MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Kris Faafoi	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Proposed Insolvency Practitioners Regulations: Policy Approval	**Date to be published**	15 April 2020

List of documents that have been proactively released		
Date	**Title**	**Author**
12 February 2020	Proposed Insolvency Practitioners Regulations: Policy Approval	Office of the Minister of Commerce and Consumer Affairs
12 February 2020	Appendix 1 – Regulatory Impact Assessment: Insolvency Practitioners Regulations	MBIE
12 February 2020	Appendix 2 – Regulatory Impact Assessment: Insolvency Practitioners Reporting Requirements	MBIE
12 February 2020	Appendix 3 – Cost Recovery Impact Statement: Regulations to Introduce Insolvency Practitioners Scheme Fees and Levy	MBIE
12 February 2020	Appendix 4 – Tables Relating to the Proposed Fees And Levy	Office of the Minister of Commerce and Consumer Affairs
12 February 2020	Appendix 5 – Memorandum Account Impact for Proposed Costs, Fees and Levy	Office of the Minister of Commerce and Consumer Affairs
12 February 2020	DEV-20-MIN-0002	Cabinet Office – Cabinet Economic Development Committee

Information redacted **NO**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Impact Summary: Insolvency Practitioners reporting requirements

Section 1: General information

Purpose
The Ministry of Business, Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. The purpose of this document is to inform final decisions to be taken by Cabinet regarding proposals to change the content of the reports prepared by insolvency practitioners in relation to individual liquidations, receiverships and voluntary administrations. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by Cabinet.

Key Limitations or Constraints on Analysis
Insolvency reports are prepared by insolvency practitioners. They comprise an initial report soon after the practitioner is appointed to administer a company liquidation/receivership, subsequent 6 monthly reports during the course of the insolvency process and a final report after the insolvency process has been concluded. Some of the information provide in the reports will also be aggregated and provided to the Registrar of Companies (the **Registrar**) for use for statistical and monitoring purposes. This paper deals with MBIE's recommendations on the content of these reports. **Status quo** New Cabinet decisions are being sought on the content of these reports. This follows the enactment of the Insolvency Practitioners Regulation Act 2019 (the **Act**) and the Insolvency Practitioners Regulation (Amendments) Act 2019 (the **Amendment Act**) earlier this year. In the lead up to the enactment of those two Acts, Cabinet made various decisions on the content of these reports. This paper treats the content of these reports, which Cabinet has previously approved, as the status quo. **Trade offs** Insolvency practitioners' costs in preparing the various reports will be met from the assets of the business. These costs will ultimately end up being passed on to the last parties entitled to be paid in a liquidation (usually unsecured creditors and shareholders) in the form of lower returns. This creates an explicit trade-off between: • the benefit of reporting (ie providing creditors with the information they need to assess the likelihood that they will be repaid the extent of any repayment they will

receive and detecting inappropriate conduct by insolvency practitioners)

- the returns ultimately received by creditors and shareholders at the end of a company liquidation.

Our proposals are intended to enhance the usefulness of reports to creditors by:

- giving priority to the disclosure of the information which is most useful to creditors; and

- removing onerous and expensive reporting requirements which are unlikely to be of use to creditors.

Subjective judgement on the appropriate level of detail to include in reports
The content chosen for inclusion in the reports insolvency practitioners will be required to prepare has been arrived at by officials using the trade-offs discussed above.

This has been based on a subjective analysis of the merits of reporting various types of information. There is no data on how useful creditors find specific information nor on the likely cost for practitioners to collect and report this information. We have however consulted with stakeholders on these matters and have taken their views into account in developing our regulatory proposals.

Responsible Manager (signature and date):

Susan Hall

Manager, Corporate Governance and Intellectual Property Policy

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Building, Resources and Markets Group

Ministry of Business, Innovation & Employment

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Background

In late 2015, the Government established the Insolvency Working Group (**IWG**) to consider various issues relating to corporate insolvency law [EGI-15-MIN-0096]. The IWG comprised an independent chair, two insolvency practitioners, two insolvency law specialists, a credit industry specialist and a representative of the Official Assignee. The IWG produced two reports, both of which were released for public consultation.

