IMPROVING THE REGULATION OF INSOLVENCY PRACTITIONERS IN THE UK* AND AUSTRALIA. WOULD A SINGLE REGULATOR HELP? [1]

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This paper explores the concept of good regulation and considers whether the existing frameworks for the regulation of insolvency practitioners (IPs) in the UK and Australia might, at a high level of generality, each be said to constitute a system of "good" regulation. It examines, for both jurisdictions, whether the introduction of a single regulator would be likely to result in a better system of regulation, recognising that the concept of a single regulator is different in the UK and Australia. The authors conclude that whilst moving to a single state regulator[2] would benefit the Australian system, it is not clear that the proposed move to a single, government regulator to replace the existing system of coregulation in the UK would, of itself, have significant benefits. [3]

*The UK comprises four nations, England, Wales, Scotland and Northern Ireland. In this paper, UK refers to England and Wales as, although the IP regime is broadly the same everywhere, insolvency laws are not uniform across the four nations.
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[2] "state" signifies a government or public sector regulator, c.f. a jurisdictional area within the Australian Commonwealth of States and Territories.

[3] Coregulation is understood as "industry associated self-regulation with some oversight or ratification by government", Ian Ayres and John Braithwaite *Responsive Regulation* OUP (1992), 102.

I. INTRODUCTION

The role of the insolvency practitioner ("IP") pre-dates Roman times. It was established to address society's need for an independent, authorised person to intervene in disputes between creditors and insolvent debtors and impose a collective resolution.[4] In the UK, the statute of Henry VIII (1542) first formally recognised the commercial and social problems caused by "absconding debtors", investing responsibility in members of the royal court to pursue them on behalf of creditors, thereby creating the statutory beginnings of the modern IP role. The role subsequently devolved through judges and court officials, state agencies and privately qualified individuals. As the purposes of insolvency have evolved, from a private focus of recouping creditor losses through to public purposes of investigating and reporting, so too has the role of the IP developed and modernised, while retaining its early connection with the courts.[5] Although in the UK the public purposes have been largely assumed by government employed Official Receivers, the role retains significant public interest tasks.[6] This is particularly so in Australia, where there is no official receiver in corporate insolvency. Thus, IPs perform a public role on behalf of the state.[7]

[4] Roland Obenchain, 'Roman Law of Bankruptcy' (1928) 3 Notre Dame L. Rev. 169a, 190-191.
[5] Millett J in *re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208 (Companies Court), 221 "An insolvent liquidation cannot be dismissed as "just a case about money"; also, Philip R Wood, *Principles of International Insolvency* (1st Edn Sweet & Maxwell 1995), 94 – 95.
[6] In the UK, Official Receivers are described as civil servants.
[7] The role of the state is beyond the scope of this paper, but see Paul Heath, 'Insolvency Law Reform: The Role of the State' [1999] NZ Law Review 569.

The two agencies essential as part of the infrastructure for the operation of any insolvency system are the courts and the IPs: an insolvency administration cannot commence and continue without a private or state IP.[8] While debt recovery by creditors is a matter of private law, insolvency law recognises the potential for disorder and unfairness among competing claimants on limited funds and authorises the IP as an independent person to impose a collective process on all creditors under legal authority. Insolvency process continues to involve the private dimension of recouping assets to pay creditors, but adding a significant public dimension in investigating, securing and protecting assets, quasi-judicially determining creditors entitlements to share in those assets, and investigating and reporting on misconduct.[9] The role extends to seeking to preserve and rehabilitate viable businesses, thus supporting a significant public economic purpose. And insolvency necessarily involves limited funds, with the costs of an administration invariably not met by the remaining assets of the insolvent.[10] It is in this unique mix that the regulation of IPs must be viewed.

