IS THERE A NEED FOR GREATER REGULATION OF INSOLVENCY PRACTITIONERS IN NEW ZEALAND? EXPLORING THE OPTIONS FOR REFORM

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I. Introduction

The success of any insolvency system is largely dependent on those that administer it, namely insolvency practitioners (IPs).[1] There is no statutory definition for an IP in New Zealand (NZ), though it is accepted that the role encompasses holding office as a liquidator, administrator or receiver.[2] These individuals carry out the most significant formal procedures available in NZ corporate insolvency law: liquidation, voluntary administration and receivership.[3] These procedures are distinct from those that apply in the personal insolvency law framework.[4]The formal corporate insolvency procedures are designed to benefit creditors as a collective group, with the ultimate goal of maximising their returns.[5] Ostensibly, IPs carrying out these procedures must act with a high level of professionalism and honesty. Further, they should not only have practical experience in the liquidation process, but also strong investigative and negotiation skills, and a sound understanding of insolvency law.[6] The UNCITRAL *Legislative Guide on Insolvency Law*

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1 Vanessa Finch *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge University Press, New York, 2009) at 178.

2 David Brown, David Vance and Jeff Hart "Insolvency Practitioners" in P Heath and M Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis NZ) at 1.

3 Lynne Taylor "Corporate Collapse" in John Farrar, Susan Watson, and Lynne Taylor (eds) *Company and Security Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) at 674. Other formal corporate procedures include compromise with the creditors and statutory management.

4 See, generally, Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomas Reuters, Wellington, 2016) at [1.3.2]. These procedures are for the most part administered by the Insolvency and Trustee Service, which is a part of the Ministry of Business, Innovation and Employment. The Insolvency and Trustee Service does administer some Court-appointed corporate liquidations. However, this is generally confined to those that are asset-less. Therefore, this paper focuses on those private IPs who are responsible to maximise any potential return to the creditors of a company.

5 Ministry of Economic Development *Insolvency Law Review: Tier One Public Discussion Documents* (Ministry of Economic Development, Wellington, 2001) at 15.

6 Brown, above n 2, at 4.

suggests that it is essential for an IP to have (1) appropriate qualifications, (2) adequate experience, and (3) certain personal qualities before taking office.[7] These requirements "ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime".[8]

The UNCITRAL suggested requirements are absent from the NZ regime. The current rules that regulate IPs in NZ are predominantly found in the Companies Act 1993 (CA) and the Receivership Act 1993 (RA). In reality, almost anyone can be an IP provided they are not disqualified by the unburdensome rules set out in the legislation. There is no requirement to obtain any qualification relating to accounting or law, and no practical experience is needed. There is no 'fit and proper' person test for appointment, nor does an appointee have to be resident in NZ. Making these requirements mandatory in NZ has proven difficult given the small number of IPs.[9] It is estimated that only 100 practitioners regularly provide insolvency services.[10]

Fortunately, the majority of IPs that regularly take office in NZ are drawn from the accounting, and in some circumstances, legal profession. These individuals are subject to ethical and professional obligations of their governing body: Chartered Accountants Australia and New Zealand (CAANZ) or the New Zealand Law Society (NZLS) respectively. The Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) also have regulatory powers over IPs, though membership is optional. The regulatory regime under the CA and RA that IPs are subject to is dependent on the supervisory jurisdiction of the Court, which is inevitably associated with cost and delay. Moreover, the statutory provisions that should warrant accountability are highly technical, which often allows IPs to circumvent punishment.[11] There is no professional body with supervisory and investigatory powers that all IPs must be registered with.[12] This means that in a minority of cases a reckless and/or incompetent person will be appointed to office, and the existing legislative regime is inappropriate to deal with this. In this circumstance, the collective benefit for creditors the formal procedures are designed to ensure is arguably illusory.

7 United Nations Commission on International Trade Law (UNCITRAL) *Legislative Guide on Insolvency Law* (United Nations, 2005, accessed 28 November 2016), at 175 <www.uncitral.org>. These are only the minimum requirements.

8 At 174.

9 See generally Companies Office "Statistics" (4 November 2016) <www.companiesoffice.govt.nz>. In 2015 companies subject to the appointment of a liquidator was 2,337, a receiver was 90, and in voluntary administration was 31.

10 Ministry of Business, Innovation and Employment "Terms of Reference Insolvency Review Working Group" (15 October 2015) at 8.

11 The problems are most evident when IPs are appointed on an ad hoc basis in small to medium size companies.

12 David Brown and Christopher Symes "The Regulation of Insolvency Practitioners: Getting to 'Trust and Confidence'" (2013) 19 NZBLQ 226 at 228.

Both regulators and commentators accept that the laissez faire policy approach that prevails in NZ is unsatisfactory: "The status quo has a proven record of being unsatisfactory as it lacks any regulatory measures for effectively dealing with the minority of practitioners who are substandard."[13] One commentator notes that the regulation is very much "after the fact", with little control into the profession and only reactive measures in place.[14] In 2010, the Government introduced the Insolvency Practitioners Bill (IPB) to "restrict or prohibit certain individuals from providing corporate insolvency services".[15] However, almost seven years have passed since the Bill was introduced, and rogue practitioners have continued to take advantage of the lacuna in the legislation. Appropriately, the Government has since put IP regulation back on the agenda with the establishment of the Insolvency Review Working Group (IRWG).[16]

This paper will be divided into two parts. Firstly, it will examine the statutory regulatory regime and the case law it has generated to demonstrate that the status quo is undesirable. It also suggests that the proposed IPB fails to address the regulatory gap that exists in NZ. As such, this paper secondly explores options for reform. It analyses the IP regulatory regimes that exist in Australia, the United Kingdom (UK) and Ireland to provide guidance for legislators in NZ. It contends that the NZ Government should introduce a positive licensing system that mandates that IPs are, inter alia, appropriately qualified, have sufficient experience, and satisfy a 'fit and proper' person test before appointment. Under this regime, an existing professional body would be given overall regulatory power, while a Government entity retains a supervisory role over this body. This co-regulatory approach is the most feasible given NZ's insolvency climate.

II. Is There a Need for Greater Regulation of Insolvency Practitioners in New Zealand?

A. A Statutory Regime in New Zealand

There are no statutory requirements that an IP must satisfy in order to be appointed. Rather, an individual may take office provided they are not

13 Ministry of Economic Development "Regulation of Insolvency Practitioners Regulatory Impact Statement" (27 April 2010) 977783 at 2. The Ministry of Economic Development was replaced with the Ministry of Business, Innovation and Employment in July 2012.

14 Matthew Berkahn "Regulation of Insolvency Practitioners in New Zealand" (2010) 18 Insolv LJ 148 at 150. This is because misconduct is generally only reviewable if claims are brought against the IPs in Court proceedings.

15 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 1.

16 Ministry of Business, Innovation and Employment *Terms of Reference Insolvency Review Working Group* (15 October 2015) at 2. This group aims to determine whether the IPB should be withdrawn, progressed or replaced. The group released the first of two reports in July 2016.

disqualified by the rules set out in the CA and the RA. The rules in the CA apply to liquidators and administrators, while the rules in the RA apply only to receivers. This paper predominantly focuses on the regulatory framework governing liquidators. This is because liquidations are the most common corporate insolvency procedure.[17] As such, it is liquidators that have mainly featured in the case law. It is important to note that the legislative provisions applicable to liquidators are largely replicated in relation to those that apply for administrators and receivers. Thus, the supervisory and enforcement regime is very similar for all three office-holders.

Section 280 of the CA provides that, unless the High Court (the Court) directs otherwise, anyone can be appointed as a liquidator provided they are over 18 years old; are not in a direct continuous business relationship with the company; are not an undischarged bankrupt; and are not subject to treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[18] Understandably, the individuals that are excluded by the legislation are those who are most likely to experience a conflict of interest in their role, and those who are expected to lack the necessary competence.[19]

Despite these prohibitions, for such a specialised profession it is arguable that the absence of any positive requirements in the legislation prima facie seems incongruous given a liquidator's statutory duties and powers. For example, the principal duty of a liquidator is to take possession of, protect, realise and distribute the company's assets or proceeds to the company's creditors in accordance with the CA, and then to distribute any surplus assets to those entitled in a reasonable and efficient manner.[20] A liquidator is a company's agent.[21] They have the power to, inter alia, commence legal proceedings, sell or dispose of property, and set aside specified types of transactions occurring prior to liquidation.[22] Accordingly, a liquidator owes the fiduciary duties and duties of care that all agents owe to their principals. This makes them "subject to external rules and ethical obligations".[23] They are also officers of the Court who are "obliged to act in a manner consistent with the highest principles" and are "not permitted to take advantage of the strict legal rights available to them if to do so would mean that they were acting unjustly, inequitably, or unfairly".[24] Creditors and other concerned parties should be assured that competent individuals are carrying out these roles. This, however, cannot be guaranteed under the current statutory scheme.

17 Companies Office, above n 9.
18 Companies Act 1993, s280. Similar rules apply to administrators and receivers. See Companies Act 1993, s239F; Receivership Act 1993, s5.
19 Lynne Taylor "Receivership" in John Farrar, Susan Watson, and Lynne Taylor (eds) *Company and Security Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) at 687.
20 Companies Act 1993, s253.
21 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (CA).
22 Companies Act 1993 sch 6 cl (a), (e), and (g).
23 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 21, at [22].
24 *Strategic Finance Ltd (in rec & in liq) v Bridgman* [2013] 3 NZLR 650 at [108].

It is important here to distinguish the methods in which liquidators may be appointed. They may be appointed by a special resolution of the shareholders, a resolution of the board on the occurrence of an event specified in the company's constitution, or the Court.[25] Appointment of a liquidator is also an option open to creditors of a company in administration at what is known as the "watershed meeting".[26] It is via shareholder and director appointments that there is most risk of incompetent practitioners being appointed.[27] Another risk is the appointment of "friendly liquidators" who may not act in the interest of creditors as a collective group by failing to pursue valid claims against the shareholders and directors should they arise.[28] It is relatively easy for delinquent individuals to assume appointment under this method and gain access to significant monies and assets that IPs are regularly entrusted with. All liquidators, however appointed, are subject to the Court's oversight and are on an "equal footing". Liquidators appointed by shareholders, however, are likely to need more supervision, given that they are generally appointed on an ad hoc basis.[29]

The legislation does not require IPs to be registered with a professional body with supervisory and investigatory powers, such as CAANZ or the NZLS. This means that if a creditor or other concerned wishes to have the conduct of an IP reviewed, when the IP is not a member of the aforesaid bodies, the concerned party must apply to the Court under the appropriate sections of the legislation: ss 284 and 286 of the CA where the practitioner is a liquidator, and ss 239ADS - 239ADV if the individual is an administrator. The Court has similar supervisory powers available under ss 34, 35 and 37 of the RA if the practitioner is a receiver.[30] These methods are not only costly, but as will be demonstrated below, some of the sections are highly technical and have a number of shortcomings.

