RESTRUCTURING INSOLVENCY & TURNAROUND
ASSOCIATION NEW ZEALAND INCORPORATED

Submissions on:
Review of Corporate Insolvency Law

Report No. 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations

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Questions for submitters on Report No. 1

Please provide reasons in support of your views for agreeing or disagreeing with the Working Group.

Insolvency Practitioner regulation

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

1.1 RITANZ agrees with the Working Group's views on the problems with the status quo. It was precisely these sorts of problems, and the inadequacy of the Insolvency Practitioners Bill to solve these problems, that caused RITANZ (and previously INSOL NZ) to devote so much time and resource to establishing a self-regulatory scheme with the Chartered Accountants of Australia and New Zealand (**CAANZ**). Providing or facilitating this self-regulatory framework has been one of RITANZ's stated objects since its inception.[1]

1.2 The Working Group broadly categorises the problems with the status quo as relating to "**unprofessional conduct**" and "**incompetence**". By way of example this can include: the insolvency practitioner preferring her or his own interests or those of the debtor company over the creditors' interests; substandard decision-making; or various other mistakes or errors occurring for which insolvency practitioners may not be held accountable.[2]

1.3 RITANZ particularly agrees with the Working Group's categorisation of these problems and its assessment of the causes of these problems. When a company is insolvent there will always be a degree of tension between the interests of creditors (secured and unsecured), shareholders, directors, employees and other stakeholders. As such it is essential that insolvency practitioners (in whatever capacity they might be appointed) balance these competing interests ethically, efficiently and in accordance with their statutory and other duties. However, for too long the lack of effective regulation has made it too easy for some insolvency practitioners, either intentionally or other ignorance, to prefer their own interests, or those of the debtor company and/or its shareholders or directors over the interests of the company's creditors.

In the most egregious of cases, well-funded creditors may be in a position to take or fund proceedings to enforce the statutory duties of insolvency practitioners and to hold them to account in the face of fraud and dishonesty. However, in the absence of an effective regulatory regime it will often be too time-consuming and expensive for insolvency practitioners to be held to

1 Rules of RITANZ, clause 3.1(b).
2 Report No. 1 of the Insolvency Working Group (**Report**), paras 39-54.

account for unprofessional conduct and incompetence as identified by the Working Group.

RITANZ also agrees with the Working Group's assessment of the causes of these problems, in particular:

(a) the relative ease with which anyone can become an insolvency practitioner; and

(b) the absence of any requirement for insolvency practitioners to operate in accordance with any professional or ethical standards.[3]

1.4 **Ease of entry:** In practical terms, insolvency practitioners take control of a company's assets in circumstances where:

(a) there are insufficient assets to meet the competing claims of the company's creditors; and

(b) the insolvency practitioner has a statutory priority over almost all other creditors for payment of her or his fees and expenses.

As such, the lack of any comprehensive entry criteria in relation to competence, honesty and integrity was extraordinary. It was out of step with the regulatory requirements that government quite rightly places on all other professionals in whom the public places such trust and confidence. It is equally out of step with international norms (as the requirements of insolvency practitioners in the Cayman Islands identified in the Report aptly demonstrates).

1.5 **Absence of mandatory professional and ethical standards:** RITANZ agrees that insolvency practitioners should be required to meet appropriate standards of professional and ethical conduct. These standards need to be transparent and enforceable. As part of this there needs to be an accessible complaints procedure and disciplinary process. This is important to ensure that creditors and other stakeholders can have confidence that insolvency practitioners will act appropriately, and can be held to account if they do not.