[8] Jay Westbrook, Charles Booth, Christoph Paulus and Harry Rajak 'A Global View of Business Insolvency Systems' (The World Bank and Brill, 2010), 203; International Monetary Fund, 'Orderly & Effective Insolvency Procedures: Key Issues' (1999).
[9] An IP adjudicating on a proof of debt is acting quasi-judicially: *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; 169 CLR 332.
[10] Consideration of appropriate funding models for the different approaches to IP regulation is beyond the scope of this paper.

IPs intervene at moments of great financial stress and anxiety. Their control over the property of others and authority to determine proprietary claims, presupposes a need for them to be subject to oversight in their activities through a system of regulation which safeguards debtors, creditors and the wider public. The nature of the safeguards imposed on IPs has been widely debated, usually following poor IP conduct, and addressed through legislative change.

Yet the question as to what constitutes "good" IP regulation has, until recently, attracted relatively little consideration, largely because discussion of IP regulation has been the preserve of insolvency lawyers rather than regulatory theorists.[11] Much of the work to date has tended to focus on the office holder principles outlined by the EBRD,[12] UNCITRAL[13], the World Bank,[14] INSOL Europe,[15] and the IAIR.[16] Studies have tended either to compare specific elements of IP regimes in different jurisdictions[17] or to focus on a specific issue faced by IPs such as IP remuneration,[18] complaints against IPs[19] or the use of pre-packaged administrations.[20] There has been limited discussion of the literature on the regulatory theory that stands behind IP regulation and in the context of the unique role of IPs.[21] This paper therefore explores the gap in the literature, seeking to integrate the discussions that have arisen in each of these two disciplines, and assess the quality of the current UK and Australian IP regulatory regimes.

What follows is a critique of the existing frameworks for the regulation of IPs in the UK and Australia against a high level consideration of the five criteria for "good" regulation outlined by Baldwin *et al,* namely: (a) is the action or regime supported by legislative authority? (b) is there an appropriate scheme of accountability? (c) are procedures fair, accessible, and open?; (d) is the regulator acting with sufficient expertise? and (e) is the action or regime efficient?[22]

[11] Notable exceptions being Vanessa Finch 'Insolvency Practitioners: Regulation and Reform' Journal of Business Law (1998) 334; and 'Insolvency Practitioners: The Avenues of Accountability' Journal of Business Law (2012), 645; Jennifer Dickfos, 'The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration' International Insolvency Review 25: 56-71 (2016) and Elizabeth Streten, 'Insolvency Practitioners: A Phenomenological Study' (2021) 29 Insolvency Law Journal 83-103.

[12] European Bank of Reconstruction and Development ("EBRD") Insolvency Office Holder Principles 2007.

The debate is being conducted in the context of expanding global business, with the potential for financial stress in multiple jurisdictions (heightened recently by Covid-19) typically requiring input from domestically regulated IPs.[23] The value of this exercise will be derived not only from determining the extent to which IP regulation in each of these jurisdictions – including the proposed introduction of a single, government regulator in the UK - might be said to satisfy this conceptualisation of good regulation,[24] but also through the application of these criteria to systems of IP regulation more generally, consistent with the scholarship of integration.[25]