25 An administrator may be appointed to a company by the company itself via a resolution of the board of directors, and also by a liquidator, secured creditor and the Court: Companies Act 1993, s239H(a)(e). The Court may also appoint receivers. However, they are most commonly appointed privately pursuant to a right accorded to a secured creditor under the terms of its arrangement (usually in the form of a general security arrangement) with a debtor company: Receivership Act 1993, ss2 and 6.

26 Companies Act 1993, ss241(2) and 239ABA(c).

27 The Court in *Jacobsen Creative Surfaces v Smiths City Ltd* (1993) 6 NZCLC 68, 422 at 437 set out its own principles that should be taken into account when a liquidator is appointed. This includes independence; resources of the liquidator; the wishes of the creditors and contributories; competence and experience; promptness; and the liquidator's familiarity with the company. See later discussion at Section II(B)(2)(b)(iii).

28 Brown, above n 2, at 5.

29 *ANZ National Bank Ltd v Sheahan* [2013] NZLR 674 at [137][138].

30 The Court also has a general power under s 301 of the CA to inquire into the conduct of all IPs and order them to repay money or return property if they are found guilty of misfeasance.

B. Summary of Case Law

An up-to-date summary of relevant case law provides a useful way to illustrate the need for greater regulation of IPs in NZ. It is also the only reliable information regarding issues and concerns about the conduct of IPs at the moment. Other evidence is merely anecdotal.[31] It is important to note that the case law is not likely to be truly representative of the extent of the problem, given the lack of incentives available for creditors to take action against IPs. Summarising ss 284, 286, and 283 will provide a framework to highlight how these provisions have been used to address relevant issues related to liquidators including general misconduct, remuneration and matters of conflicts of interest or independence.

(1) Section 284

This section grants the Court general supervisory powers over the conduct of liquidators. Those entitled to make an application as of right are the liquidator and the liquidation committee. A creditor, shareholder, other entitled person[32] or director may also make an application, though they will need the leave of the Court. The eight orders the Court may make are listed in s 284(1). These include giving directions in relation to any matter arising in connection with the liquidation; confirming, reversing or modifying the acts of the liquidator; granting a declaration as to the validity of a liquidator's appointment; or reviewing and fixing the remuneration of the liquidator to ensure that it is reasonable.[33] These powers are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under pt 16 of the Act. They are also exercisable if the liquidator is no longer acting, or if the company has been removed from the register.[34]

(a) Seeking leave

In *Trinity Foundation (Services No 1) Ltd v Downey* the Court held that a creditor seeking leave to make an application under s 284 must establish that they have an arguable case. This has two characteristics. First, a credible factual basis and second, a reasonable likelihood that, if the claim

31 Because the number of IPs in NZ is based on anecdotal evidence only, coming up with a solution is not an easy task. This makes it particularly difficult to determine whether stringent regulation recommendations, such as imposing qualification requirements or establishing a supervisory body that would result in compliance costs, would be justified based on the size of the industry.

32 Section 2 of the Companies Act 1993 defines an "entitled person" as a person upon whom the constitution confers any of the rights and powers of a shareholder.

33 Companies Act 1993, s284(1)(a), (b), (e), (f) and (g). The other orders include directing an audit of the accounts of the liquidator, and making other orders that the auditor requests, directing the retention or disposition of records of the liquidator or company itself.

34 Companies Act 1993, s284(2).

is established, the Court will disturb the act or decision in question. The liquidator's decision thus needs to be regarded as "unreasonable"[35] and the onus of proof in establishing this lies with the challenger.[36] This threshold for leave strikes a balance between preserving the rights of meritorious claimants, while ensuring that the assets of a company are not frittered away as a result of the claims that are not likely to succeed.[37] It also "favours allowing liquidators to make business decisions which they, as the persons appointed to exercise statutory responsibilities, are better qualified than the Courts to make".[38]

Applicants who do have an "arguable case" will not be able to pursue the claim if they are not listed as an entitled person under s 284(1). This was confirmed in *Official Assignee v Norris*.[39] Beginning in June 2010, the Registrar of Companies (the Registrar) received significant complaints about Norris, a liquidator handling eight separate liquidations in Nelson.[40] Following a thorough investigation, the information was referred to the Official Assignee (OA). The OA made wide-ranging allegations against Norris, including that he failed to comply with his principal duty under s 253 of the CA; combined the funds of the companies' and his own business; charged unreasonable and excessive fees; and failed to keep full and accurate records.[41]

Having regard to the gravity of Norris's conduct, the OA first sought orders under s 284(1)(a).[42] However, Norris was conveniently able to strike out the claim, as the OA was not listed as an entitled person to seek the exercise of the Court's supervisory power.[43] Mallon J noted that s 284(1) operates as a "filtering mechanism" designed to ensure that the actions of liquidators are challenged only in appropriate cases.[44] His Honour added that s 284 "is also designed to ensure that such challenges are brought only by those with a sufficiently direct interest in the liquidation."[45] The OA sought to rely on the Court's inherent jurisdiction, but the Court was reluctant to exercise its jurisdiction as a way around the limits prescribed by the statute.[46] This case suggests that it may be appropriate to amend s 284(1) to enable any other person, who is able to show the Court that they have a direct interest in the liquidation, to make an application. The OA, being the person appointed by

35 *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263 at [21].
36 *Commissioner of Inland Revenue v Hulst* (2000) 8 NZCLC 262, 266 (HC) at [28].
37 *Trinity Foundation (Services No 1) Ltd v Downey*, above n 35, at [22].
38 *Levin v Lawrence* [2012] NZHC 1452 at [54].
39 This is a leading case regularly cited which exemplifies the inadequacies of New Zealand's current regime. See generally M Tingey, D Friar and A Smith "Deficiencies exposed in regulation of insolvency practitioners" (1 August 2012) National Business Review <www.nbr.co.nz>.
40 *Official Assignee v Norris* [2012] NZHC 961 at [5].
41 At [9].
42 At [1]. Section 284(1)(a) allows the Court to give direction in relation to any matter arising in connection with the liquidation.
43 *Official Assignee*, above n 40, at [28].
44 At [18]. Citing *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263 at [21].
45 At [18].
46 At [30].

the Registrar to review the complaints about Norris, would arguably have a sufficient interest in the circumstances.

(b) Remuneration of liquidator: s 284(1)(e) and (f)

An application to review or refund the remuneration of a liquidator appears to be the most common claim made under s 284(1). While a number of applicants have been successful in challenging the fees of unscrupulous IPs, the case law illustrates the difficulties of bringing such a claim. A clear example is *Rai v Chapman*. The liquidator, Chapman, refused to make his records available to an independent accountant to assess the reasonableness of his work; he failed to respond to the requests to hold shareholders meetings; he failed to respond to telephone calls and any form of correspondence; and charged excessive fees.[47]

Invoices provided by Chapman showed that he charged fees of $62,767.89 plus GST.[48] Associate Judge Bell analysed Chapman's time records, stating that they were simply not accurate enough to determine what he was doing for days on end. He was also particularly critical of Chapman's decision to put the company into liquidation before the completion of the sale of the business and assets. His Honour considered that this decision was a mistake and that any IP would have advised the company to carry on trading under current management.[49] Accordingly, the Court found that this error of judgment resulted in a lot of unnecessary charges and difficulties that Chapman should be personally responsible for.[50]

In his concluding remarks, Associate Judge Bell drew attention to the practical and emotional difficulties of bringing a claim against a liquidator. He noted that most times it is not even worthwhile bringing a claim against them, which "leaves the liquidator in a position of some immunity".[51] He therefore praised Rai for challenging the conduct of Chapman, indicating that an amount of unprofessional conduct by IPs is likely not detected. Interestingly, in a subsequent hearing Chapman was fined $2,000 for not adhering to a Court order to hand over all records relating to the liquidation after being replaced as liquidator by a shareholders' resolution.[52] Associate Judge Bell determined that his "tardiness deserves punishment" and that his slow compliance reflects badly on him as a liquidator.[53] Notwithstanding this, Chapman is still legally able to practice as an IP today.

47 *Rai v Chapman* HC AK CIV-2010-404-002300 [30 July 2010] at [6] and [17].
48 At [11] and [25]. He had charged himself out at $200 an hour and his secretary out at $140, plus GST.
49 At [28].
50 At [29]. Chapman's expenses were fixed at $25,000 and he was required to return all payments he received in excess.
51 At [35].
52 *Rai v Chapman*, above n 47. Chapman had also failed to repay the money owed from the original judgment.
53 At [8].

The facts of *Chapman* were similar to those in *Healy Holmberg Trading Partnership v Grant*. In this case the applicant claimed that the appointed liquidators, Grant and Khov, acted unreasonably and improperly by taking significantly high fees for themselves.[54] The Court first acknowledged that liquidators appointed by shareholders resolution are not bound by reg 28 of the Liquidation Regulations 1994.[55] This means that the Court has no formula to determine what a reasonable fee is for liquidators appointed via this method, as the case was here. Rather, it must refer to previous jurisprudence to decide a fee for the case before it, taking into account the complexity of the liquidation, the experience of the practitioner, and the actual work carried out.

Citing Hammond J in *Re Goldamost Dynamics (NZ) Limited (In Liquidation),* Robinson J noted "liquidations are not a bottomless well from which insolvency practitioners may drink" and that "where there is demonstrated misconduct on the part of the liquidator, fees may be disallowed in whole or in part".[56] On the facts, his Honour observed that the liquidators could not provide sufficient evidence that allowed the Court to identify the true profit from their fees, and that they had been guilty for double charging in a number of instances.[57] Additionally, he established that there was evidence that unnecessary costs were incurred as a result of the practitioners' inadequate preparation for the liquidation as a whole.[58] Specifically, they made little effort to obtain the best possible price for the assets they seized. Robinson J, therefore, found that the liquidators were guilty of misconduct and the remuneration for their work was fixed at $20,000.[59]

The distinction between liquidators appointed by the Court and those appointed by shareholders was also discussed in *Re Roslea Path Ltd (in liquidation).*[60] Heath and Venning JJ drew attention to the difficulties of determining what 'reasonable remuneration' is when private individuals are appointed under s 241(2)(a) of the CA. In practice, it means that creditors must take an active stance in challenging remuneration charged by these liquidators. Otherwise "unscrupulous liquidators may charge as they like."[61] Their Honours held that fair and reasonable remuneration was reflected in the value of services provided. However, value in this sense went

54 *The Healy Holmberg Trading Partnership v Grant* HC AK CIV 2009-404-002279 [15 December 2009] at [8]. The liquidators charged fees of $74,825.46 (charged themselves out at $350 an hour) and there was an additional deduction of $27,939.84 for unspecified disbursements. The applicant accordingly sought relief under s 284 (1)(e) and (f).