1.6 **RITANZ:** The accreditation regime that RITANZ has set up in conjunction with CAANZ is intended to address these issues. RITANZ considers this regime to be very successful. It requires Accredited Insolvency Practitioners to demonstrate minimum standards of competence and experience before becoming accredited. It also requires Accredited Insolvency Practitioners to agree to comply with ethical and other professional standards; to submit to practice review; to maintain appropriate levels of professional indemnity insurance; and to commit to a minimum level of Continuing Professional Development (**CPD**). But this regime is still voluntary. Only insolvency practitioners who are members of RITANZ are required to meet the entry requirements to become an Accredited Insolvency Practitioner.[4] RITANZ is confident that its standards will

3 Report, para 55.

	go a long way towards promoting "best practice". However, practitioners wishing to avoid these standards can easily do so by not becoming members of RITANZ. 1.7 RITANZ is greatly encouraged by the number of its members (397) and the number of those who have become accredited (93). As at the date of this submission, there are 95 Accredited Insolvency Practitioners. 21 of those are members of RITANZ but not CAANZ. They have voluntarily committed themselves to meeting the professional standards described above, and subjected themselves to sanction if they do not. RITANZ believes that the fact so many practitioners have voluntarily assumed the obligations of accreditation demonstrates the extent to which the profession has been seeking the benefits of greater regulation. However, some practitioners may not believe they would meet the entry criteria, or may wish to avoid committing themselves to the obligations of self-regulation. RITANZ believes that some former INSOL members did not join RITANZ so as to avoid regulation. Similarly, some RITANZ members have retired their membership in order to take appointments without being accredited. 1.8 **Scope of harm:** It is difficult to quantify precisely the harm being caused by the problems with the status quo. RITANZ is confident that its members endeavour to work professionally and ethically to achieve good outcomes, and would do so even if the self-regulation scheme had not been implemented. However, in the absence of meaningful entry criteria and enforceable standards of conduct and best practice, wrongdoers outside of RITANZ can avoid sanction.[5] This does not just play out in the more extreme situations involving fraud and dishonesty. It can mean that poor decisions are made, appropriate consequences are avoided and those who are entitled to payment are left out of pocket. 1.9 As well as the financial loss suffered on particular occasions, more generally creditors and other stakeholders will have little confidence in a system without enforceable standards of conduct. Prior to RITANZ being incorporated, INSOL would receive complaints from members of the public, but in the absence of any enforceable standards or sanctions was unable to pursue these complaints in any meaningful way.
2	***Do you agree with the listed objectives? (see paragraphs 78-81)***

4 The entry requirements are in the Accreditation Framework as agreed by RITANZ, CAANZ and NZICA. It is published at http://www.nzica.com/Technical/Accredited-Insolvency-Practitioners/Become-an-Accredited-Insolvency-Practitioner.aspx. These set out the qualifications, fit and proper person, and experience requirements for accreditation, as well as the practice review, continuing professional development and Professional Indemnity Insurance obligations.

5 An example is in *McKay v Smith* [2016] NZHC 1691. The High Court has recently held that Mr Smith as liquidator of H.B. Garments Limited (in liquidation and in receivership) failed to account for approximately $500,000, and fabricated documents in the course of the proceedings issued against him by the receiver. The High Court also took the highly unusual step of debarring Mr Smith from defending the receiver's application because of the way in which Mr Smith had been conducting himself prior to that order being made.

	2.1 RITANZ agrees with the objectives set out at paragraph 78-81 of the Report. 2.2 The confidence of the commercial community is crucial. In the insolvency context the relevant commercial community is very broad. It includes banks and commercial lenders, but also trade creditors, small service providers and other suppliers, directors and shareholders of large and small companies. 2.3 In the course of carrying out their functions, insolvency practitioners will often hold assets and moneys for the benefit of the Crown, the company, its creditors and its shareholders. There will not be sufficient assets or moneys to pay everyone, but the insolvency practitioner will get paid first. As such there is a high burden of responsibility and level of skill required to maintain the integrity of the insolvency system and the confidence of those who are or may be exposed to it.
3	***Do you generally agree that changes proposed in the Insolvency Practitioners Bill that do not relate to the registration regime proposed in that Bill along with the additional related changes proposed by the Working Group should be progressed? Please include any comments you have on one, some or all of the proposals detailed in Annex 3.*** 3.1 As noted above, in the course of establishing the RITANZ/CAANZ model of self-regulation, RITANZ (and previously INSOL NZ) consulted and communicated with its membership to ensure that the RITANZ board had as broad a mandate as possible to implement that model. This is part of the reason for its success. 3.2 On the other hand, RITANZ has not formally consulted its membership about the other proposed amendments contained in the Insolvency Practitioners Bill, or the IWG's report on those proposal. RITANZ presently has 397 members, and it is likely that there will be differing views within the membership about the various proposals contained in the Bill. RITANZ has strongly encouraged its members to make submissions in response to the Report. 3.3 On that basis, RITANZ makes the following comments on the amendments proposed in the Bill and the discussion contained in the report: (a) **Professional Services Relationship:** RITANZ agrees that practitioners appointed by or at the instigation of a creditor to investigate, monitor or advice on the financial affairs of a Company should not be precluded from subsequently being appointed as a liquidator of that Company. Nor should they have to obtain Court approval prior to accepting such appointment. RITANZ agrees that s 280(1)(ca) needs to be amended in that regard. (b) **Interest statements:** As well as disclosing whether or not a practitioner ***has*** a relationship with the company, or its officers, shareholders or creditors, they should be required to disclose whether they have had such a relationship in the previous 2 years. RITANZ questions whether a new interest statement must be completed with each report, or whether it would be sufficient to identify any new conflicts of interest and the