[13] United Nations Commission on International Trade Law ("UNCITRAL") 'Legislative Guide on Insolvency Law' (2004), Part Two: III B paras 35-74.
[14] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2021), D7 and D8.
[15] INSOL Europe 'Report on the Regulation of Office Holders" (2016).
[16] International Association of Insolvency Regulators ("IAIR") 'The Regulatory Regime for Insolvency Practitioners: The IAIR Principles' (2018).
[17] EBRD 'Assessment of Insolvency Office Holders; Review of the Profession in the EBRD Region' (2017); Gerard McCormack, Andrew Keay and Sarah Brown *European Insolvency Law, Reform and Harmonization* (2017) Edward Elgar, Chapter 2; Stacey Steele, Meng Seng Wee, Ian Ramsay 'Remunerating Corporate Insolvency Practitioners in the UK, Australia, and Singapore: The Roles of Courts' Asian Journal of Comparative Law 13 (2018) 141-172.
[18] Jennifer Dickfos, 'Does CIP remuneration provide value for money?' (2016) 24 Insolvency Law Journal 62-69; Mr Justice Ferris' Working Party, 'The Remuneration of Office Holders and Certain Related Matters' (London 1998); INSOL International Special Report by Lézelle Jacobs, 'Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?*'* August 2020.
[19] Adrian Walters and Mary Seneviratne 'Complaints Handling in the UK Insolvency Practitioner Profession' (2008) and 'Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study' (2009).
[20] Peter Walton *'*Pre-packin' in the UK' International Insolvency Review 18 (2009) 2, 85-108; Dickfos (n 11).
[21] John M. Wood 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour', Journal of Corporate Law Studies (2019) 19:2, 333-366; Streten (n 11); Catherine Robinson, 'An early response to regulatory changes under the Insolvency Law Reform Act 2016 (Cth): A Survey of Registered Liquidators and Registered Trustees' (2019) 27 Insolvency Law Journal 211 – 227; IAIR Principles (n 16).
[22] Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed Oxford University Press (2012), 26.
[23] Scott Atkins and Jonathon Turner, 'The Ability of Insolvency Practitioners to Operate in Foreign Jurisdictions' INSOL World - First Quarter 2019, 6-10.
[24] UK Government, 'The Future of Insolvency Regulation', Updated 21 March 2022 www.gov.uk/government/consultations.
[25] See Ernest L Boyer, updated and expanded by Drew Moser, Todd C Ream and John M Braxton *Scholarship Reconsidered: Priorities of the Professoriate* John Wiley & Sons Inc (2016) 82 on the importance of making connections across disciplines.

The issues surrounding the regulation of IPs in each jurisdiction are complex and distinct, in part because of their different structures for IP regulation. The UK has, since the commencement of the licensing of IPs in 1986, pursued a co-regulatory model relying on its recognised professional bodies (RPBs) to both license and regulate IPs, with independent government oversight provided by the Insolvency Service, an executive agency of the Department for Business Energy and Industrial Strategy (BEIS).[26] Australia has always pursued direct state regulation and, despite the existence of relevant professional bodies,[27] does not have a co-regulatory model.[28] Instead, parallel systems exist for personal insolvency IPs and corporate IPs. The historical bifurcation of Australian insolvency law between individual (or natural person) debtors and corporate debtors[29] has resulted in separate government departments with policy responsibility for each area;[30] two separate government bodies regulating personal and corporate insolvency practitioners;[31] and different courts exercising jurisdiction over personal and corporate insolvency in Australia.[32]

[26] Following enactment of the Insolvency Act 1986. The UK system of IP regulation combines self-regulation by the profession and independent oversight regulation by the government through the Insolvency Service Insolvency Practitioner Regulation Section. Insolvency Service Call for Evidence: Regulation of Insolvency Practitioners, Review of Current Regulatory Landscape, July 2019.

[27] The Australian Restructuring Insolvency and Turnaround Association ('ARITA') Code of Professional Practice is the dominant industry code but has no legal status. It is a reference source for guidance on remuneration and practitioner independence: *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914.

[28] Although an Australian IP may have two regulators for the different practice elements.

[29] The problems were discussed in the Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, Australian Government Publishing Service, Canberra, 1988 ("the Harmer Report"), [25]-[32].

[30] The Attorney-General's Department for personal insolvency; the Treasury for corporate insolvency.

[31] The Australian Financial Security Authority (AFSA) regulates personal insolvency practitioners, and the Australian Securities and Investments Commission (ASIC) regulates corporate insolvency practitioners.

[32] The federal court exercises sole jurisdiction over personal insolvencies; the federal courts and state supreme courts exercise concurrent jurisdiction over corporate insolvencies.