55 At [32]. Reg 28 of the Liquidation Regulations 1994 specifies that the Official Assignee and Court appointed liquidators are to charge fees of no more than $200 per hour, and employees of the liquidator no more than $140 per hour.

56 At [40].

57 At [41].

58 At [49].

59 At [64].

60 Central to this case was an order under s 284(1)(f) of the CA to deduct some of the remuneration of interim liquidators appointed over a farming business.

61 *Re Resola Path Ltd (in liquidation)* [2013] 1 NZLR 297 at [40].

beyond mathematical application of hourly rates and hours administering the company's affairs. Instead, it had to be proportionate to the nature, complexity and extent of the work undertaken.[62] Although *Re Roslea Path* was a liquidation case, there is "no reason in principle why the Court's approach to fixing a liquidator's remuneration should differ from that applied to a receiver or an administrator."[63]

These cases raise the question whether different remuneration procedures should apply to liquidators if they are appointed by different mechanisms. In *Re Roslea Path* Heath and Venning JJ stated that "the premise [that the] liquidator is an experienced insolvency practitioner in whom the Court could have trust and confidence in is not a feature of the 1993 Act".[64] Therefore, it is arguable that there needs to be more regulation around the fees that IPs appointed by shareholders can charge. This is, of course, in addition to the changes that are needed with regard to the regulations that govern the criteria for admission, and the existing supervision and enforcement provisions.

(2) Section 286

This section gives the Court the power to make a range of orders. Most important are orders for a liquidator to comply with a relevant duty imposed on him or her (s 286(3)),[65] an order removing the liquidator from office (s 286(4)), and an order prohibiting the liquidator from acting as such for a specified period (s 286(5)). The persons who have standing to apply for these orders are listed in s 286(1). The list includes a liquidator,[66] a liquidation committee, a creditor, shareholder, director, other entitled person, and the OA. It also includes in some circumstances a receiver, the President of CAANZ, and the President of the NZLS.[67] In contrast to s 284, no special leave is required from the Court for any party. However, a number of procedural requirements must be satisfied.

(a) Procedural requirements

First, a notice of the failure to comply must be served on the liquidator not less than five working days before the date of the application.[68] This is to give the liquidator the opportunity to remedy the alleged failure and to avoid the Court's involvement.[69] Second, the failure to comply must still be continuing when the application is heard. If these two requirements are met, it lays the

62 At [102][108].
63 At [182].
64 At [36].
65 The duty may arise under statute, the rule of law or the Court. See s 285 of the CA.
66 It also includes a person seeking appointment as a liquidator.
67 Under the Insolvency Practitioners Bill 2010, it is proposed that the Registrar of Companies be added to the list.
68 Companies Act 1993 a 286(2). "Failure to comply" is defined in s 285 of the Companies Act 1993.
69 Taylor and Slevin, above n 4, at 618.

basis for the Court to make an order enforcing the liquidator to comply with their duty or relieving the liquidator from having to comply either wholly or in part.[70] The Court may also remove the liquidator from office if these two requirements are met or if the person becomes disqualified under s 280.[71] If the Court is satisfied that a person is unfit to act as a liquidator by reason of persistent failures to comply or the failure is considered serious, the person may be prohibited from acting as a liquidator.[72] However, this order has an additional procedural requirement: the applicant must particularise the ground upon which the order is sought.[73] The period of time the liquidator will be prohibited for is a matter for the Court, which may be an indefinite period.[74]

(b) Removal orders – specific examples

Where the liquidator becomes disqualified under s 280, removal under s 286(4) will not generally be complicated as demonstrated by *Commissioner of Inland Revenue v Xu*. The applicant argued that the liquidator, Xu, had a clear conflict of interest as he, and his employer, provided professional services to the company less than two years before it entered liquidation and he had a continuing business relationship with the company, having shared their operation premises.[75] There was also evidence that Xu had failed to comply with a number of statutory obligations.[76] Gendall J was, therefore, satisfied that there were sufficient circumstances to remove Xu from office under s 286(4)(a).[77]

(i) Is s 286(4) a stand-alone removal provision?

Orders to remove liquidators from office, on the basis of general misconduct, are regularly dismissed by the Court if they fail to satisfy the stringent notice requirements.[78] This has given rise to an issue of whether s 286 is a stand-alone section that gives the Court the power to remove a liquidator, or whether s 284 also grants the power of removal under the auspices of its supervisory controls. Associate Judge Bell in *McMahon v Ah Sam* sought to clarify the position.[79] His Honour drew attention to the Companies Act

70 Companies Act 1993, s286(3).
71 Companies Act 1993, s286(4).
72 Companies Act 1993, s286(5).
73 Namely a matter of persistent failures or the seriousness of the failure. See *Official Assignee v Norris*, above n 40.
74 Companies Act 1993, s286(5)(b).
75 *Commissioner of Inland Revenue v Xu* [2009] NZCCLR 10 at [9].
76 At [11]. This included failing to advise the Registrar of his appointment within 10 working days and failing to send a report to the creditors within 5 working days.
77 Accordingly, an order was also made reversing Xu's final report under s 284(1)(b).
78 See generally *Rai v Chapman*, above n 47, at [21]; *The Healy Holmberg Trading Partnership v Grant*, above n 54, at [30]; *Official Assignee v Norris*, above n 40.
79 In this case the actions of the liquidator were not considered inappropriate. However, the judgment is important as it clarifies the scope of ss 284 and 286.

1955, which allowed the Court to remove a liquidator "on cause shown".[80] However, he noted that the provisions under the 1993 Act are quite different, and that ss 284 and 286 grant separate powers.[81] He interpreted s 286 to be a stand-alone provision that enables the Court to remove a liquidator. His Honour found that "the carefully prescribed procedures under that section cannot be outflanked by applying under s 284."[82] He went on to note that s 286 has been criticised for being "too narrow" especially when compared with the wide-ranging power under the 1955 Act.[83] However, the reasons for these procedural requirements were to "spare liquidators from being subject to general wide-ranging attacks".[84] Associate Judge Bell remarked that it was not his job to comment on the law further, but simply to apply it.

On the basis of this authority s 284 cannot be used to remove a liquidator from office.[85] However, in *Hyndman v Newson,* seven months after *McMahon* was delivered, Associate Judge Osborne declined to interpret s 286 as a stand-alone provision. His Honour concluded that "the s 284(1)(a) jurisdiction includes in appropriate circumstances the removal of a liquidator".[86] This decision, therefore, casts doubt on the scope of the provisions and adds further uncertainty, making reform of these sections necessary.

(ii) Reviewing a liquidator's appointment: s 283(4)

A vacancy in the office of liquidator of a company may arise if the holder of that office resigns, dies or becomes disqualified under s 280.[87] In the event of a resignation, the departing liquidator may appoint a successor liquidator.[88] However, the Court may review the appointment of the successor liquidator and, if appropriate, appoint another person.[89] This limited provision, therefore, provides another avenue to remove a liquidator (separate from s 286(4)) if the liquidator's initial appointment is declared invalid. The persons entitled to make an application for review include the company; a shareholder or other entitled person; a director; or a creditor of the company.[90] The case of *Fisher International Trustees Ltd v Waterloo Buildings Ltd (In Liquidation)* illustrates this procedure and, also highlights the high threshold that is required for removal under this method. The director of Waterloo Buildings Limited, Brent Clode, initially appointed his brother-in-law, Michael Cooper

80 Companies Act 1955, s237(1).
81 *McMahon v Ah Sam* [2014] NZHC 659 at [13].
82 At [27].
83 At [34].
84 At [34].
85 This was certainly the approach taken in *Chapman, Healy Holmberg Trading Partnership,* and *Norris.*
86 *Hyndman v Newson* [2014] NZHC 2513 at [51].
87 Companies Act 1993, s283(1).
88 Companies Act 1993, s283(2).
89 Companies Act, s283(4) and (7). See *Re Hilltop Group Ltd (in liq)* (1998) 8 NZCLC 261, 505 (HC).
90 Companies Act 1993, s283(4).

as liquidator.[91] However, Cooper later had to resign from office, as he was declared bankrupt. Accordingly, Brent made a second appointment, Peter Clode, who was supposedly Brent's brother and a sports masseuse living in the United States.[92] Peter was later replaced by one of Brent's Facebook friends, Melisa Watson. Watson had a Bachelor of Science, but did not appear to have any significant experience in winding up companies.[93] It was also suggested that she was under the influence of the company's sole director.[94]

The creditor, Fisher International, challenged the appointment of Watson under s 283(4) of the CA, arguing that she was not qualified or independent and should be replaced as liquidator. White J noted that under ss 256 - 258A a liquidator has a number of statutory duties that require a level of skill, and competence. As such, they should have the appropriate qualifications, experience and resources to carry these duties in a reasonable and efficient manner.[95] His Honour stated: "the Court has a duty, in the wider public interest, to ensure that interests of persons concerned in the winding up are best served by the appointment."[96] Citing *Re Trafalgar Supply (In Liquidation),* he also noted that there must be a factual foundation to support any suspicion before the person's appointment can be reviewed.[97] This would need to be proven on the balance of probabilities.[98] However, in the circumstances, a further hurdle needed to be satisfied: the liquidator had a lack of independence that had been overwhelmingly demonstrated, and that there was a great urgency to replace them.[99]

Despite being satisfied that there was a factual foundation for suspicion, the Judge was not convinced that it had been overwhelmingly demonstrated or that it was urgent to replace her. An order was, therefore, made to file and serve an affidavit to prove that she was appropriately qualified, experienced, and impartial.[100] In a subsequent hearing, Watson failed to take the opportunity given to her.[101] White J held that this behaviour showed that she was not competent to act as a liquidator and removed her from her position.[102] This case exemplifies the frustrations on behalf of the judiciary, which expressed that IPs should be appropriately qualified to take an appointment of such responsibility. However, it is limited in the way it can challenge appointments, given that there are no positive statutory requirements to take office.