process by which they are being managed.

(c) **Duties to report serious problems:**[6] RITANZ agrees that liquidators, receivers and administrators should have the same rights and obligations in this regard. As such:

i. Administrators should have the same express protection of absolute privilege as receivers and liquidators;

ii. The reporting thresholds should be the same. Administrators must report when they "believe" that an offence has been committed, while liquidators and receivers must report when they "consider" that an offence has been committed. It maybe that in practice there is no material difference, but this should be clarified.

(d) Arguably the reporting threshold should not be so high as to require liquidators, receivers and administrators to spend the creditors' money conducting investigations to determine whether they "believe" or "consider" that an offence has been committed. In Australia, they are required to report only if it "appears" that an offence has been committed.

(e) **Statements of Receipts and Payments:** The statements of receipts and payments should not have to refer to individual payers and payees, or individual transactions.[7] To provide this level of granular detail would be unnecessarily expensive and not add any material benefit. The accounting description of receipts and payments should be able to be categorised in the usual way.

(f) **Insolvency Practitioner domiciled in New Zealand:** RITANZ believes that insolvency practitioners appointed in respect of New Zealand companies should be domiciled in New Zealand. This is consistent with recent reforms requiring New Zealand companies to have at least one New Zealand director, and is appropriate given that in many respects our liquidators, receivers and administrators effectively take over from the directors. It would also harmonise the New Zealand laws with Australian laws; by way of example New Zealand based insolvency practitioners cannot be appointed as liquidators, administrators or receivers of Australian companies.

In this regard it is important to remember that the primary functions of an insolvency practitioner are (depending on the nature of their appointment) to facilitate the rescue of as much of insolvent company's business as possible, or otherwise to realise the business assets for the best price reasonably available. This needs to be done efficiently and cost-effectively. New Zealand based practitioners will have a knowledge

[6] Report para 102 – 106; Annexe 3, Table 2, line 22.

[7] cf Report, para [114]; Annexe 3, Table 3, lines 27-29.

