functions on the premise that there would be a requirement for independent and experienced IPs in the new Act. However, s280 CA 1993 did not contain any requirement for licensing etc. and therefore the premise, that the liquidator is an experienced IP that the court could have trust and confidence in, was not a feature of the 1993 Act

Therefore, after discussing overseas approaches, particularly the UK Practice Statement of Registrar Baister in 2004, which had set out eight principles for assessing reasonable remuneration, the Court has set out its future approach for the review or fixing of prospective fees on the basis of the reputation of the practitioner or his or her firm, and whether or not they are well-known to the court. [104] The Court suggested that practitioners who sought prospective remuneration at the time of their appointment, should file a curriculum vitae with the court setting out their experience, in cases where they were not known to the court. [105] Though the court was making the best of the

[99] [1993]3 NZLR 611
[100] [2001]3 NZLR 145
[101] S276 Companies Act 1993
[102] S284
[103] [1993]3 NZLR 611
[104] *Re Roslea Path Ltd. (In Liq)*, HC Tauranga, CIV 2005-470-611, 17/12/09, Heath and Venning JJ. For retrospective applications, they recommended a voluntary disclosure regime as the starting-point for IPs.

[105] Para 107- "when appointees are known by the Court to be independent and experienced (as the Law Commission suggested) the Court is likely to have confidence in such people to abide by ethical

situation in terms of remuneration, it essentially devised a rudimentary system of judicial licensing of insolvency practitioners. Although there are other jurisdictions where selection of (otherwise unlicensed) IPs is effectively made by the Court, it does seem to be something of a counsel of despair caused by lack of any strict guidance coming from Government or the profession itself. The High Court explicitly mentioned the lack of government regulation in this connection. [106] Nevertheless, the Court should not be put in this position. While the Court has rightly questioned whether judges should be assessing the fine print of IP's remuneration bills, it is certainly not the role of the Court to fulfil the quality control or licensing function, or assess the curriculum vitae of officeholders, notwithstanding that some of them will be officers of the court. The Court was directly influenced by some of the principles, particularly that of 'integrity', from the 2004 Practice Statement in the UK.

The two relevant principles were:

(1) Professional integrity- weight given to the fact that there is regulated profession so subject to rules and guidance as to professional conduct;

(2) Professional guidance- Relevant and current statements of practice promulgated by any relevant regulatory or professional body can be taken into account

However, the comments in the Practice Statement were clearly premised on the fact that in the UK there is a regulated profession. The regulatory structure in the UK provides the 'trust and confidence' that the New Zealand High Court sought to provide by filling the regulatory gap itself.

In *A Judicial Perspective on Insolvency Law and Practice*, [107] Associate Judge Doogue identified problems with *Medforce* guidelines. The Court in *re Roslea Path Ltd*. paraphrased these:

(a) On the basis of information required to be put before the Court, Associate Judges find it difficult to determine reasonableness of particular charges
(b) There is an inability for the Court to test evidence of senior practitioners who corroborate evidence of quantum of fees. While in general most practitioners appeared cognisant of their obligations as expert witnesses, there remained 'some questions about the source and quality of the evidence before the Courts'.
(c) Value of work is rarely ever addressed. Whilst having the benefit of liquidators' reports as per *Medforce*, the court did not generally receive comment from experts tying the appropriate level to the value of word done having regard to factors and outcomes. Allied to this problem was the difficulty in using only time-based charging as a method to fix remuneration.

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standards for any professional organisation to which the belong and to adhere to their obligations as officers of the High Court (Heath and Whale, Assoc Prof Brown, paras 38.4, 38.17, 38./41-44)"

[106] Para 36
[107] LexisNexis Corporate Insolvency conference, Feb 2009

(d) Is it appropriate for remuneration of liquidators to be isolated from accountancy practice generally- information vacuum on acceptable hourly rates?
(e) Have market forces imposed the discipline envisaged by *Medforce*? In particular, to what extent is there true competition for appointment as liquidators?
(f) If a petitioning creditor is one of many who will carry the cost, there is little motivation to inquire; also if a surplus is to be returned to shareholders, it is they, not the creditor, who will be affected.