Report No. 1, published in July 2016, covered the regulation of insolvency practitioners and voluntary liquidations. All but one of the recommendations in Report No. 1 has been given effect to through the Act and the Amendment Act.

The Act and the Amendment Act received Royal Assent on 17 June 2019 and will come into force in June 2020.

Consistent with the recommendations of the IWG, the Act puts in place a co-regulatory licensing regime, under which:

- accredited industry bodies will be responsible for carrying out the frontline regulation of insolvency practitioners, including regulating entry and ongoing competence (via licensing), and investigating complaints and taking disciplinary action where appropriate

- the Registrar will be responsible for oversight of the accredited bodies. Oversight includes accreditation of bodies, ongoing monitoring and reporting, and corrective action to ensure the quality and effectiveness of the accredited bodies' regulatory systems and processes. The Registrar will also maintain a register of insolvency practitioners licensed by accredited industry bodies, which will be publicly searchable.

The main policy goals reflected in the co-regulatory licensing regime are to:

- introduce a robust regime that will include rigorous competence, honesty and integrity criteria in relation to obtaining and retaining a licence

- provide effective ways for holding practitioners to account

- raise the standards of insolvency practitioners over time by requiring such things as continuing professional development.

This regime is intended to address problems associated with a small number of insolvency practitioners that do not meet the standards of competence or professionalism expected of them. This includes practitioners:

- who have been convicted of dishonesty offences

- who charge excessive fees or carry out unnecessary work in order to generate extra fees

- who act predominantly or solely in the interests of those who appoint them (ie the directors or shareholders of the debtor company), often at the expense of the creditors of the company whose interests practitioners they are appointed to look after

- who lack the skills, knowledge and experience to make high quality decisions.

We understand that problem practitioners are most often appointed as liquidators of small/medium businesses that are insolvent. In the case of larger insolvency engagements parties are sufficiently incentivised and resourced to take action to remove any disreputable insolvency practitioners.

The Amendment Act makes a number of changes to the *Companies Act 1993* and the *Receiverships Act 1993* to reflect the requirements in the Act. These amendments provide, among other things, that the content of certain reports provided by insolvency practitioners during the course of a liquidation or receivership need to be prescribed in regulations. The relevant regulations will need to be made before these amendments come into force.

These reports are intended to:

- provide creditors with the information they need to assess the likelihood that they will be repaid and the extent of any payment they may receive

- assist creditors, professional bodies and the Registrar of Companies to detect inappropriate conduct, such as fraud, by insolvency practitioners.

The detailed content of many of the reports was originally included in Supplementary Order Paper Number 45 (**SOP**) to the Insolvency Practitioners Bill. Parliament referred the SOP to the Economic Development, Science and Innovation Committee to consider.

The reporting requirements in the SOP relevantly:

- required insolvency practitioners to report information on each payment made and received (**transaction**) in the course of a liquidation or receivership

- made no distinction between what needed to be reported for solvent liquidations (where all creditors will be paid in full within 12 months of the start of the liquidation) and insolvent liquidations.

There is an existing reporting regime currently contained within the Companies Act and the Receiverships Act. The reporting requirements in the SOP substantially expanded on the detail of these requirements. This was intended to primarily address issues with inconsistency between the reports provided by different practitioners and to facilitate the detection of inappropriate conduct by insolvency practitioners.

A number of submitters on the SOP raised issues with these reporting requirements. Many of those submissions related to the requirement to detail each transaction. This was considered to be overly burdensome and of limited use.

Submitters also stated that there should be reduced reporting requirements for solvent liquidations. It was stated that many of these businesses are not subject of detailed reporting of any sort (eg annual reporting or financial reporting). Requiring a liquidator to report detailed information about these businesses could unjustifiably disclose commercially confidential information.