The question as to whether there is benefit in introducing a single regulator to displace current IP regulation arrangements, while it must be framed differently for each jurisdiction, is worthy of interrogation in both jurisdictions. Perceived deficiencies in the UK system led to the inclusion of a reserve power for the Secretary of State for Business Energy and Industrial Strategy (BEIS) to establish a single regulator for IPs, exercisable until 2022.[33] The issue in Australia is different. The system in Australia is not so much a product of a clear rational policy, as one based on constitutional history,[34] now cemented in place over time. For Australia, the issue is whether there should be a single state regulator, rather than the two at present. [35]

This paper will consider the development of IP regulation in each jurisdiction and then critically examine the concept of "good" regulation outlined by Baldwin *et al* to determine first, whether having a single regulator in the UK would lead to a better system for the regulation of IPs in the UK and second, whether one state regulator would result in a better system for the regulation of IPs in Australia.[36]

[33] Section 144 Small Business Enterprise and Employment Act 2015. This power remains exercisable until October 2022. The Explanatory Notes, state the power will only be used if changes "do not succeed in improving confidence in the regulatory regime for IPs." The Insolvency Service Call for Evidence (n 26) has asked whether the "government" should be able to take on this role at para 5.3, p14.
[34] See Michael Murray and Jason Harris *Keay's Insolvency: Personal and Corporate Law and Practice* 11th ed Thompson Reuters (2022) at [2.135] and [10.130].
[35] Analysis of a co-regulatory approach with the professional bodies to the Australian system (considered in drafting the Insolvency Law Reform Act 2016 [ILRA]) is outside the scope of this paper.
[36] "better" here means an improvement on the existing regime, rather than "better regulation… as a policy initiative" considered for example, by Robert Baldwin in 'Better Regulation: The Search and the Struggle' in eds Robert Baldwin, Martin Cave and Martin Lodge *The Oxford Handbook of Regulation* OUP (2010), 259.

II. THE DRIVE TO REGULATE IPs

There has long been a desire to oversee the work of IPs.[37] Addressing the tension between maximising creditor returns (a private interest) whilst protecting society from those preying on bankrupt estates (a public interest) is a perennial concern. [38] The role of the state-sponsored official is evident in both the statute of Henry VIII, which empowered officials to dispose of a fugitive debtor's assets, and the statute of Elizabeth I (1571) which enabled the Lord Chancellor to seize and distribute a debtor's assets *pro rata* following a creditor's petition. Although the role of Official Assignee, introduced to curb abuses, failed to do so the creation of the office of Official Receiver (OR) in 1883 strengthened the public interest and still exists today.[39]

[37] T F Bathurst, 'The Historical Development of Insolvency Law' Francis Forbes Society for Australian Legal History (2014); L E Levinthal, 'The Early History of Bankruptcy Law' (1918) 66(5) University of Pennsylvania Law Review, 223.

[38] The Insolvency Law and Practice *Report of the Review Committee* Cm 8558 (the "Cork Report"); Finch (n 11).

[39] Peter Walton 'It's Officialism – the Uncertain Past, Present and Future of the Insolvency Practitioner Profession in the United Kingdom' (2017) Gore-Browne on Companies Special Release SR97 [107]; Bankruptcy Act 1831; Bankruptcy Act 1869; Cork Report (n 38), paras 46-49; Levinthal (n 37).

The Cork Report led to the modernisation of UK insolvency law with the Insolvency Act 1986; until then the insolvency industry in the UK was unregulated. Sir Kenneth Cork recognised that "keeping out the cowboys", required specialist, skilled IPs with appropriate qualifications and professional indemnity insurance.[40] A particular concern of the time was the receivership practice "of appointing receivers who are closely connected with the company, either as directors, or relatives of directors or shareholders".[41]

Australian insolvency law was reviewed in the 1988 Harmer Report, which examined an existing court controlled regulatory regime for Australian bankruptcy trustees and a lesser, but nevertheless, formal process for liquidators. The Harmer committee recommended a self-regulatory system under a statutory board which would delegate responsibility to the professional bodies. Although this structure was not accepted or implemented, it is apparent that at that stage Australia's regulatory system was more advanced than that of the UK. Although there was a later review in 1997,[42] the same system continued for the next 20 years with direct regulation of liquidators by the Australian Securities & Investments Commission (ASIC), and of trustees in bankruptcy by the Australian Financial Security Authority (AFSA).