91 *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation) and* HC AK CIV-2009-404-00640 [12 November 2009] at [7].
92 Jane Phare "Clode Meets his Waterloo" (8 November 2009) <http://www.nzherald.co.nz>.
93 *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation)*, above n 91, at [5].
94 Westlaw NZ *Company Law* (online looseleaf ed, Thomson Reuters) at [CA283.02].
95 *Fisher International Trustees Ltd*, above n 91, at [19][20].
96 At [21].
97 At [23].
98 At [25].
99 At [28].
100 At [31].
101 *Fisher International Trustees Ltd*, above n 91. She did not make an attempt to provide any affidavit evidence, nor did she make an attempt to be heard orally.
102 At [7].

(iii) Suitability of incoming liquidator – criteria of the Court

The decision of *Waterloo Buildings* is also important as it discussed the competence requirements to be considered following an application by creditors under s 243(7) to replace a liquidator appointed by the Court.[103] The requirements, which were established in *Jacobsen Creative Surfaces Ltd v Smiths City Ltd,*[104] are also relevant to the exercise of the Court's discretion under s 283(4) today.[105] Briefly, the incoming liquidator should be independent, competent and have sufficient experience and resources to conduct the liquidation. They should also consider the wishes of the creditors and contributories, have familiarity with the company, and carry out the liquidation efficiently and promptly.[106] These criteria stand alongside the disqualifying requirements listed in s 280.[107] However, as demonstrated, these specific criteria need not be satisfied when private individuals are appointed by shareholders or the board of directors under s 241(2)(a) and (b). It is, therefore, arguable that similar criteria, particularly those that require experience and competence, should be incorporated into the statutory regime to ensure that appropriate individuals are appointed at the outset. This will allow the company to be wound up in a more efficient manner.[108]

(c) Prohibition orders – specific examples

The recent case of *Commissioner of Inland Revenue v Kamal* highlights the procedural difficulties of s 286(5). Kamal was the liquidator of two companies known as Hillman Ltd and GDZ Ltd. The Commissioner alleged that Kamal had a continuing business relationship with the directors of both companies. Accordingly, she claimed that Kamal failed to certify that he was disqualified by s 280(1) of the CA. [109] The Commissioner requested that Kamal rectify his failures by resigning from the companies and providing an undertaking that he would not accept appointment as liquidator of any company for five years.[110] If Kamal did not do as requested, the Commissioner advised that she would apply for a prohibition order under s 286(5). Kamal resigned as liquidator from the companies but did not agree to the undertaking.

Kamal was subsequently able to strike out the application for the prohibition order. This was because Kamal's "failures to comply" were no longer "continuing" as required by s 286(5), when the Commissioner's

103 Companies Act 1993, s243(7).

104 *Jacobsen Creative Surfaces*, above n 27. These factors were developed to provide guidance when appointing a replacement liquidator under s 235(c) of the Companies Act 1995. The equivalent provision is today found in s 243(7) of the Companies Act 1993.

105 *Fisher International Trustees Ltd*, above n 91, at [22].

106 *Jacobsen Creative Surfaces*, above n 27, at 437.

107 Lynne Taylor "The Regulation of Insolvency Practitioners in New Zealand" (2008) 16 Insolv LJ 150 at 156.

108 Companies Act 1993, s253.

109 *Commissioner of Inland Revenue v Kamal* [2016] NZHC 1053 at [9][10].

110 At [20].

proceedings were filed.[111] The Commissioner sought to rely on the Court's inherent supervisory jurisdiction under s 284(2) to prohibit Kamal from taking office in the future. However, Smith J stated that this provision could not be relied on when interpreting s 286.[112] His Honour drew attention to the "arguably unfortunate consequence" of this interpretation noting that "a defaulting liquidator will always be able to avoid a prohibition order by the simple expedient of resigning before the creditor's proceeding is commenced."[113] His Honour stated that if this limitation was not intended by Parliament, it ought to be corrected by the legislature. However, until this was done, he could not stretch the wording to bear a contrary interpretation.[114]

In *Official Assignee v Norris,* the OA also sought to rely on s 286(5). However, the Court held that the notice given by way of a draft statement claim was not 'notice' as Norris was left in a position not knowing how to rectify his failure to comply.[115] Furthermore, the OA did not specify the grounds on which he sought the prohibition order, namely he did not specify whether he was relying on "the seriousness of the alleged failures or their persistency".[116] In *Rai v Chapman* the Court noted that it had the power to make a prohibition order under s 286(5) though, while Chapman's conduct was concerning, it considered that the circumstances were not serious enough to make such an order. [117] At present, the statute provides little guidance of when conduct will be 'serious' enough to warrant a prohibition order.

(i) A lack of 'fitness' will not warrant a prohibition order

The case of *Kamal* also confirms that previous convictions, including those relating to dishonesty, will not preclude a liquidator from taking office. Kamal had previous convictions under the Tax Administration Act 1994 for aiding and abetting a company in providing false income tax and GST returns, and by supplying misleading information to the Commissioner.[118] In light of this, the Commissioner argued that Kamal was not 'fit' to act as a liquidator and should be prohibited from acting. The Commissioner argued that the list in s 280, which disqualifies liquidators from acting, is not exhaustive.[119] On this interpretation she relied on s 286(5), as well as the Courts supervisory jurisdiction under s 284, to found a broad duty of fitness.[120] However, the Court was reluctant to adopt this argument finding

111 At [68].
112 At [69].
113 At [77].
114 At [78].
115 *Official Assignee*, above n 40, at [57].
116 At [74]. The proceedings were stayed until the OA gave sufficient notice and properly particularised its claim.
117 *Rai v Chapman*, above n 47, at [22].
118 *Commissioner of Inland Revenue*, above n 109.
119 At [36].
120 At [45].

that there is no overarching 'fitness' requirement for liquidators. Smith J was of the opinion that, because Parliament had set out such a lengthy and detailed list in s 280, it was not appropriate to add to that list.[121] Undoubtedly, this case reinforces that the absence of a 'fit and proper' person test in the legislation ought to be reviewed.

(3) General misconduct with no ss 284 or 286 application

The recent judgement of *McKay v Johnson* highlights once again the need for regulation of IPs.[122] However, the Court made no mention of removing or prohibiting Smith from office under ss 284 or 286. The key issue before the Court was whether Smith had received monies belonging to the companies that were secured to Westpac, and failed to account for such receipts.[123] Westpac had only become aware of Smith's appointment in March 2014, when he filed the first liquidator's report identifying Westpac incorrectly as an unsecured creditor.[124] Subsequently, Smith was ordered to file an affidavit setting out, inter alia, details of the companies' assets that he had dealt with since his appointment, and the details of any assets that he had previously had in his possession. Smith's affidavit evidence was considered deficient and it was established that Smith had failed to comply with his statutory duties to file reports in respect of the companies at six-month intervals.[125]

In a later affidavit, Smith made a claim that had never been advanced. This was that, in December 2013, he had sent notice to Westpac under s 305 of the CA requiring Westpac's election, which if defaulted, its security would be deemed abandoned.[126] Annexed to that document was a letter recording discussions of a meeting where the s 305 notice had been considered. [127] The result of these documents, Smith claimed, was that Westpac's security was invalid.

The Court held that Smith had fabricated the documents. This was supported by forensic evidence that suggested the documents were created on dates that were significantly later than those suggested by Smith.[128] It was also relevant that Smith had a history of dishonesty, which included convictions for tax evasion, theft, fraud and falsifying documents.[129] Muir J noted that the work undertaken by a liquidator must result in an indisputable

121 At [57][58].
122 *McKay v Johnson* [2016] NZHC 1691.
123 At [4].
124 At [7].
125 At [13][17]. Under s 255(2)(d) of the CA the liquidator is required to "prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report … on the conduct of the liquidation during the preceding 6 months."
126 At [20].
127 At [15].
128 At [32]. This finding enabled the Court to consider the liability of Smith for conversion by not accounting to Westpac secured assets.
129 At [28].

benefit to the secured creditor.[130] However, it was clear that Smith had failed to act in this way. Smith had set up two bank accounts whereby he swept the companies' funds from the pre-liquidation accounts into the liquidations account, and the disbursed funds totalling $852,988.54 were secured to Westpac.[131] Accordingly, Smith was ordered to pay $540,402.82 plus interest.

(4) Summary of case law

The case law confirms two things. First, there are a number of incompetent and reckless individuals that are able to enter the profession with ease. Some individuals appear to take office as an IP in an attempt to help friends or relatives out of financial difficulties without realising the level of responsibility the statutory duties impose. Other self-interested individuals have charged absurd fees for the amount of work they carried out, and even fraudulently obtained monies belonging to creditors. Second, the case law confirms that these individuals are able to practice with virtually no accountability. When creditors, or others concerned, do challenge the conduct of incompetent and unscrupulous practitioners in Court, the procedural difficulties of ss 284 and 286 often allow them to circumvent punishment. Consequently, it is arguable that the jurisprudence is not truly representative of the extent of the problem. Challenging the conduct of IPs should be affordable, accessible and relatively easy. It should also preclude incompetent individuals from practising in the first place. However, the current regime does not provide this.

C. The Response Thus Far

The absence of meaningful regulation of IPs has been the subject of extensive debate among Government officials, academics and even the media in recent times.[132] There is consensus that there is a need for greater regulation of IPs. However, the Government has been extraordinarily slow to respond with a definitive recommendation to reduce the regulatory gap. The length of time is unusual as the same problem was identified in the early 2000s. The Law Commission in its 2001 Study Paper *Insolvency Law Reform Promoting Trust and Confidence*, recommended that the regulatory regime should minimise the concerns of "rogue" liquidators.[133] The issue rested for a number of years, but in 2004 the NZ Ministry of Economic Development released

130 At [57].
131 At [98].
132 Hamish Fletcher "Business Insider: Sheriff fixing to draw a bead on liquidators?" (6 August 2016) <www.nzherald.co.nz>.
133 NZLC *Insolvency Law Reform: Promoting Trust and Confidence* SP 11 (2001) at [157]. It raised doubts about the safeguards that were in place, which ensured that only properly qualified and impartial practitioners were being appointed.

a Discussion Document considering IP regulation.[134] Frustratingly, nothing eventuated from these deliberations either. The Insolvency Practitioners Bill (IPB), which was introduced in April 2010, has since put IP regulation back on the agenda. However, any legislative progression of the Bill has come to a standstill.