The Departmental Report for the Committee on the SOP stated that:

> *We agree with all of the main points made by submitters. We agree, in particular that:*
>
> *….*
>
> b. *Many of the proposed disclosure and reporting requirements are excessive, including some that are grossly excessive.*
>
> c. *A tiered approach should be taken, with reduced disclosure and reporting requirements in relation to solvent liquidations.*

In response to submissions on the SOP, the Committee ultimately determined that the submitters concerns around the reporting requirements would be best addressed during the development of the regulations.

Status quo

As noted above, we are treating the reporting requirements in the SOP as the status quo ie:

- requiring insolvency practitioners to report information on each payment made and received (transaction) in the course of a liquidation or receivership
- making no distinction between solvent liquidations (where all creditors will be paid in full and insolvent liquidations in setting reporting requirements.

Our rationale for this is that Cabinet has previously approved these reporting requirements as part of the development of the SOP.

Problems with status quo

Information about transactions too detailed

- The information which is most useful to creditors in assessing the likelihood that they will be repaid is the overall cash flow position of the business. Requiring detailed reporting of each transaction in the course of a liquidation or receivership:
  - Risks hiding this information behind overly detailed reporting.
  - Imposes costs on practitioners. In most cases this detailed information will be of very limited benefit to creditors, but they will ultimately be required to meet the costs of providing it.

Relevant information for creditors in a "solvent" liquidation

- In an *insolvent* liquidation, where all creditors will not be paid in full or will not be paid for some time, information about a business' assets and debts and transactions by a

liquidator or receiver will be of assistance to creditors in assessing the likelihood that they will be repaid.

- This information can be commercially confidential. It can be used to determine the value of a business, and many businesses will never have had to publically disclose this information.

- Overriding the confidentiality of this information can be justified in an insolvent liquidation in order to protect the interests of creditors.

- The rationale for requiring the disclosure of this information is not strong in the context of a solvent liquidation where all creditors will be repaid in full.

Note: There is a risk that:

- A company which was considered to be solvent at the time it was placed into liquidation will be discovered to be insolvent after a liquidator is appointed.

- A company will be improperly declared to be solvent in order to avoid reporting information to creditors.

These risks are addressed through amendments to the Companies Act which provide that:

- Only a licensed insolvency practitioner may act as the liquidator of an insolvent company

- Where the liquidator of a solvent company (who is not licensed insolvency practitioner) discovers that the company is in fact insolvent, they must resign if they are not licensed.

- It is an offence for directors to declare that a company will be able to pay its debts in full without having reasonable grounds for doing so.

Evidence supporting the existence of the problem

The existence of these problems relies on a subjective assessment of the trade-offs between the benefits of additional reporting and the costs of preparing those reports. There is no data on:

- how useful such reports would be for creditors, accredited bodies or the Registrar

- the likely cost for practitioners to collect and report this information, which will be different for each liquidation and depend on the number, variety and types of assets each company owns at liquidation.

As no bodies have yet been accredited for the purposes of the insolvency practitioners regime, we have not been able to seek their views on the usefulness of the information and the level of detail that ideally would usefuly be included in reports.

Why these problems need to be addressed now

Regulations are being developed that will set insolvency practitioners reporting obligations. These regulations will need to be promulgated ahead of the coming into force of the Act and the Amendment Act in June 2020.

2.2 Who is affected and how?

Whose behaviour do we seek to change

These changes relate to the information insolvency practitioners must report on. The content of the reports they are required to prepare will be set by these regulations.

Who wants this to happen? Who does not?

The problems with the status quo were raised by insolvency practitioners during Select Committee consideration of the SOP. Although we have sought information from other stakeholders on these problems and our proposed solutions, we have received limited feedback and no quantitative data to assist our analysis.

The majority of the changes originally approved by Cabinet, to the suite of reports provided by insolvency practitioners, were recommended in IWG Report No 3.