[40] Kenneth Cork *Cork on Cork* (Macmillan 1988), 202.
[41] Cork Report (n 38) para 439.
[42] Working Party, 'Review of the Regulation of Corporate Insolvency Practitioners' (1997).

Further reviews of IP regulation took place in both jurisdictions in the 2010s.[43] In the UK these were prompted by concerns over excessive IP remuneration[44] leading to changes to fee charging and time costing rules[45] and the introduction of a complaints gateway.[46] There were also concerns over the role of IPs in pre-packaged administrations,[47] resulting in the introduction of Statement of Insolvency Practice (SIP 16) (later revised after the Graham Review).[48]

[43] Office of Fair Trading ("OFT") 'The market for corporate insolvency practitioners; a market study', OFT 1245 June 2010, para 1.18. This reinforced the earlier findings of John Armour, Audrey Hsu & Adrian Walters in their paper 'Corporate insolvency in the United Kingdom: the impact of the Enterprise Act 2002', European Company and Financial Law Review, 5 (2) 148-171 (2008).

[44] Adrian Walters & Mary Seneviratne 'Complaints Handling in the UK Insolvency Practitioner Profession' (n 19). A consultation on changes to the complaints handling system followed the OFT Report (n 43) with the 2011 Insolvency Service 'Consultation on reforms to the regulation of insolvency practitioners' and dissatisfaction with the fees regime leading to the 2013 Insolvency Service Consultation 'Strengthening the regulatory regime and fee structure for insolvency practitioners'.

[45] Insolvency Rules 2016 Part 18 (4) (Remuneration and expenses in administration, winding up and bankruptcy) rr18.15-18.38.

[46] Accessed through the Insolvency Service website: https://www.gov.uk/complain-about-insolvency-practitioner. See also the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021, SI 2021/427 which introduced additional requirements to be met before a company's property can be sold to a connected person.

[47] Finch 'Insolvency Practitioners: the avenues of accountability' (n 11) 645; Walton (n 20).

[48] Teresa Graham, *Graham Review into Pre-pack Administration; Report to the Rt Hon Vince Cable MP*, June 2014.

Similar concerns in Australia about IP conduct and fees as well as the adequacy of ASIC's regulation of liquidators led to the 2010 Senate Economics Committee review[49] which found the system of regulation to be weak and ASIC slow to act. The inquiry questioned the retention of two different systems of regulation for each of personal and corporate insolvency.[50] It found that the system of regulation in personal insolvency by AFSA preferable, recommending that AFSA take on a single regulatory role. Although that reform was rejected, the government decided to review and harmonise the regulation of IP professionals.[51] The Insolvency Law Reform Act 2016 (ILRA), which while it maintained the separate regulation of personal and corporate IPs, sought to harmonise processes, and regulation, and the minimum disclosure and approval processes for remuneration.[52]

[49] Senate Economics Committee, 'The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework' (2010) Parliament House, Canberra.
[50] Ibid para 11.9.
[51] "A common theme for the retention of the status quo [a parallel system for the registration of IPs] by the various reviewing bodies has been the difficulty of quantifying the costs and benefits of implementing a merged regulatory system." Jennifer Dickfos, 'The Regulation of Corporate Insolvency Practitioners: 25 Years on from The Harmer Report (or Everything Old is New Again!)' (2014) 2 NIBLeJ 3, 23.
[52] Division 60 of the Insolvency Practice Schedule (Bankruptcy) ("IPSB") and Division 60 Insolvency Practice Schedule (Corporations) ("IPSC"). Also see the Harmer Report (n 29) paras 946 – 951.