(1) Insolvency Practitioners Bill

The explanatory note to the IPB stipulated that at present there are a number of practitioners continuously underperforming.[135]Accordingly, the Bill sought to strengthen existing remedies to deal with rogue practitioners. It introduced "a negative licensing system that [would give the Registrar] the power to restrict or prohibit individuals from providing corporate insolvency services."[136] It also sought to introduce a number of new disqualifying requirements. For example, someone who has been convicted of a crime involving dishonesty would not be able to be appointed, nor would someone who has been expelled from the NZLS.[137] It considered that a licensing system would not be cost effective.[138]

The IPB was referred to the Commerce Select Committee in August 2010, who reported back in May 2011. The Committee recommended that the Bill be passed, albeit with a number of significant changes. Most importantly, this included the abandonment of the proposed negative licensing regime in favour of a registration system for IPs. The Committee was of the opinion that the proposed system "would not address the problems and risks associated with practitioners who are dishonest, or lack independence".[139] Furthermore, the Committee noted "it would be preferable to prevent such practitioners from undertaking insolvency duties before damage has been done."[140] As a leading NZ law firm commented, the Committee favoured an approach that was like a fence at the top of the cliff, as opposed to an ambulance at the bottom of the cliff that was suggested in the Bill.[141]

The objective of the recommended registration system was to enable the public to access information about practitioners, and also for the Registrar to

134 Ministry of Economic Development *Draft Insolvency Law Reform Bill Discussion Document* (2004).

135 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2. This is because it is possible for people who have very little knowledge of commercial law or the relevant legislation to wind up an insolvent company

136 At 2.

137 Insolvency Practitioners Bill 2010 (141-1) cl 5. It, however, should be noted that the Court will retain a power to appoint a practitioner even if they are excluded by the specific categories.

138 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2.

139 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 1.

140 At 1.

141 James McMillan "All Insolvency Practitioners to be Registered" (11 May 2011) <www.chapmantripp.com>.

collect information from IPs in order to regulate them more effectively.[142] A person would be eligible for registration if they satisfied two requirements. First, that they are a natural person over the age of 18, and second if they do not fall within one of the specific categories.[143] It was proposed that once the IP is registered, their full name, business address, membership of relevant professional organisation (if any) would be specified.[144] The Registrar would also be given the power to cancel a person's registration in certain circumstances.[145]

With respect, the proposed IPB as it stands does not address the regulation gap that exists for IPs in NZ. The Select Committee noted that a certain class of individuals need to be excluded under the registration system, yet paradoxically it recommended that the eligibility requirements for registration should be minimal.[146] The registration scheme merely provides that first, someone has bothered to apply to register and second, that they are not otherwise disqualified.[147] It is also arguable that the registration system will provide false assurance that the practitioners are in fact qualified and experienced to take appointments. This is misleading for the public and undesirable. The register is a step in the right direction when compared to the negative licencing scheme. However, the proposed system will not exclude those IPs that are incompetent and unethical from practising, at least not before the damage is done. There are no positive requirements such as academic qualifications, professional experience or a 'fit and proper' person test. Furthermore, the Bill does not adequately amend the provisions that allow the Court to hold IPs account, which are fraught with problems as illustrated by the case law summary.

(2) Working Group

In November 2015, the Minister of Commerce and Consumer Affairs, Paul Goldsmith, announced the formation of the IRWG to evaluate NZ's corporate insolvency laws, including the regulation of IPs.[148] A fundamental reason for the establishment of the group was to determine whether the

142 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 4.

143 These 'specific prohibitions' include most of the disqualifying requirements presently set out in s 280 of the CA with a number of additional factors.

144 Taylor and Slevin, above n 4, at 622.

145 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 5. These circumstances are: (1) if the person fails to comply with the requirements of the legislation on two or more occasions or the failure is considered serious or significant; (2) if their registration is based on false or misleading information; or (3) if the person no longer meets the eligibility requirement for registration.

146 At 4.

147 Brown, above n 12, at 231.

148 Paul Goldsmith, New Zealand Government "Expert Group Set Up to Review Insolvency Law" (press release, 18 November 2015) <www.beehive.govt.nz>.

IPB should be withdrawn, progressed or replaced.[149] There is no official explanation for the delay between the Select Committee Report on the IPB and the establishment of the IRWG. However, it is evident that different Ministers have prioritised IP regulation more than others.[150] The IPB was also subject to wide criticism. [151] This made research into an alternative option necessary, resulting in more delays.

In July 2016, the working group released the first of two reports, which examined and provided independent advice on the regime that regulates IPs. The report undoubtedly confirms that the status quo is unsatisfactory.[152] This includes the statutory proposals for reform in the IPB. In brief, the group identified two significant reasons why a number of IPs fall short of the standard that the public are entitled to expect. First, it is too easy for an individual to become an IP. The current disqualifying requirements do not guarantee that a person with integrity, knowledge or the appropriate experience is carrying out the roles that are often associated with immense complexity. Second, there is a lack of accountability for poor behaviour. The likelihood of a creditor, or other concerned party challenging the conduct of an IP in Court are slender. This is not only because of the costs associated with litigation, but also because of the technical hurdles in the primary legislation.

For practical reasons, the recommendations of the IRWG will be discussed in the forthcoming discussions. This paper contends that the working group makes some perfectly acceptable recommendations, though does not go far enough in other recommendations to rectify the regulatory lacuna. It is important to note that the report is not yet law, but merely suggestions at this stage.

III. Exploring the Options for Reform

A. Examination of the Regulation Regimes in other Jurisdictions

It is necessary to examine the regimes that regulate IPs in jurisdictions similar to NZ. For ease of comparison, the examination will be limited to the regulatory regime that governs liquidators. Australia provides a helpful comparison given the Trans-Tasman Mutual Recognition Act 1997.

149 Ministry of Business, Innovation and Employment "Terms of Reference Insolvency Review Working Group" (15 October 2015) at 2.

150 Simon Power was the Minister of Commerce when the Bill was introduced. He also held office in this position for the Bill's first reading, and when the Select Committee reported back. Power was succeeded by Craig Foss who introduced the Bill for a second reading in November 2013. The Bill did not progress past this stage and Foss made no significant attempts for it to be. Paul Goldsmith assumed office in October 2014 and eventually set up the working group the following year.

151 See generally INSOL New Zealand *Consultation Document: Insolvency Practitioner Regulation* (June 2013).

152 Ministry of Business Innovation and Employment, on behalf of Insolvency Working Group "Review of Corporate Insolvency Law" (Report No 1) (27 July 2016) at 3.

This Act aims to, inter alia, enable persons who have obtained the same occupation in either NZ or Australia to practice without further testing or examination.[153] At present, licensed IPs in Australia are able to practice in NZ, though the reverse situation is not permitted, given Australia's more onerous requirements for entry. The UK has analogous company laws given our colonial history and similarities in corporate insolvency procedures, making it a useful jurisdiction for comparison.[154] Ireland, on the other hand, provides a practical comparison as it has a similar population size to NZ and thus number of practitioners.[155] All jurisdictions vary in the regulatory model that they use. However, they all have similar prerequisite criteria to be appointed as a liquidator. This comprises academic qualifications, sufficient experience in conducting liquidations, and a 'fit and proper' person test.

(1) Australia

The regime in Australia is considered to be one of the most onerous in the developed world.[156] This is a reflection of the size of the industry, and a response to high levels of corporate and regulatory failure in the past.[157] The Corporations Act 2001 (Cth) (Corporations Act) is the primary statute that regulates IPs in Australia. The Australian Securities and Investments Commission (ASIC), an independent Commonwealth Government Body, is given the power of general administration of this Act.[158] ASIC must register a person wishing to be appointed as liquidator provided they satisfy a number of stringent requirements.[159] There are 703 liquidators registered in Australia today.[160] ASIC also monitors whether the liquidators are sufficiently performing their duties, and has the power to bring complaints before the Companies Auditors and Liquidators Disciplinary Board, who may refer the matter to the Administrative Appeals Tribunal or the Federal Court if the matter is serious enough.[161] The Courts also maintain a broad supervisory and investigatory function over IPs and, like in NZ, have the power to review any act, omission or function of liquidators. NZ may seek guidance from the supervision powers that ASIC has over IPs. However, it may not be

153 Trans-Tasman Mutual Recognition Act 1997, s15.
154 NZLS "Submission on the Insolvency Practitioners Bill" (11 October 2010) at 3 <https://www.parliament.nz>.
155 Brown, above n 12, at 237.
156 This also makes it one of the most successful in excluding rogue and incompetent individuals from the profession.
157 Brown, above n 12, at 150.
158 Corporations Act 2001 (Cth), s5B. ASIC was established by the Australian Securities and Investments Commission Act 2001 (Cth).
159 Anneli Loubser "An International Perspective on the Regulation of Insolvency Practitioners" (2007) 19 SA Merc LJ 123 at 131. These rules are stipulated in s 1282 of the Corporations Act 2001 (Cth).
160 Australian Securities and Investment Commission *Australian Insolvency Statistics* (October 2016).
161 Brown, above n 12, at 234.

particularly feasible to establish a similar independent body in NZ given the size of the industry.

(2) United Kingdom

Since 1986 the UK has adopted a co-regulatory model for its IPs.[162] Staunch criticism of the preceding self-regulatory model was a driving factor for reform.[163] In order to practice as a liquidator today, a person must have a licence from one of seven recognised professional bodies (RPB),[164] or directly from the Insolvency Service (IS). The IS operates on behalf of the Secretary of State for Business, Innovation and Skills (SOSBIS)[165] and has an overarching supervisory responsibility over the RPBs by conducting regular visits and practice reviews.[166] The RPB's have their own membership rules, though they all must ensure that the applicant meets a number of minimum requirements that are stipulated in the Insolvency Act 1986 (UK) and the Insolvency Practitioners Regulations 2005 (UK). Each RPB has its own procedures to deal with complaints and disciplinary action. However, in order to maintain some degree of consistency, all bodies are subject to a memorandum of understanding with the SOSBIS. The Joint Insolvency Committee also meets on a quarterly basis. This group comprises representatives from each RPB and is mainly concerned with the harmonization of professional and ethical standards amongst IPs.[167] There are approximately 1,700 IPs licenced in the UK today, the majority of which are licenced by the Institute of Chartered Accountants in England and Wales (a RPB).[168] The co-regulatory model used in the UK provides a possible option for NZ. However, caution should be given to whether there should be multiple regulatory bodies.[169] This is because the inevitable variation in style and form of regulation among the different bodies may lead to inconsistency.[170]

162 A number of reforms were introduced following the completion of the Cork Report, a report produced by an insolvency review committee led by Sir Kenneth Cork.