	of the local market and legal system that will enable them to complete an appointment more efficiently and cost effectively than off-shore practitioners.
4	***Do you agree with the proposed changes to the High Court supervision of liquidators? (see paragraphs 154-156)*** 4.1 RITANZ agrees that the High Court should continue to have oversight of liquidations, and liquidators' statutory duties should remain. 4.2 RITANZ also agrees that under the status quo it is too difficult for creditors to enforce these statutory duties. In particular, the difficulties in enforcing the High Court's powers to remove liquidators and prohibit them from taking further appointments render those powers ineffective. As the Report has noted, the absence of any material entry requirements for liquidators and the legal and practical difficulties in having attending liquidators removed or banned from office creates a substantial regulatory gap that is a significant cause of the problems with the status quo. 4.3 RITANZ agrees with the Working Group's proposal to repeal section 286 and amend section 284 to make orders to enforce a liquidator's duties and to provide for removal and prohibition order. RITANZ also proposes that section 284 be amended to allow RITANZ and CAANZ to apply for these orders, with the leave of the Court.
5	***What are your views on the four occupational regulation options proposed by the Working Group? (see paragraphs 116-146)*** 5.1 Of the four occupational regulation options proposed by the Working Group RITANZ prefers Option C, ie co-regulation. 5.2 RITANZ views on the four options are as follows: 5.2.1 **Option A: Registration as Proposed in the Insolvency Practitioners Bill** • RITANZ agrees that the registration regime proposed under the Bill is fundamentally flawed. It provides no requirements for entry in respect of either competence or integrity. It will actually be counter-productive because many stakeholders affected by an insolvency practitioner's decisions will wrongly infer that because the practitioner is "registered" she or he is also regulated. 5.2.2 **Option B: No Statutory Occupation or Regulation** • For the reasons set out above, RITANZ agrees that there are significant problems with the status quo that need to be resolved. • RITANZ considers that the standards set out in the Accreditation Framework should be recognised as a baseline of "best practice".[8]

8 Report, para 130.

	But as set out above the potential benefits of the scheme are unavoidably limited because it is voluntary. 5.2.3 **Option C: Co-Regulation** This is RITANZ's preferred option because: • Some Government involvement and oversight is required if regulation is to be mandatory. • Delegated statutory powers are required to enable professional bodies such as CAANZ to suspend or ban practitioners. • The RITANZ/CAANZ regime already provides the necessary regulatory framework. In constructing this framework RITANZ and CAANZ consulted broadly and were also able to apply their knowledge of the Australian regulatory regime. As the Working Group has noted, it should be relatively easy to modify this to become a "frontline regulation system".[9] This regime is the result of 3 years' work between CAANZ and RITANZ. Both have substantial industry knowledge, and CAANZ has access to a regulatory framework through the role of the New Zealand Institute of Chartered Accountants (**NZICA**) in supervising the New Zealand accounting profession. 5.2.4 **Option D: Government Licensing** Direct Government licensing of practitioners is probably unnecessary now that the CAANZ/RITANZ regime has been implemented: • Industry bodies such as RITANZ and CAANZ have market knowledge that should be incorporated into the regulatory regime. A lot of this would be lost if the Government effectively took over. • That is particularly the case given that RITANZ and CAANZ have already set up the self-regulation regime. • Effective education is also an important part of an effective regulative regime, and RITANZ is best placed to provide that. • There is no need to entirely "re-invent the wheel", and to do so would likely give rise to unnecessary expense.
6	**Do you agree with the details of the co-regulation system recommended by the Working Group? (see Recommendations 3-8 on pages 3 and 4)** 6.1 In broad terms RITANZ agrees with the structure of the co-regulation model described in recommendations 3 – 8, but makes the following submissions in

9 Report, para 163.

respect of some of the details:

- RITANZ does not consider there is any need for a Government regulator (or any other body) to license overseas-qualified practitioners who are not members of an accredited professional body. The insolvency of New Zealand companies should be carried out by insolvency practitioners domiciled in New Zealand and able to be regulated by an accredited professional body (see 3.3(e) above).

- The Working Group says that consideration will need to be given to whether some fundamental disqualification criteria should remain in the legislation.[10] RITANZ submits that the Accreditation Criteria set out in the Accreditation Framework should remain. In terms of the requirement that a practitioner be a "Fit and Proper Person", this includes full disclosure of all details of any conviction in any jurisdiction involving dishonesty. The accrediting agency (CAANZ) then makes a final assessment as to whether it considers, in its sole discretion, an applicant to be fit and proper to hold accredited status.

- **Compromises:** The Working Group does not support regulating those who manage compromises under Part 14 of the Companies Act 1993 (**Act**). The Working Group perceives a "significant risk" that regulating administration managers would negatively impact the "simplicity and flexibility" of the compromise system which the Working Group says are its primary benefits.