These stimulating issues are also relevant in Australia, and show the difficulties for creditors and courts in obtaining objective and comparative information in order to make an informed decision about IP's remuneration.

Remuneration of insolvency practitioners

In this paper we confine our focus to the remuneration of liquidators, both court- appointed and voluntary, and also administrators. We do not focus on provisional liquidators, receivers, controllers and informal appointments.

For compulsory liquidation, s 473(3) provides that: "A liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined;(a) if there is a committee of inspection – by agreement between the liquidator and the committee of inspection; or (b) if there is no committee of inspection or the liquidator and the committee of inspection fail to agree: (i) by resolution of the creditors; or (ii) if no such resolution is passed – by the Court."

The smoothest path is clearly the agreement between liquidator and committee of inspection and the other creditors can have this reviewed,[108] provided the creditor(s)who wish to complain hold at least 10% of the total amount of proved debts.[109] Section 473(3)(b) provides options if there is no agreement by the committee of inspection and s473(4) requires all creditors to be sent a notice of meeting and a statement of all receipts and expenditure and the amount of remuneration sought. The creditors' meeting can then approve the remuneration. Section 473(4A) covers the situation where the creditors meeting fails to achieve a quorum and it is then that the creditors are taken to have passed a resolution that the liquidator is entitled to $5,000 or such greater amount as is prescribed or a lesser amount if the liquidator determines! Whether the remuneration is being approved by the committee of inspection or the creditors' meeting, the liquidator must always prepare a report setting out information that will enable the approving body to make an informed assessment as to whether the proposed remuneration is reasonable, a summary of the major tasks already performed and those likely to be performed and finally the costs associated with each major task.[110]

[108] using s473(5)
[109] If sufficient support cannot be secured then s536 could be used for an inquiry into liquidator's conduct by court or ASIC. See also *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137.
[110] Corporations Act 2001 (Cth) s473(11), (12).

The involvement of the court in the determining of remuneration is a last resort. The liquidator must seek the approval from the committee of inspection or creditors' meeting before coming to the court.[111] The application for the court to fix remuneration is done by interlocutory process.[112]

Section 473(10) directs what a court must take into account when determining whether the remuneration is reasonable. The matters specified in s473(10) are "(a) the extent to which the work performed by the liquidator was reasonably necessary; (b) the extent to which the work likely to be performed by the liquidator is likely to be reasonably necessary; (c) the period during which the work was, or is likely to be, performed by the liquidator; (d) the quality of work performed, or likely to be performed, by the liquidator; (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the liquidator; (f) the extent (if any) to which the liquidator was, or is likely to be, required to deal with extraordinary issues; (g) the extent (if any) to which the liquidator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case; (h) the value and nature of any property dealt with, or likely to be dealt with, by the liquidator; (i) whether the liquidator was, or is likely to be, required to deal with (i) one or more receivers; or (ii) one or more receivers and managers; (j) the number, attributes and behaviour, or the likely number, attribute and behaviour, of the company's creditors; (k) if the remuneration is ascertained, in whole or in part, on a time basis: (i) the time properly taken , or likely to be taken, by the liquidator in performing the work; and (ii) whether the total remuneration payable to the liquidator is capped; (l) any other relevant matters."

In voluntary liquidations, an almost identical regime applies to remuneration of liquidators. [113] In relation to voluntary winding up generally ,s 504 is the one section dedicated to the review of liquidator's remuneration. It states : "Any member or creditor, or the liquidator, may at any time before the deregistration of the company apply to the Court to review the amount of the remuneration of the liquidator, and the decision of the Court is final and conclusive." Section 504(2) is identical to s473(10), [set out above] with regard to the matters to which the court must have regard when assessing reasonableness of remuneration.