2.3 Are there any constraints on the scope for decision making?

Scope

We are not reconsidering the content of the entire suite of reports to be provided by insolvency practitioners. No material problems have been identified with that content – other than the problems canvassed in this paper.

Connections

As indicated above, regulations setting insolvency practitioners reporting obligations need to be set ahead of the coming into force of the Act and the Amendment Act in June 2020.

Broader regulations covering the accreditation of professional bodies and setting licence conditions are also being developed to facilitate the coming into force of the Act and Amendment Act. Work on those regulations will be advanced alongside the regulations setting insolvency practitioners reporting obligations.

Section 3: Options identification

3.1 What options have been considered?

We have considered two options for each of the problems identified, the status quo and our proposed solution. In each case we have assessed our preferred options against the status quo using the following criteria:

- creditors are provided with the information they need to assess the likelihood that they will be repaid and the extent of that repayment
- information provided assists in detecting inappropriate conduct by insolvency practitioners
- cost of reporting the information are minimised
- confidential information should only be required to be disclosed where there are strong grounds for overriding the confidentiality of that information

Problem 1 - Information about transactions too detailed.

Option 1 (status quo):

Require that reports by insolvency practitioners should be required to include information on each transaction made during an insolvency – as part of the overall package of information to be included in reports by insolvency practitioners.

Option 2 (preferred option):

Require that reports by insolvency practitioners would only be required to include summary information about the transaction during a liquidation or receivership – as part of the overall package of information to be included in reports by insolvency practitioners.

Problem 2 - disclosure of information in a "solvent" liquidation not justified

Option 1 (status quo):

Require that information about:

- a business' assets and debts, and
- the amounts received and paid by the liquidator

should be provided to creditors in all cases, making no distinction between solvent (where all creditors will be repaid in full within 12 months) and insolvent liquidations. – as part of the overall package of information to be included in reports by insolvency practitioners.

Option 2 (preferred option):

Provide that information about:

- a business' assets and debts, and
- the amounts received and paid by the liquidator

need not be provided to creditors in the case of solvent liquidations – as part of the overall package of information to be included in reports by insolvency practitioners. Where a solvent liquidation becomes insolvent (eg if a liquidator forms the view that there are insufficient assets to repay all creditors) then the liquidator must disclose this information in the next report provided to creditors.

3.2 Which of these options is the proposed approach?

Problem 1 - Information about transactions too detailed

Assessment against criteria

Criteria	Option 1 - Status quo	Option 2 - Preferred option
Creditors are provided with the information they need to assess the likelihood that they will be repaid	× Will be harder for creditors to find the information which will be of most use to them.	✓ Focuses reporting on the information which is most useful to creditors to assess the likelihood that they will be repaid.
Information provided assists in detecting inappropriate conduct by insolvency practitioners.	✓ Possibly easier to detect inappropriate conduct by insolvency practitioners but may be of limited benefit	× Possibly harder to detect inappropriate conduct by insolvency practitioners
Cost of reporting the information are minimised	× Costly to provide reports detailing every transaction.	✓ Costs to report information reduced
Confidential information should only be required to be disclosed where there are strong grounds for overriding the confidentiality of that information	- Neutral. Withholding this information on the grounds of confidentiality discussed in problem 2.	- Neutral. Withholding this information on the grounds of confidentiality discussed in problem 2.

Discussion

We consider that reports by insolvency practitioners should only be required to include summary information about the amounts paid and received by an insolvent business after it was placed into liquidation or receivership. The status quo requires disclosure of this information in all cases.

In our view this option focuses reporting on the information which is most useful to creditors to assess the likelihood that they will be repaid.

While requiring practitioners to report detailed payment information may result in some inappropriate conduct being detected, we consider that it may be of limited benefit in comparison to the costs it will impose. We have reached this view on the basis that:

- The introduction of a licensing regime should result in most bad actors being excluded from practice – so the overall instance of inappropriate conduct by insolvency practitioners should reduce.