  RITANZ disagrees and considers that those who manage compromises should also be regulated. The RITANZ/CAANZ model does apply to practitioners who are engaged as an administrator, supervisor or monitoring accountant (or similar role) appointed under Part 14 of the Act.[11] Practitioners who accept these appointments often manage other people's money. They also advise on the details of the proposed compromise, including the categorisation of classes of creditors for voting purposes which can often determine whether a compromise will succeed or fail. This requires a standard of independence, skill, integrity and objectivity no different from that required during any other insolvency engagement.

  The very recent judgment of the High Court in *Advicewise People Limited & Ors v Trends Publishing International Limited*[12] is an example of what can occur when those standards are not met. In setting aside the compromise, Heath J recorded that:

  > *"[102] I infer that the meeting of creditors was structured deliberately to ensure that [the statutory majority and value was obtained] in a situation that both Mr Khov and Mr Johnson knew would bring about that result. Accordingly, I find that each of the challenging creditors*

10 Report, R3, page 5.
11 See definition of "Regulated Insolvency Engagement" set out in the Accreditation Framework.
12 [2016] NZHC 2119, per Heath J.

	was unfairly prejudiced by the decision to call only one meeting of creditors. In my view, such a manipulation is precisely the type of abuse of process at which s 232(3)(c) of the Act is aimed."[13] Although a creditor may apply to the Court for orders qualifying or overturning the compromise if it is unfairly unprejudicial or was irregularly obtained, prejudiced creditors will need to incur considerable cost in order to obtain these orders. RITANZ considers that the need for these orders would be greatly reduced if insolvency practitioners involved in promoting the compromises were properly regulated. • **Solvent Liquidations:** RITANZ is aware that there is a divergence of views within its membership as to whether or not those conducting solvent liquidations should be regulated. Under the RITANZ/CAANZ scheme liquidators of solvent companies do not need to be accredited. The RITANZ Board considers that the Working Group's proposal that a liquidator of a solvent company should be a member of a professional body so as to ensure that they transfer the liquidation to an appropriately licensed practitioner if they become aware that the liquidation is not solvent, would strike an appropriate balance in this regard. • **Costs:** Both RITANZ and CAANZ have already invested significant resources establishing the self-regulation scheme. We agree that this scheme can be easily modified to become a "frontline regulation system", but we do not consider that either RITANZ or CAANZ should be expected to contribute further to the costs of implementing this system.
7	***Are there are other feasible options to address the problems identified by the Working Group with the provision of insolvency services?*** 7.1 RITANZ (and previously INSOL NZ) has been working with CAANZ and previously NZICA for many years to find ways to resolve the problems identified by the Working Group. This has included consulting the memberships of both organisations. RITANZ is firmly of the view that effective regulation is essential to resolving the identified problem. 7.2 As well as (but not instead of) effective regulation, RITANZ has other objects intended to promote the high standards of practice and professional conduct in insolvency and corporate restructuring work, including: • **Education**: to provide members with information relating to insolvency law, practice and administration and the obligations of those undertaking insolvency engagements; • **Qualifications**: to promote the development of education or qualifications

13 Ibid, para [102].

	for those undertaking insolvency engagements; • **Advice**: to obtain, or assist members in obtaining legal advice on or judicial determination of any question of general importance or interest to Members or Accredited Insolvency Practitioners; • **Legislation**: To monitor insolvency legislation and promote, support and assist the development of legislation which furthers the common interest of Accredited Insolvency Practitioners, lenders, creditors and the general public; • **INSOL International**: to seek and maintain accreditation with INSOL International. 7.3 RITANZ would also support any substantive or procedural law reform that would make it easier and more cost-effective for creditors and other interested parties to obtain orders from the High Court enforcing the relevant rights and duties set out in the Act.
8	***An alternative option for regulating insolvency practice would be to only require the practitioner to be a member of a professional body, such as CAANZ or RITANZ, without any oversight from an independent government regulator. Would this option provide a more cost effective model for regulating insolvency practitioners?*** 8.1 Effective regulation needs to be compulsory, and include the power to suspend or ban practitioners. 8.2 This requires at least light-handed government regulation, especially given the complete lack of any mandatory regulation to date and the fact that the RITANZ/CAANZ scheme is still in its infancy. 8.3 As things stand, some insolvency practitioners are not eligible for membership of CAANZ, and choose not to be members of RITANZ. RITANZ believes that some practitioners choose not to be members of RITANZ in order to avoid regulation. In those circumstances it is not sufficient to force those practitioners to join RITANZ, or to force RITANZ to accept them as members. Government should set the standards and require practitioners to comply with them. These standards might be enforced by CAANZ in the first instance, but pursuant to a specific delegated statutory authority. 8.4 In time government might consider that compulsory membership of RITANZ and/or CAANZ will be sufficient. This is currently premature, but can be monitored.
9	***Should insolvency services be restricted to only certain members of an accredited professional body, as opposed to all members of the accredited professional body? If so, what criteria should be applied to determine which members of the accredited professional body would be permitted to provide insolvency services?***