163 Brown, above n 12, at 236.

164 The RPBs must be recognised under the Insolvency Act 1986 (UK), s391. The seven RPB's are: The Association of Chartered Certified Accountants (ACCA); The Insolvency Practitioners Association (IPA); The Institute of Chartered Accountants in England and Wales (ICAEW); The Institute of Chartered Accountants in Ireland (ICAI); The Institute of Chartered Accountants in Scotland (ICAS); The Solicitors Regulation Authority; The Law Society of Scotland.

165 The Insolvency Service "How Insolvency Practitioners are Authorised in Great Britain" (7 April 2014) <www.gov.uk>.

166 Finch, above n 1, at 184.

167 Insolvency Service, above n 165, at 3.

168 Finch, above n 1, at 183.

169 The UK Government in a report indicated that seven regulatory bodies are far too many, and that one single-regulator should be a long-term goal. See The Insolvency Service *Consultation on Reforms to the Regulation of Insolvency Practitioners* (February 2011) <www.bis.gov.uk>.

170 Finch, above n 1, at 184.

(3) Ireland

In the past, Ireland has used a limited regulatory model which, like NZ, imposed no positive statutory requirements.[171] However, the Irish Government recently introduced a number of reforms through the Companies Act 2014 (IE), resulting in a co-regulatory model similar to the UK. Today, liquidators need to be registered with a prescribed accountancy body (PAB), the Law Society of Ireland (LSI) or a similar body recognised by the Irish Auditing and Accounting Supervisory Authority (IAASA). Approximately 230 liquidators are registered with these bodies.[172]

Chartered Accountants Ireland (CAI) is the most active PAB in Ireland and the Chartered Accountants Regulatory Board (CARB) issues insolvency practice certificates, monitors compliance, and takes disciplinary action where appropriate.[173] The IAASA directly regulates the liquidators that are not members of a PAB or the LSI, and also supervises how these bodies regulate and monitor its members.[174] Ireland's co-regulatory model has only been in place since June 2015, thus it is too early to determine the actual effect it has had in the insolvency industry. However, the reforms have no doubt been welcomed with open arms. One observation of the Irish regime is that the Government has a less active stance compared to the UK, leaving the majority of the regulation to the accounting agencies. It will be useful for the Government to have an active role, particularly in drafting the licensing criteria. Furthermore, selecting a professional body that largely focuses on insolvency, such as RITANZ, will be beneficial. This will allow those wishing to practice solely in the insolvency industry to be distinguished from the accounting profession.

B. Criteria for Admission

All of the jurisdictions discussed above have similar requirements to practice as a liquidator. These requirements reflect the position of responsibility and are designed to protect the general body of creditors, establish confidence in the insolvency system and to ensure the best possible returns.[175]

171 Christopher Symes "A Postcard from "Mourning" Ireland: The Freckled Nation of Insolvency" (2012) 12(6) Insolv LB 126 at 127. Like NZ, this meant that the regime was largely "reactive".

172 Brown, above n 12, at 237.

173 At 237.

174 Companies Act 2014 (IE), s904(1)(a).

175 Colin Anderson and Catherine Brown "Mind the Insolvency Gap: Lessons to be Learned from Audit Expectations Gap Theory" (2014) 22 Insolv LJ 178 at 180.

(1) Qualifications

The specific qualifications required to take office vary in each jurisdiction. In Australia, a person must have completed a degree, diploma or certificate from a university or institution comprising at least a three-year course of study in accountancy, as well as a two-year course of study in commercial law (including company law).[176] Unlike Australia, liquidators are not required to have an accountancy background in the UK, though in practice most will. Rather, a person must first pass the Joint Insolvency Examination Board (JIEB) exams. These exams comprise three separate exams and cover material in liquidations; administrations, company voluntary arrangements and receiverships; and personal insolvency.[177] A person will be qualified in Ireland if they fall into one of the five listed categories. [178] These categories predominantly rely on the qualification requirements to practice as a chartered accountant or lawyer.

(2) Experience

The person must have experience in winding up corporate entities in each jurisdiction. Experience simply enables people to develop particular skills to deal with issues that may arise, which often occur early in an IP appointment. NZ High Court authority has noted that, when an IP is known to be experienced, the Court is more likely to have confidence in them to abide by ethical standards of any professional organisation to which they belong, and to adhere to their fundamental obligation as officers of the High Court.[179]

In Australia, it is expected that the person has worked in corporate insolvency full time for the past five years, and three of those years at a very senior level.[180] Examples of the complexity and breadth of a person's experience, and how they resolved complex tasks must be provided. Additionally, two referees must accompany this evidence that supports the experience claimed.[181] In the

176 Corporations Act 2001 (Cth), s1282(2)(a)(ii). The person may also have in the opinion of ASIC, qualifications that are equivalent to those mentioned in subparagraph (ii).

177 Finch, above n 1, at 183.

178 Companies Act (IE), s633. This includes if the person is (1) a member of a prescribed accountancy body (PAB); (2) a member of the Law Society of Ireland (LSI); (3) a member of another professional body recognised by the Supervisory Authority; (4) a person who is qualified as a liquidator in the European Economic Area; or (5) a person who, in the opinion of the Supervising Authority, has obtained sufficient relevant experience in winding up companies.

179 *Re Resola Path Ltd*, above n 61, at [107].

180 Senior level work will typically involve preparing draft documents for creditors on behalf of the external administrator, supervising a team that reports back, and forming opinions and making professional recommendations about the financial and legal position of the corporate entities.

181 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators* (November 2016) at 1. One of the referees must be from a registered liquidator who has supervised the person over the past three years <http://asic.gov.au>.

UK, the applicant[182] must have completed either 30 cases as an office holder over the past 10 years, or acquired 7,000 hours of insolvency work experience, with 1,400 of those hours being in the last two years.[183] In regard to the latter, the person must also demonstrate that they have engaged in higher insolvency work as defined by the regulations.[184] In Ireland, the experience requirements are not specified in the legislation. Instead, the IAASA relies on the experience requirements of the co-regulatory bodies before an individual can carry out liquidations. For example, the CARB requires the individual to obtain two years of "post membership experience" in corporate insolvency work before they can be issued with an "insolvency practicing certificate".[185] If the person is not an accountant or lawyer, the IAASA will determine whether, in the opinion of that body, they have "sufficient experience".[186]

(3) 'Fit and proper' person

In each jurisdiction, the applicant must also be a "fit and proper" person. This test dates back to the 18th century in England when candidates running for town councils were elected.[187] Since then it has been used in a subjective manner to determine whether an applicant is suitable for a specific profession.[188] Generally, for someone to prove that they are a fit and proper person, they must show integrity, reliability and honesty.[189]

In Australia, the applicant must be capable of performing the tasks required. This requires an examination of the person's personal and practice capacities. ASIC must be satisfied that the person has access to, inter alia, adequate human and technological resources, and appropriate processes for ongoing supervision and training. An applicant's personal capacity will be assessed by his or her ability to perform duties and functions relevant to corporate insolvency. Furthermore, applicants must demonstrate that they are honest, have integrity, a good reputation and are personally solvent.[190] In the UK, the RPB must take into account an applicant's history of inappropriate

182 The regulations distinguish between applicants who have never been authorised to act as an IP and those who have held office previously.

183 Insolvency Practitioners Regulations 2005 (UK) reg 7.

184 Regulation 5 "Higher insolvency work experience" means engagement in work in relation to insolvency proceedings where the work involves the management or supervision of the conduct of those proceedings on behalf of the office-holder acting in relation to them.

185 CARB *Guidance on Public Practice Regulations* (5 January 2015) at 29.

186 IAASA *Consultation Document on the Authorisation Process of Certain Individuals as Liquidators* (25 June 2015) at 2. This determination is made on a case-by-case basis.

187 E P Hennock *Fit and Proper Persons: Ideal and Reality in Nineteenth-Century Urban Government* (Edward Arnold, London, 1973).

188 Magda Slabbert "The Requirement of Being 'Fit and Proper' Person for the Legal Profession" (2011) 14 Potchefstroom Elec LJ 208 at 209.

189 At 212. More aspects will come into play depending on the circumstances in which it is being applied.

190 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators*, above n 181, at 34.

behaviour and criminal offences, if any.[191] In Ireland, the IAASA again relies on the tests applied by the co-regulatory bodies. For example, the CARB conducts a review of the applicant's financial integrity, disciplinary record and financial standing.[192]

(4) Miscellaneous

A number of miscellaneous requirements should also provide guidance. Each jurisdiction has a requirement to obtain sufficient indemnity insurance.[193] The purpose of this insurance is to ensure that finances are available in the event that a registered liquidator needs to compensate creditors or other claimants for loss suffered that is caused by inadequate or improper performance of their legal obligations. The UK legislation also stipulates that if a liquidator is seeking renewal of a licence to practice, which they must do every three years, they must also demonstrate that they have completed at least 108 hours of continuing professional development (CPD) in between the applications.[194] Activities that may satisfy this requirement include attendance of courses, seminars or conferences, or producing written material for publication.[195] Lastly, in each jurisdiction the person must not be disqualified by the specified factors in the legislation. These factors are similar to those set out in s 280 of the CA.[196] Interestingly in Australia, the liquidator will not be able to take office if they are not ordinarily resident there.[197]

It is noteworthy that the Australian Government has recently introduced the Insolvency Law Reform Bill 2015, which aims to strengthen existing bankruptcy and corporate insolvency laws even further.[198] The Bill is the product of a long-winded review process that was deemed necessary following, among other factors, the actions of an Australian IP that was disqualified for

191 Insolvency Practitioners Regulations 2005 (UK) reg 6(a)(f). This includes whether the applicant has: (1) been convicted of an offence involving fraud or dishonesty; (2) contravened any insolvency legislation; (3) engaged in any deceitful, oppressive or improper conduct in the course of their profession; (4) access to adequate control systems to support professional conduct; (5) previously carried out their practice, and will continue to do so, with independence, integrity and professional skills; and (6) formerly failed to disclose any conflict of interest when acting as an IP.

192 CARB *Guidance on Public Practice Regulations*, above n 185, at 31.

193 For Australia see Corporations Act (Cth), s1284; for the UK see Insolvency Practitioners Act 1986 (UK), s390(3) and Insolvency Practitioners Regulations 2005 sch 2 cl 3; for Ireland see Companies Act 2014 (IE), s634. This insurance in Ireland also must comply with the recently introduced regulations: Companies Act 2014 (Professional Indemnity Insurance)(Liquidators) Regulations 2016.