In relation to Voluntary Administrations under Pt5.3A , 'the administrator of a company under administration is entitled to receive such remuneration as is determined(a) by agreement between the administrator and the committee of creditors (if any); or (b) by resolution of the company's creditors; or (c) if there is no such agreement or resolution – by the Court." [114] Section 449(1A) grants the same treatment to administrators of companies under DoCAs.[115] The court can

[111] *Re Interchase Corp Ltd (in liq)* (1993) 44 FCR 501; *Walker & anor as liquidators of OneTel Ltd* (2005) 23 ACLC 1276.

[112] Federal Court (Corporations) Rules 2000. r9.4, Form 16 and rule 9.4 . There are 7 sub-rules requiring inter alia the liquidator serving notice on creditors and members of committees of inspection of his or her intention to apply for the court order ; if there are objections then objectors will receive a copy of the interlocutory process

[113] For creditors voluntary liquidations see s499(3) which is in similar terms to s473(3) Section 499(3A) is similar in effect to s473(4A). Section 499(6) and (7) mirrors the requirement in s473(11) and (12) in requiring a report from the liquidator to either the committee of inspection or the creditors. For members' voluntary liquidations the remuneration is fixed by the company in general meeting. It is possible to fix the remuneration at the same meeting that appoints the liquidator, s495

[114] section 449E(1)

[115] s449E(1B). The resolution must not be bundled with any other resolution.

determine remuneration if there has been no meeting of the committee of inspection (with DoCAs), the committee of creditors,or creditors (with administrations).[116] Before any of these approving bodies determines remuneration, they are to receive a report setting out the same details as found in s473 (11),(12 discussed above.[117]

In relation to voluntary administrations under Pt5.3A, the court may review and alter the remuneration.[118] The application for review can be made by ASIC, the administrator or an officer, member, or creditors of the company.[119]

Methods of calculating remuneration

There is no statutory direction or formula to provide a basis for calculating remuneration. The statutory expectation is that it be "reasonable".[120] There is also a judicial expectation that it be "reasonable".[121] But there is no fixed scale and no legislative direction on permissible methods , apart from s 473(3) which goes the closest by stating "remuneration by way of percentage or otherwise". In Australia it is the time basis of assessment that is common and it is likely to stay that way.[122] The CPP provides four options that include both percentage and time basis.[123]

The most discussed judicial comment in recent years is Finkelstein J's judgment in *Re Korda: Stockford Ltd* [124] where he suggests borrowing from the US the use of the "lodestar" amount.[125] Such an amount is reached by the number of hours reasonably spent by the insolvency practitioner multiplied by a reasonable hourly rate.[126] This step requires consideration of whether the work performed was necessary to the administration, whether it was performed within a reasonable time and whether the rate is reasonable having regard to what the practitioner, and other practitioners, usually charge their clients.[127] The next step is to adjust upwards or downwards to reflect other factors including the quality of the work performed, the complexity of the administration, the novelty and difficulties that had to be confronted and the ultimate result.[128] This approach was recently endorsed by the Court of Appeal of Western Australia in *Conlan v Adams* [129]

The changes to the Corporations Act that were effective from 31 December 2007 incorporated some of these ideas, for instance aspects of 'complexity' and 'difficulties such as when dealing with receivers or creditor's attributes when courts are reviewing reasonable remuneration.

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[116] s449E(1C), (1D).
[117] s449E(5),(6) and (7).
[118] s449E(2)
[119] s449E(2).
[120] The court when exercising power to review must have regard to whether remuneration is reasonable for example see s473(10) for court appointed liquidators.
[121] See *Re Korda*; *Stockford Ltd* (2004) 52 ACSR 279.
[122] Gronow, *McPherson's Law of Company Liquidation* para 8.2470.
[123] See Part B, Section 13.2 CPP
[124] (2004) 52 ACSR 279 ; 140 FCR 424
[125] Re Korda; *Stockford Ltd* (2004) 140 FCR 424 at [47].
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] [2008] 65 ACSR 521