	9.1	RITANZ considers that all practitioners who wish to take "Regulated Insolvency Engagements"[14] need to be accredited in accordance with the accreditation criteria set out in the Accreditation Framework.
	9.2	No RITANZ member may take any such appointments unless they have been accredited. RITANZ understands that CAANZ is proposing to put forward a rule change for member vote that will similarly restrict its New Zealand members from taking Regulated Insolvency Engagements unless they have also been accredited.
	9.3	RITANZ does not consider that any member of any accredited professional body, including CAANZ, should be able to take Regulated Insolvency Engagements without being able to demonstrate that they are appropriately qualified, sufficiently competent, and a fit and proper person to be entrusted with other people's money. RITANZ Accredited Insolvency Practitioners have all demonstrated a combination of qualifications and experience in support of their accreditation, and have committed to ethical standards, a disciplinary process, practice review and minimum levels of continuing professional development.
	9.4	RITANZ repeats the comments about solvent liquidations made in answer to question 6.
10	***How might the different options impact on competition within the insolvency services sector? How would the different options impact on the availability of insolvency services to businesses and creditors outside the main centres of New Zealand?***	
	10.1	Before implementing RITANZ/CAANZ scheme we carefully considered the need to ensure that insolvency services are available outside the main centres, and that the market for insolvency services remained competitive.
	10.2	**Competition**: It is important to bear in mind the standards required to obtain and maintain accreditation are not unduly prohibitive, particularly given the nature of the work that insolvency practitioners routinely undertake. RITANZ considers that any practitioner who is unable to meet the accreditation criteria should not be permitted to take Regulated Insolvency Engagements. That does not preclude them from being employed by (or otherwise working with) an Accredited Insolvency Practitioner.
	10.3	The costs of accreditation are in line with costs paid by other accounting professionals and members of the New Zealand Law Society.
	10.4	**Regional Insolvency Services**: A table showing the location of the 95 Accredited Insolvency Practitioners is attached. RITANZ considers that insolvency services will remain available to business and creditors in the provinces for the following reasons: • Members of CAANZ with more general practices will still be able to conduct

14 As defined in the Accreditation Framework.

	solvent liquidations without needing to be formally accredited. • Many national advisory practices have offices or affiliated offices in the provinces. In those situations regional general practitioners will be able to continue working with their local clients on insolvency related matters, provided that they do so under the direction and supervision of an Accredited Insolvency Practitioner from another office within their network. • If a regional general practitioner is not part of (or affiliated with) a firm that includes an Accredited Insolvency Practitioner, she or he can still arrange for an Accredited Insolvency Practitioner to take the appointment and then continue to work with their local clients under the supervision of that practitioner. This could operate in much the same way that solicitors with general practices will engage barristers or other specialist lawyers when appropriate. RITANZ would be prepared to consider options to facilitate a system whereby Accredited Insolvency Practitioners could be available to supervise other professionals wishing to assist their clients with Regulated Insolvency Engagements. • Alternatively, if a practitioner is not an insolvency specialist, they may still be able to be accredited if they can demonstrate that they are "otherwise competent to undertake Regulated Insolvency Engagements.[15] • A table showing the location of the 95 Accredited Insolvency Practitioners as at the date of this submission is attached.
Voluntary liquidations	
11	***Do you agree that introducing a licensing regime for insolvency practitioners would reduce much of the harm raised by aspects of the voluntary liquidation process? (see paragraphs 174-178, 201)*** 11.1 RITANZ agrees that much of the harm raised by certain aspects of the voluntary liquidation process would be substantially reduced by an effective regime for licensing insolvency practitioners. 11.2 To be effective the licensing regime would need to set out proper entry criteria in terms of experience, competence and integrity; require insolvency practitioners to maintain adequate standards in the course of providing insolvency services; and provide a robust complaints and disciplinary framework for the enforcement of those standards. 11.3 In this way, an effective licensing regime will go a long way towards ensuring that insolvency practitioners utilise the powers and pursue the remedies available to them in the Companies Act in a way that delivers the most effective outcomes for creditors and other stakeholders. This will require an appropriate investigation into the circumstances giving rise to a liquidation