194 Insolvency Practitioners Regulations 2005 (UK) reg 8(2)(b).

195 Regulation 8(3)(b)(i) and (ii).

196 For Australia see Corporations Act 2001 (Cth), s532; For the UK see Insolvency Practitioners Act 1986 (UK), s390(4); For Ireland see Companies Act 2014 (IE), s635.

197 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators*, above n 181, at 4. Ordinarily resident is not defined in the Act, though it is presumed that a common-sense approach will be taken.

198 These changes will mainly be made to the Corporations Act 2001 (Cth).

life in 2009 for serious misconduct.[199] A number of the reforms require brief comment. First, liquidators will now be required to renew their registration every three years in order to promote professionalism and competence in practitioners.[200] Second, creditors will benefit from increased rights, including the ability to appoint an independent specialist to review the performance of an incumbent IP.[201] Third, the Bill introduces statutory default remuneration amounts for liquidators. And fourth, ASIC will be granted additional surveillance powers to review the conduct of IPs.[202] The Bill received royal assent on 29 February 2016 and is likely to come into effect in early 2017.

C. Suggested Reforms

The above comparison confirms that IPs in NZ are, by international standards, under-regulated.[203] Furthermore, the proposals made in the IPB will not move NZ any closer to the systems of insolvency regulation common overseas.[204] It is, therefore, fitting to investigate an option that will place NZ on more of an equal footing with other developed nations like Australia, the UK and Ireland. It is first necessary to explore possible regulatory models, and then the criteria for admission.

(1) Self-Regulation

Self-regulation is an option that relies on industry bodies to encourage and promote its own ethical and professional standards. It is a system of private regulation, whereby the Government has no active stance.[205] In January 2016, RITANZ, in collaboration with CAANZ, developed a framework of self-regulation for IPs.[206] Those individuals that meet the criteria specified in the framework will be able to hold themselves out as an "Accredited Insolvency Practitioner" (AIP).[207] Once a person is granted with accredited status, the person's name, business details and the date at which they became accredited are added to the CAANZ public register. As at August 2016, there are 94 AIP's registered under the scheme.[208]

199 *Australian Securities and Investments Commission v Stuart Karim Ariff* [2009] NSWSC 829.
200 Insolvency Law Reform Bill 2015 cl 20-1.
201 At cl 80-50.
202 Paula Pyburne *Insolvency Law Reform Bill 2015* (Bill Digest No. 82, 22 February 2016) <http://parlinfo.aph.gov.au>.
203 INSOL New Zealand, above n 151, at 5.
204 At 5.
205 Eva Hüpkes "Regulation, Self-regulation or Co-regulation?" (2009) 5 JBL 427 at 427.
206 RITANZ is an organization affiliated with the International Association of Restructuring, Insolvency and Bankruptcy Professionals, also known as INSOL.
207 This criterion will be discussed in Part D of this section.
208 Chartered Accountants Australia and New Zealand "AIP Register" (25 August 2016) <http://www.nzica.com>. The practitioners' status becomes subject to annual review.

In regard to compliance, CAANZ continue to have a supervisory role over its members. RITANZ members who are not affiliates of that body will also become subject to the New Zealand Institute of Chartered Accountants' (NZICA) rules, which regulates NZ residents of CAANZ.[209] This includes the Service Engagement Standard of Insolvency, SES 1, which sets a code of ethics containing fundamental principles that should guide how IPs conduct their professional obligations.[210] The Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Council, which were established by the New Zealand Institute of Chartered Accountants Act 1996, operate to deal with complaints and disciplinary action of AIPs.

The newly introduced self-regulatory framework is certainly welcomed. The public can be assured that those individuals who have accredited status are qualified, experienced and fit to carry out the insolvency appointments, something that the current regime or the proposed IPB does not guarantee. The accreditation criterion also aligns NZ with other equivalent overseas models. However, and most importantly, the accreditation process is not mandatory. Equivocally, it is not even a requirement for members of the CAANZ to be accredited to accept regulated insolvency appointments.[211] This model is, therefore, not likely to address the problem that is most pertinent: rogue and incompetent practitioners. As the IRWG notes, under this option the status quo prevails, which is not a viable long-term option.[212] Therefore, although this is a perfectly acceptable stepping stone, it is not the final option for reform that should be accepted.

(2) Government Licensing

Another possible option of reform would be to establish an independent Government body that would directly regulate IPs. This would require inaugurating a licencing regime, compliance body and disciplinary board specifically for IPs. This is essentially the option that has been implemented in Australia.

This option is not particularly appealing for NZ. Although it would have the positive consequence of limiting, or even precluding, incompetent practitioners from acting, it does have a number of drawbacks. The first is that it is simply not cost-effective. Although the exact number of IPs in NZ has not been established, it is estimated that there are around 100 that regularly take appointments. This number is markedly less than the number

209 New Zealand Institute of Chartered Accountants Rules 2015.

210 Service Engagement Standard 1: Performance of Insolvency Engagements (New Zealand Institute of Chartered Accountants, February 2003) para 8. The principles are integrity, objectivity and independence, competence, quality performance and professional behaviour.

211 However, from 30 November 2015, RITANZ requires that its members are accredited before they accept insolvency engagements.

212 Ministry of Business Innovation and Employment, above n 152, at 25.

of acting IPs in Australia where the regime is successful.[213] The Government considers that the insolvency profession in NZ is merely not large enough to fund an independent body to regulate it. It estimates that it would cost several thousand dollars per person each year to operate. These costs would eventually be borne by creditors, which is not particularly attractive. [214]

The second reason why this option is not desirable, which was highlighted by the IRWG, is that an independent Government body would not have sufficient market knowledge that a professional body may have.[215] Further, it has been contended that this option may exclude practitioners' involvement from their own regulation. [216] There is much to commend about involving those who act on the frontline, as evinced by lawyers with the NZLS.

(3) Co-Regulation

Another option of reform for NZ would be to adopt a co-regulatory model, similar to the one that operates in the UK and Ireland. This is the option that that this paper endorses, and also the option that was recommended by the IRWG.[217] Under this regime, an existing professional body (or bodies) would be given overall regulatory power, while a Government entity retains a supervisory role over these bodies. These parties should be partners that work together to produce a model that is efficient, effective and fair.[218] The professional body would be required to determine applications and issue licences in accordance with the standards set by the Government entity, monitor compliance of ethical and professional standards, conduct practice reviews, investigate complaints and, where appropriate, take disciplinary action. This option is far more cost-effective than Government licensing as it provides a mechanism of regulation that leverages off the architecture that is already in place by professional bodies in the insolvency industry.

Serious consideration will need to be given to who the appropriate professional body will be. The IRWG suggested making both CAANZ and RITANZ accredited professional bodies.[219] However, this paper contends that having more than one body is unfavourable. Despite having a monitoring Government entity, there is a possibility that inconsistency will develop between professional bodies with regard to compliance and disciplinary standards. This is a problem that exists in the UK.[220] Having

213 There are over 700 liquidators alone. This does not include administrators and receivers.
214 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2.
215 Ministry of Business Innovation and Employment, above n 152, at 27.
216 James McMillan "Submission to the Ministry of Business, Innovation and Employment by Kensington Swan on Report No. 1 of the Insolvency Working Group relating to insolvency practitioner regulation and voluntary liquidations" (7 October 2016) <www.kensingtonswan.com>.
217 Ministry of Business Innovation and Employment, above n 152, at 23.
218 Hüpkes, above n 205, at 427.
219 Ministry of Business Innovation and Employment, above n 152, at 30.
220 Loubser, above n 159, at 130.

one body is more likely to lead to transparency in the regulation of IPs generally, and remove any confusion the public may face when they wish to make a complaint about an IP.[221] Lastly, given the small size of the insolvency industry in NZ, it is a number that can easily be accommodated under the auspices of a single body.[222] Arguably, the more favourable candidate for this position is RITANZ. This is because its focus is confined to insolvency and turnaround services, as opposed to the accounting profession generally, like CAANZ. Similarly, this body already carries out what the IRWG identifies as frontline regulation.[223]

Consideration will also need to be given to who the supervising Government entity will be. The IRWG made no formal recommendation but suggested either the Financial Markets Authority (FMA) or the Registrar of Companies. The Registrar has more industry knowledge and existing responsibilities relating to insolvency under the CA, including its general power of inspection under s 365.[224] The FMA, on the other hand, already has occupational regulation-related responsibilities, such as oversight responsibility under the Auditor Regulation Act 2011. Under this Act, the FMA prescribes the licensing and registration criteria of auditors and monitors the regulatory systems of accredited bodies. [225] These are functions that would be easily transferrable to the insolvency sector. This paper contends that the more appropriate body of the two is the FMA. It is already very familiar with co-regulation principles and practices. Furthermore, it will develop industry knowledge by working alongside the chosen professional body.

D. Suggested Licensing Criteria for an IP in New Zealand

The IRWG simply suggested that an IP would need to be a fit and proper person, and be "sufficiently skilled".[226] It did not discuss any possible criteria in detail, but suggested that it could build upon the CAANZ/RITANZ criteria. The criteria for accreditation reflect many of the requirements operative in Australia, the UK and Ireland.

The fact that IPs are presently able to practice as an IP without any qualifications whatsoever seems absurd, particularly as they are able to charge themselves out at $350 plus an hour.[227] In order to be qualified under the CAANZ/RITANZ criteria, the applicant must be a member of either of these professional bodies. If the member is not a practising chartered accountant, it relies on the existing membership requirements of RITANZ, which restricts

221 At 130.
222 Chapman Tripp "Chapman Tripp submission to the Insolvency Working Group" (7 October 2016) <www.chapmantripp.com>.
223 Ministry of Business Innovation and Employment, above n 152, at 24.
224 At 30.
225 Auditor Regulation Act 2011, s5.
226 Ministry of Business Innovation and Employment, above n 152, at 24.
227 *The Healy Holmberg Trading Partnership*, above n 54, .

entry to individuals who practice in the insolvency field, such as lawyers. This requirement is not likely to be burdensome because the majority of IPs in NZ come from the accounting or legal profession with appropriate qualifications already. This is the approach adopted in Ireland. However, there a liquidator will also be qualified if they are a member of a professional body recognised by the supervising authority. This option should be adopted in NZ to extend to practitioners that are qualified under sufficient authorities abroad, such as ASIC. If the foreign applicant is not a member of an Australian authority, it will be appropriate for them to sit an exam similar to the UK JIEB exams to determine the applicant's understanding of corporate insolvency laws in NZ.[228]

The IP should be able to demonstrate that they have practical experience in corporate insolvency work. The current CAANZ/RITANZ criteria suggests that the applicant must have 1,000 hours of practical experience in insolvency work at a senior level in the preceding three years (2,000 if they are not a chartered accountant). In order to ensure that there is consistency, it will be preferable to only have one standard, and not separate hour requirements depending on the person's membership. A requirement of 2,000 hours is more in line with international standards. It should also be possible for a person to be licensed who has not obtained the appropriate hours, but can show that they are otherwise competent, also known as a grandfather clause.