A published scale can give certainty, and give the courts a ready-made pathway to follow when called upon to either set or review remuneration. [130] In the 1990s ASIC's forerunner issued a recommended scale,[131] and the IPAA had a scale from at least the 1970s. However, this ceased in 2000, and some of the discussion is set out in *Gould v CALDB*.[132] The IPA no doubt removed the scale and moved to broader guidelines due to the fact that such rates and recommendations become quickly out of date, are more honoured in the breach because additional factors such as size and complexity can usually justify an increase in the rates, and because it does not wish to alienate a large section of its members, particularly from larger firms, by setting rates so low that some insolvency work would become marginal or uneconomic to perform. It is fair to point out that global thinking in relation to the economics of price restriction as a method of regulation of professional services has been to move away from price restrictions, particularly as it is unclear that they actually improve quality, though recommended fees are still acceptable as guides. [133] This may suggest that recommended rates are less intrusive than scale rates.

However, insolvency services are different from other areas of professional pricing, because there is a clear and direct relationship between the rate and amount charged by IPs, and the actual outcome for creditors , so that it can hardly be said to be just a matter of regulating quality. Currently the IPA recommends that members use their usual hourly rates and comply with the CPP.[134] In the CPP it is acknowledged that remuneration in most administrations will be based on time spent on the particular tasks, and that disclosure of fee rates and estimates of total fees is expected in each administration.

The road to reform

ASIC has limited time and resources and seems to go through periods where the focus of the corporate regulator is distinctively on matters other than insolvency. Recently, a new commissioner was appointed who has extensive experience in insolvency and the Senate inquiry will also no doubt sharpen their focus, as its terms of reference extent to ASIC's role prior to collapse. However, when compared to the UK with its active investigations and 'flying squad' inspections of insolvency practices, the relatively few matters that ASIC brings before the CALDB does seem like regulatory inattentiveness. If ASIC is not going to be active and funded appropriately, then it may be preferable to endorse a more developed IPA Code, with a strengthened disciplinary regime, so that the IPA itself can be relied upon to investigate, and where required impose disciplinary measures. In that scenario of self-regulation, some regulatory or independent body might still need to have oversight.

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[130] See the comments of Barker AACJ in *Gallagher v Dobson* [1993]3 NZLR 611 cited in *re Roslea Path Ltd*. (in liq), HC Tauranga, CIV 2005-470-611, 17/12/09

[131] *Re Fine Food Distributors Pty Ltd* (1993) 9 ACSR 599.

[133] Garoupa, *OECD Competition and Regulation in Auditing and Related Professions*, 2009, Policy Roundtables, DAF/COMP/(2009)19, 15 December 2009, www.oecd.org/competition

[134] Part B, section 13.2

There is no doubt that, despite some cracks, the IPA Code of Professional Conduct is a significant milestone in setting standards for the profession of insolvency practitioners. However, with enhancements, it could be incorporated into the regulatory regime and thus given the imprimatur of Government. The advantages of this would be that it would no longer be seen as 'not law', and it would therefore enhance its status in the eyes of the courts, but also stakeholders and IPs. A model for how to bring that about might be the approach to industry codes under the Trade Practices Act. An alternative is to make it a condition of licensing (currently through ASIC) that everyone must join one of the organisations that has a code (APES or IPA Code). Membership of a relevant professional body would be the simplest way to ensure the Code binds IPs.

We suggest in the paper that, even if ASIC is to retain the licensing function, the entry requirements could be fine-tuned to provide for change of nomenclature, to' insolvency officeholder ' (licensed or registered). It is also to be noted that official liquidators have no different qualifications anymore from registered liquidators, and therefore, since it is just at the discretion of ASIC who to appoint to the list of official liquidators, there has to be a question whether that distinction is worth maintaining.