15 Accreditation Framework – Practical Experience/Competence.

	including whether market value has been received for assets sold prior to liquidation; enforcement of directors' duties; setting aside prejudicial and voidable transactions; and taking appropriate steps to deal with fraud and dishonesty.
12	***Do you agree that the latent defect problems in the building and construction sector are issues best solved by building and construction sector law and should not be directly addressed by changing insolvency law? (see paragraphs 179-186) If not, what would you suggest?*** 12.1 From time to time specific problems may arise within any particular industry. Where appropriate RITANZ considers that these problems should be addressed in the context of regulating that particular industry, rather than through insolvency law reform. That is notwithstanding that these particular problems may reveal themselves most acutely in insolvency situations. 12.2 RITANZ believes that to a large extent the latent defect problems in the building and construction sector are a good example of this. These problems are best resolved by law reform focused at the building and construction sector rather than through insolvency law reform. 12.3 Liquidators and other insolvency practitioners routinely need to familiarise themselves quickly with the industry standards and regulatory requirements relating to any particular company with which they are dealing. They then need to conduct a proper investigation into the company's affairs and apply the relevant insolvency laws and principles as efficiently and effectively as possible. These laws and principles should be considered by those tasked with addressing particular problems that may arise in certain industries, but insolvency law reform will not be the most efficient way of regulating those industries. 12.4 That said, RITANZ considers that effective Insolvency Law Reform will benefit all sectors of the economy, including the building and construction sector. Implementary effective regulation and reforms designed to contract the rise of phoenix companies are good examples of this.
13	***Do you agree that one, some or all of the three measures proposed by the Working Group will address the harm of some voluntary liquidations? (see paragraphs 187-200)*** **Measure 1: Remove the ability to appoint a liquidator after service of a liquidation application** 13.1 RITANZ agrees that problems can arise in circumstances where shareholders voluntarily appoint a liquidator during the period after a creditor has served the company with a liquidation application but before the High Court has dealt with that application. This does create an opportunity for the appointment of debtor-friendly liquidators who may not conduct a sufficiently robust investigation into the causes of the liquidation, or who may even assist with the distribution of assets in a way that does not produce the best outcome for

creditors.

13.2 However, there will also be occasions where it is entirely appropriate for shareholders to appoint liquidators to insolvent companies before the High Court is able to deal with a creditor's liquidation application. Insolvent companies should be wound up and their remaining assets rescued and redeployed as quickly and effectively as possible. However, in some registries it has taken 8 – 12 weeks from filing for the High Court to deal with a liquidation application.

13.3 RITANZ considers that the implementation of an effective licensing regime should go a long way towards ensuring that debtor-friendly liquidators do not get appointed. If such a licensing regime is implemented then a blanket prohibition on shareholder appointed liquidators following service of a creditor's liquidation application may not be necessary to deal with this issue. The Petitioning Creditor would hopefully have more confidence that the liquidator nominated by the shareholder would undertake the liquidation in the best interests of the creditors, rather than the interests of the company and its shareholders and directors.

13.4 Another option could be to expedite the High Court process in circumstances where a petitioning creditor and the shareholders both agree that a liquidator needs to be appointed. If the only issue in dispute between the petitioning creditor and the shareholders is the identity of the liquidator then this issue should be able to be dealt with quickly by the High Court.