- The most common inappropriate conduct by insolvency practitioners does not relate to payments, but rather to not pursuing claims against certain parties. This would not be revealed by requiring disclosure of payment information.

- Where inappropriate conduct by insolvency practitioners relates to payments then insolvency practitioners have an incentive to falsify the reporting of that information – which will reduce the value of those reports in detecting inappropriate conduct.

Problem 2 - Relevant information for creditors in a "solvent" liquidation

Assessment against criteria

Criteria	Option 1 - Status quo	Option 2 - Preferred option
Creditors are provided with the information they need to assess the likelihood that they will be repaid	- Neutral. In a solvent liquidation all creditors will be paid in full.	- Neutral. In a solvent liquidation all creditors will be paid in full.
Information provided assists in detecting inappropriate conduct by insolvency practitioners.	✓ Possibly easier to detect inappropriate conduct by insolvency practitioners but may be of limited benefit	× Possibly harder to detect inappropriate conduct by insolvency practitioners
Cost of reporting the information are minimised	× Costly to provide reports detailing every transaction.	✓ Costs to report information reduced
Confidential information should only be required to be disclosed where there are strong grounds for overriding the confidentiality of that information	× Will result in disclosure of confidential information where there are not strong grounds for requiring its disclosure.	✓ Will result in confidential information being withheld where there are not strong grounds for requiring its disclosure.

Discussion

We consider that reports to creditors about liquidations where all creditors will be paid in full within 12 months should not be required to contain information about:

- business' assets and debts; and

- amounts received and paid by the liquidator.

We consider that this information is commercially confidential because the value of a business and other intercompany arrangements can be deduced from this information and most companies will never have had to disclose this information before. While the disclosure of this information may be of interest to creditors, we do not consider that their interest in it is sufficient to override commercial confidentiality (the status quo).

In this regard we note that:

- Many companies are liquidated simply because a business has been sold, closed

down or reorganised for tax and/or management purposes; not because they are unable to pay their creditors.

- The type of inappropriate conduct by liquidators the Act is intended to address also happen mainly in the liquidation of smaller insolvent companies. We consider that there is little risk of this type of conduct spilling over into the market for solvent liquidations because any losses caused by inappropriate conduct would be met by shareholders (not creditors) as the recipients of any amounts remaining after creditors are paid. Shareholders therefore have incentives to ensure competent liquidators are appointed.

- Because all creditors will ultimately be repaid in full a solvent liquidation, requiring reporting of this information will have no impact on creditors returns.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits - Problem 1 - Information about transactions

Affected parties *(identify)*	**Comment**: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*
Additional costs of proposed approach, compared to taking no action		
Regulated parties – insolvency practitioners	Nil – insolvency practitioners will incur no additional costs in providing more limited information about payments	Nil
Regulators - accredited bodies and the Registrar	Low – it may be more difficult for accredited bodies and the Registrar to detect inappropriate conduct by insolvency practitioners	Low
Wider government	NA – we do not anticipate wider government having an interest in the reporting of this data	NA
Other parties – general public	Nil - we do not consider there is wider public benefit in the reporting of this data	Nil
Total Monetised Cost	-	-
Non-monetised costs	-	Low
Expected benefits of proposed approach, compared to taking no action		
Regulated parties – insolvency practitioners and creditors	Low – Insolvency practitioners will incur lower costs by providing more limited information about payments and this saving will be passed on to creditors and shareholders in the form of slightly higher returns. Creditors will also receive a benefit from being able to more readily find the information which is most relevant to them.	Low
Regulators - accredited bodies and the Registrar	Nil – accredited bodies and the Registrar will not benefit from insolvency practitioners providing more limited reporting.	Nil
Wider government	Nil – we do not anticipate wider government having an interest in the reporting of this data	Nil
Other parties – general public	We do not consider there is wider public benefit in the reporting of this data.	Nil
Total Monetised Benefit	-	-
Non-monetised		Low

benefits		

4.2 What other impacts is this approach likely to have?

There is a possibility that this option will result in a decrease in the detection of offending relating to payments by insolvency practitioners. We consider that this is unlikely for the following reasons:

- The introduction of a licensing regime should result in most bad actors being excluded from practice – so the overall instance of inappropriate conduct by insolvency practitioners should reduce.
- The most common inappropriate conduct by insolvency practitioners does not relate to payments but rather to not pursuing claims against certain parties. This would not be revealed by requiring disclosure of information about transactions.
- Where inappropriate conduct by insolvency practitioners relates to payments then insolvency practitioners have an incentive to falsify the reporting of that information. This makes it unlikely that requiring this information to be included in reports would facilitate detecting inappropriate conduct.

4.3 Summary table of costs and benefits Problem 2 - Relevant information for creditors in a "solvent" liquidation

Affected parties *(identify)*	**Comment**: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*
Additional costs of proposed approach, compared to taking no action		
Regulated parties – insolvency practitioners	Nil – insolvency practitioners will incur no additional costs in providing more limited information about payments	Nil
Regulators - accredited bodies and the Registrar	Low – it may be slightly more difficult for accredited bodies and the Registrar to detect inappropriate conduct by insolvency practitioners acting as liquidators of solvent companies.	Low
Wider government	Nil – we do not anticipate wider government having an interest in the reporting of this data	Nil
Other parties – general public	Low - there may be a wider interest in this data as many businesses are not otherwise required to disclose this information.	Low
Total Monetised Cost	-	-
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		
Regulated parties – insolvency practitioners, shareholders of companies being liquidated	Low – Insolvency practitioners will incur lower costs by providing more limited information about solvent liquidations, which would be passed onto shareholders in the form of slightly higher returns. There will be privacy benefits for solvent companies being liquidated as confidential information will not need to be disclosed.	Low
Regulators - accredited bodies and the Registrar	Nil – accredited bodies and the Registrar will not benefit from insolvency practitioners providing more limited reporting.	Nil
Wider government	Nil – we do not anticipate wider government having an interest in the reporting of this data	Nil
Other parties – general public	-	-
Total Monetised Benefit	-	-
Non-monetised benefits	-	Low

4.4 What other impacts is this approach likely to have?
None.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Officials undertook targeted consultation with the following stakeholders on the proposed solutions to the identified problems:

- Chartered Accountants Australia New Zealand (CAANZ) and CPA Australia
- Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ)
- The New Zealand Bankers' Association (NZBA)
- Business NZ
- Consumer NZ
- The New Zealand Credit & Finance Institute (NZCFI).

CAANZ, CPA Australia and RITANZ, were consulted in their capacity as industry bodies to provide feedback as to whether the proposed solutions were workable in practice.

NZBA, Business NZ, Consumer NZ, and NZCFI, as representatives of the users of the reports prepared by insolvency practitioners, were consulted for their views as to whether the proposed solutions provided useful information from the point of view of both creditors and consumers.

CAANZ, RITANZ and PWC submitted on the proposed solutions and agreed with the proposed solutions to the problems discussed in this paper.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?
The solutions proposed in this paper will be given effect through regulations made under the Companies Act 1993. No transitional arrangements will be required in these regulations as transitional arrangements are already contained in the Act which address when Insolvency Practitioners will be required to report against these new requirements. Accredited bodies, as the front line supervisors of insolvency practitioners will be responsible for ensuring that insolvency practitioners comply with their reporting obligations. The proposed obligations will come into effect in June of next year when the Act and Amendment Act are brought into force, subject to the transitional provisions contained in the Act.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?
We do not intend to specifically monitor the impact of the content chosen for inclusion in the reports insolvency practitioners' will be required to prepare.

7.2 When and how will the new arrangements be reviewed?
While we do not intend to specifically monitor the impact of the content chosen for inclusion in the reports insolvency practitioners' will be required to prepare - it is intended the information requirements for reports by insolvency practitioners will be included in a review of the Act in 2022.