A "fit and proper" person test should also be employed. It is helpful to determine the way in which the test has been applied in the legal profession in NZ to understand how it works in practice. Under s 55 of the Lawyers and Conveyances Act 2006 (LCA), for a person to be admitted as a solicitor and barrister of the High Court, the matters taken into account include whether the person, inter alia, is of good character; has been convicted of any offence; or has been subject to any mental or physical health condition.[229] The judiciary suggests that the test requires that the person must possess "such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with [a client's] business and private affairs."[230]The person seeking admission must have probity and trustworthiness,[231] and recognise that they are in a delicate position that "carries exceptional privileges and exceptional obligations"[232] The position of an IP has considerable similarities to that of a lawyer. Practitioners are entrusted with significant monies and assets, which will often influence the livelihoods of creditors. They are the person to whom creditors turn to when they are in a difficult and often emotional situation, much like a lawyer. This

228 Australia should be excluded given the objectives of the Trans-Tasman Mutual Recognition Act 1997.

229 Lawyers and Conveyances Act 2006, s55(a), (b), (c) and (l).

230 *Re Lundon* [1926] NZLR 656 at 658.

231 *Re Owen* [2005] 2 NZLR 536.

232 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.

gives rise to a general duty of care.[233] Therefore, it is arguable that a similar sort of fitness for purpose test should be adopted in the insolvency profession.

The existing fitness for purpose criteria under the CAANZ/RITANZ regime requires the body to take into account 11 factors. These factors are mainly focused on whether the applicant has been convicted of any crimes that involve perverting the course of justice, such as those relating to bribery, corruption, forgery or fraud. It also includes if they have been dismissed from any position of management, trust, or fiduciary obligation. [234] The factors mainly focus on improper behaviour that has been detected. In other words, they are restricted to negative considerations and do not assess the applicant's eligibility entirely. Therefore, this paper contends that it is beneficial to add general positive requirements such as if the person is of good character, like that used in the LCA. Or a requirement to demonstrate honesty, integrity, and good reputation as used under the Australian regime. These positive factors are more likely to ensure that the appropriate person takes office.

Presently an IP may take regular appointments despite not living in the country or having a NZ business address.[235] Arguably the status quo enables practitioners to act without accountability, and does not allow them to sufficiently comply with their duties. For example, their physical absence may compromise their duty to have regard to the views of creditors and shareholders, or to report any suspected offences.[236] Where non-resident IPs have been appointed, they have often had to resign once it became evident that it was unfeasible to conduct their obligations from abroad.[237] This does not ensure that that the company is wound up reasonably or efficiently.[238] The requirement to be a resident is articulated in the Australian regime in order to avoid these problems.[239] Accordingly, this paper contends that NZ adopt the same approach.

The list of disqualifying requirements for liquidators is already convoluted and does not need additional factors added to it. [240] In fact, the IRWG fittingly recommended that some of the factors be removed. This includes the "professional services relationship" provision and the "continuing business relationship'" provision.[241] These provisions unnecessarily exclude the more experienced and capable IPs who are actually most suitable for

233 *Sleepyhead Manufacturing Co Ltd v Dunphy* (2006) 9 NZCLC 264,000 (HC) at [26].

234 Chartered Accountants Australia and New Zealand "Accreditation Framework" (2016) <www.nzica.com>.

235 Lynne Taylor "Further Changes Mooted to the Regulation of Insolvency Practitioners in New Zealand" (2011) 19 Insolv LJ 209 at 216.

236 Companies Act 1993, s258 and 258A.

237 See *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation)*, above n 91.

238 Companies Act 1993, s253.

239 Corporations Act 2001 (Cth), s1282(2)(5).

240 Companies Act 1993, s280. See also ss 239F of the CA for the list that disqualifies administrators and s 5 of the RA for the list that disqualifies receivers.

241 Ministry of Business Innovation and Employment, above n 152, at 2021. These factors are found in s 280(1)(ca) and (cb) of the Companies Act 1993.

appointment.[242] For example, where a professional has been brought in at the end of a company's trading life, they will later be excluded from acting as the liquidator. Paradoxically, this is the person who is likely to have the most knowledge about the company, and who will be most able to perform the liquidation efficiently. Similarly, where the IP is more experienced, it is more likely that they will have a relationship with the trading banks, namely the secured creditors, thus disqualifying them from appointment. This situation is undesirable.

A number of other factors listed in s 280 also need to be removed if the proposed regime is adopted. This is because many of the factors already listed would be used to determine whether, in the opinion of the professional body, the person is a fit and proper person for appointment. Specifically, this paper contends that the criteria that disqualify persons who have been prohibited from managing companies,[243] limited partnerships,[244] incorporated or unincorporated corporate bodies,[245] or for being unfit to act as an administrator[246] be removed from s 280(1). It is also unnecessary to specify that persons will be disqualified if they have been prohibited from acting as a liquidator or receiver previously.[247] The existing disqualifying requirements will thus be restricted to age,[248] conflicts of interest,[249] undischarged bankrupts,[250] and mental incapacity and incompetence in managing properties.[251] This position is more harmonised with international standards.

The CAANZ/RITANZ regime contains a number of factors that this paper contends are perfectly acceptable and should be added to the criteria for appointment. This includes the requirement to engage in CPD, have adequate professional indemnity insurance cover, and to pass all practice reviews conducted by the professional body.[252]

242 At 20.

243 Companies Act 1993, s280(1)(k) and (l). A person may be prohibited by way of an order under ss 382, 283, 385 or 385AA of the Companies Act 1993 or by way of an order under s 299(1) of the Insolvency Act 2006 for reason of bankruptcy.

244 Companies Act 1993, s280(1)(kaa). See ss 103A, 103B, 103D or 103E of the Limited Partnership Act 2008.

245 Companies Act 1993, s280(1)(ka). See the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.

246 Companies Act 1993, s280(1)(m). See s 239ADV of the Companies Act 1993.

247 Companies Act 1993, s280(1)(g) and (h). See 286(5) of the Companies Act 1993 and s 37(5) of the Receivership Act 1993.

248 Companies Act 1993, s280(1)(a).

249 Section 280(b), which prohibits a creditor of the company, and (c), which prohibits a person who has within the last two years been a shareholder, director, auditor or receiver of the company in liquidation or a related company.

250 Section 280(1)(d).

251 Section 280(1)(e) and (f).

252 Chartered Accountants Australia and New Zealand, above n 234. Further discussion on these factors is not necessary.

The above criteria, if adopted, will bring NZ into line with international standards of IP regulation. The regulation requirements will also enable someone who is registered as an IP in NZ to practice in Australia.[253] Most importantly, the collective benefit for creditors the corporate insolvency procedures are designed to ensure is more likely to be attained with these conditions. It guarantees that all persons carrying out these roles are qualified, experienced and fit to be appointed to this position of immense trust and responsibility.

E Recommendations

The current statutory regime and case law summary confirms that there is a need for greater regulation of IPs in NZ. This paper, therefore, recommends that NZ:

1) Does not proceed with the current IPB. It does not ensure that IPs are sufficiently qualified, experience or competent for appointment.
2) Adopts a co-regulatory model for IPs. RITANZ is the best candidate to carry out the frontline regulation given its confined focus in insolvency services, and the FMA is the most appropriate supervising body. This is because it already has supervisory functions over other registered professionals (such as auditors) that can be extended to the insolvency profession without difficulty.
3) Introduces a licensing scheme that ensures the applicant:
    1. is appropriately qualified;
    2. has sufficient experience in the winding up of companies;
    3. is a fit and proper person for appointment;
    4. is ordinarily resident in NZ;
    5. has sufficient indemnity insurance;
    6. is not disqualified by the factors in the primary legislation;
    7. engages in continuing professional development; and
    8. passes all practice reviews.
4) Amends the technical difficulties in the legislation that enable interested parties to hold IPs account. Priority should be given to ss 284 and 286 of the CA.

IV. Conclusion

IPs play a fundamental role in the corporate insolvency procedure. They are placed in a position of trust and responsibility to ensure that the interests of creditors and other concerned parties are protected. However, the present

253 See Trans-Tasman Mutual Recognition Act 1997, s15.

statutory regime does not adequately ensure that the appropriate individuals are appointed to office. The Government has recognised the current lacuna in the regime, but has been unusually slow to implement any significant changes to address the problem. The IRWG has recently made a number of useful, although incomplete, recommendations for change. Although, it is unclear whether and, if so, when these will be acted upon.[254] In the meantime, incompetent and/or dishonest IPs may continue to take advantage of the weak insolvency regulation.

It is evident that greater regulation of IPs is needed, and similar jurisdictions including Australia, the UK and Ireland provide helpful guidance for the form it should take. This paper has argued that NZ adopts a co-regulatory model whereby RITANZ is given the overall power to regulate entry into the profession, compliance and disciplinary action. The FMA should be given a supervisory role over this body and the power to set the licensing criteria. In order to bring NZ into line with international standards, this criterion should include minimum academic qualifications related to accounting and/or law, professional experience, and a fit and proper person test. Additional requirements such as indemnity insurance, being resident in NZ and engaging in CPD will also be beneficial.

Consideration also needs to be given to the provisions in the CA and the RA that allow the Court to review the conduct of an IP. An analysis of the amendment options is beyond the scope of this article. However, removing the procedural difficulties in ss 284 and 286 of the CA should be given priority.

The strengthening of the regulation of IPs will benefit company law at large. This is because the performance of IPs is undoubtedly intertwined with the behaviour of shareholders, directors and creditors. Moreover, the proposed changes will facilitate international recognition and assist IPs that are licensed in NZ to practice abroad if they wish to do so.[255] The recommendations made, therefore, demand consideration more than ever.

254 Recent developments are promising. However, at the time of writing this paper, the IPB is not formally before Parliament for consideration. See Fiona Rotherham "Insolvency Practitioners to be Licensed under New Regime to Stop Poor Behavior, Goldsmith Says" (30 November 2016) <www.nbr.co.nz>.

255 INSOL New Zealand, above n 151, at 5.