It is a hallmark of many professions which have licensing, that the license has to be renewed, subject to verification that ongoing fitness and qualification criteria are still satisfied, which often includes continuing professional development. We note that these matters are recommended under the EBRD Code. Many insolvency practitioners, as members of the ICAA for example, are required to undertake certain hours per year of CPD, but we suggest that there should be a separate requirement for insolvency CPD, though it could overlap. Compulsory CPD is controversial, and there are debates about design of schemes. It is obviously easier if it can be voluntarily established by the professional body itself, with the advantages of signalling and branding that this brings with it.

In the area of accounting and auditing standards, one impetus to adoption and Parliamentary endorsement of professional codes and standards has been international organisations and federations. In the area of insolvency, there have been many international initiatives, most notably in cross-border insolvency and secured transactions, largely driven by INSOL (the International organisation of insolvency practitioners), and UNCITRAL's Working Party V on Insolvency. Given that the principles which seem to emerge from domestic codes and pronouncements in courts around the world (for example on remuneration) are very similar,[135] it should be possible to produce an agreed international code of conduct for insolvency practitioners at a level of generality which is applicable across borders. Whilst there has not been much movement by the leading insolvency body, INSOL, there was a World Bank/EBRD initiative in 1999 which has been updated to 2007.[136] We have referred to specific principles from the EBRD document earlier in this paper, and we suggest that the Senate Inquiry might be interested in benchmarking Australia's system against these international principles to test whether it really is 'among the best in the world'.

Even where, as in Australia, there is a professional body which covers remuneration extensively in its Code of Professional Practice, ultimately it will be necessary for someone to decide whether or not the charges are reasonable. No amount of information about method and basis of calculation can

[135] For example, SIP 9 in the UK, and the IPA CPP (Part B12-14, Part C 20) in Australia.
[136] n 31above.

prevent allegations that actual rates applied to time spent are excessive. If this is something that courts do not feel resourced or inclined to do, what other solutions might there be? Given that the professional body itself cannot provide that level of independence, and that expert witnesses similarly can only give a certain amount of comfort, is there a role for some other body, perhaps an insolvency services ombudsman or similar insolvency assessor.[137] In re *Roslea Path* the New Zealand High Court noted that[138] the Law Commission had suggested consideration to reposing function of fixing liquidators remuneration in a new statutory officer charged with all public functions under the Companies Act 1993. Notwithstanding that the specific recommendation was rejected by the Government of the day. The High Court suggested that: "Parliament may wish to reconsider (as a matter of competing priorities) whether the task of approving liquidators' remuneration is better undertaken by busy Associate Judges or through some other administrative process".

It has been suggested in the paper by Brand, Fitzpatrick and Symes at this conference [139]that the concept of an Insolvency Services Ombudsman is worth exploring, including with jurisdiction over the 'fit and proper' criteria for insolvency practitioners. An Ombudsman would be able to focus on delivery of insolvency services in a way which ASIC, and the CALDB in its current form, are not able to do. Such an office would also be able to review Codes of Conduct and make recommendations or endorsements of these from time to time, thereby enhancing further the status of such codes and bringing them within the public regulatory fold.

In conclusion, we have raised several possibilities for reform and fine-tuning of the current regulatory structure. These are issues which we hope will be subject to scrutiny by the current Senate inquiry. Whilst we, like Austin J and the Attorney-General, commend the IPA Code of Professional Conduct, it is only one piece in the regulatory jigsaw, albeit an important one. We look forward to the day when Australia will be able to tick all of the boxes against the international checklist of a perfect framework for regulation of insolvency practitioners.

[137] In England and Wales, the Court may appoint an assessor or costs judge to report, and then hear an application either with or without that assessor suitably qualified persons to act as assessors. See Practice Statement of Registrar Baister [2004] discussed in *re Roslea Path Ltd. (in liq)*, see n34 above

[138] New Zealand Law Commission "Promoting Trust and Confidence" Study Paper 11 (NZLC, Wellington, 2001) para 170, Part II

[139] "Fit and proper": an integrity requirement for liquidators in the Australian corporate legal framework (Unpublished conference paper)