13.5 Another way to address this issue would be to require the shareholder-appointed liquidator to hold a creditor's meeting where a creditor has the opportunity to replace that liquidator. In principle this is the most obvious solution, however, RITANZ acknowledges that in some instances the cost of convening this creditor's meeting may be prohibitive. In addition RITANZ is aware of situations where the outcome of a creditor's meeting has been affected by manipulating the voting process. Again, the regulation of insolvency practitioners should ensure that the meeting and voting processes are properly followed.

13.6 An effective compromise could also be to require a shareholder appointed liquidator to hold a creditor's meeting if the Petitioning Creditor does not agree to the appointment of that particular liquidator. Given the inevitable costs of holding the meeting, this should go some way to facilitating agreement between the Petitioning Creditor and shareholder as to the identity of the liquidator.

Measure 2: Avoid transfers of assets after service of a liquidation application

13.7 RITANZ agrees that abuses have occurred whereby directors have caused company assets to be transferred in the period following service of a liquidation application but before the High Court has dealt with that application. However, RITANZ is concerned that a blanket prohibition on the transfer of assets may give rise to unnecessary commercial uncertainty

notwithstanding the exceptions and defences that have been proposed.

13.8 This prohibition may have a negative impact on bona fide purchasers for value if they are obliged to assume a risk that they may subsequently need to "prove a basis on which [they] should retain the assets".[16] It could potentially be very difficult for bona fide purchasers to mitigate that risk. A search of all the High Court registries is time consuming and expensive. A vendor's warranty and/or indemnity would be worthless in the event it ever came to be called upon. There is a five working day time lag between service and advertising of the application. The phrase "ordinary course of business" has been well tested but would likely lead to further litigation in this context.

13.9 There will also be occasions when the sale of a company's assets after a liquidation application is served but prior to the liquidation order being made will be in the best interests of all parties. Provided those assets are sold for market value, and the proceeds distributed appropriately, the sale should not be challenged. As a general rule business assets are likely to achieve a higher price if sold by the company before it is placed into liquidation.

13.10 Liquidators already have powers to avoid transfers at an undervalue, and transferees have defences available to them. Again, the implementation of an effective licensing regime should help ensure that liquidators use those powers in appropriate cases. So, once an appropriate licensing regime is implemented, a blanket prohibition on the transfer of assets after service of a liquidation application, may create more problems than it would solve.

13.11 The same concerns may not apply when a purchaser is not bona fide. RITANZ agrees that the prohibition should apply to the transfer of assets to associated parties such as those described at section 298(2) of the Act. It may also apply to transfers of assets to creditors in full or partial satisfaction of their debt. As the IWG has proposed, this should be subject to the subsequent ratification of the liquidator if she or he is satisfied that the transfer occurred for proper value.

Measure 3: Introduce a Director Identification Number

13.12 RITANZ agrees that any individual should have to provide proper proof of identity before being able to register as a director of a New Zealand company. RITANZ also agrees that assigning directors a unique identification number would be a useful way of providing relevant information to businesses who are considering whether to advance credit to a particular company.

16 Report, para [193].

14	***Do you agree with the benefits of a unique identification number for directors?*** See above.
15	***Do you have any other comments on Report No. 1?*** 15.1 RITANZ acknowledges the substantial efforts of the Insolvency Working Group and compliments it for producing their comprehensive Report. RITANZ is hopeful that this will lead to an effective licensing regime that will ensure better outcomes for all stakeholders. RITANZ is committed to working together with the IWG, MBIE and other stakeholders to achieve this result.

RESTRUCTURING INSOLVENCY & TURNAROUND
ASSOCIATION NEW ZEALAND INCORPORATED

LOCATION SCHEDULE OF INSOLVENCY PRACTITIONERS	
Auckland	50
Christchurch	13
Dunedin	2
Hamilton	2
Kumeu	1
Napier	1
Nelson	1
New Plymouth	1
Palmerston North	2
Paraparaumu	1
Rotorua	1
Tauranga	5
Wellington	12
Whangarei	2
(Blank)	1