The authors contend that any discussion of IP regulation must recognise that IP practice is *sui generis*, separate and of greater authority and responsibility than that of the lawyers and accountants from which it is sourced. Insolvency law authorises the IP as an independent party to impose a collective process on all creditors, and to impose demands on the debtor. While it involves private law interests of recouping losses of creditors, for whom the IP is a fiduciary, it also involves the significant public dimensions in both determining creditors' legal entitlements to share in those assets and in investigating and reporting on misconduct. The role extends to seeking to preserve and rehabilitate – 'restructure' - the business. This requires the IP to not only take on stewardship, but also to have the knowledge, skills, ability, attributes, and training to manage a potentially chaotic situation in order to rehabilitate the insolvent or, as Milman put it in the business context, "to perform an efficient burial in accordance with the norms of distributional justice".[53]

The complexity of corporate IP work has increased dramatically as insolvency is no longer understood merely in terms of the failure of a UK factory or Australian family farm. IPs work closely with financial institutions holding secured interests. One end of the spectrum of IP activity is global, connected to the failure of financial institutions such as Lehman Brothers or Greensill; financial contagion now a factor in IP work. At the other end, IPs are involved in the insolvency of individuals and small businesses.

[53] David Milman, 'Stewardship and the Insolvency Practitioner: a review of the current position' (2012) Amicus Curiae 92, 2.

The role of education and training of professional IPs must be acknowledged as a factor in the regulatory landscape, albeit that a detailed discussion is beyond the scope of this paper. The IP profession in the UK is made up of highly qualified and experienced individuals.[54] Likewise, in Australia, eligibility criteria have featured in numerous reviews[55] and in 2016 requirements were harmonised for Registered Trustees in bankruptcy (RTs) and Corporate Insolvency Practitioners (CIPs).

Lastly, the institutional framework cannot be overlooked.[56] It is certainly the case that both the UK and Australia have a highly skilled, experienced and independent judiciary and that insolvency judges in both jurisdictions are seen as highly competent with a good working knowledge of both the law and procedure.

[54] Cork Report (n 38).

[55] Harmer Report 1988 (n 29) (chapter 18); Working Party 1997 (n 42), Chapter 6; Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency Laws: A Stocktake' (2004) Chapter 3; Senate Economics Committee (n 49) Chapter 7.

[56] UNCITRAL (n13) 33-34; World Bank (n 14), Recommendation D7. As Bó observes in E D Bó 'Regulatory Capture: A Review' (2006) 22(2) Oxford Review of Economic Policy 203-25, problems such as regulatory capture are more likely in countries where both the rule of law and the job stability of regulators are weak.

III. WHAT MIGHT CONSTITUTE "GOOD" IP REGULATION?

Two insolvency academics who have drawn on the regulatory theory literature are Finch [57] and Dickfos.[58] Their work and other relevant literature, will now be reviewed to understand the extent to which the concept of good regulation has already been considered before the five criteria for good regulation identified by Baldwin *et al* are explored.[59]

Finch describes the UK co-regulatory IP system as "governmentally monitored self-regulation".[60] For Finch, the public role of IPs in making decisions about the livelihood of employees means that a system of IP regulation should "have the capacity to demonstrate democratic justification as well as respect for individual rights", which requires the system to be "effective… efficient… accountable… [and] fair".[61] Her four themes will be considered in due course, but a moment's reflection is needed on her public interest explanation for regulating IPs as well as the more general matter of the approach taken by the UK and Australian governments to regulation.

[57] Finch (n 11).
[58] Dickfos (n 11, n 18).
[59] Baldwin (n 22).
[60] Finch (n 11).
[61] Ibid.

The public interest explanation, as outlined by Finch and espoused by others has traction as a rationale for the development of IP regulation.[62] It is consistent with the historical development of the role of the IP and the changes to IP regulation resulting from the Cork Report and provides an explanation carrying "special force".[63] Public interest justifications for regulation are generally founded on a need to correct market failure or substantive welfare economics grounds.[64] IPs investigate insolvencies and act as fiduciaries; roles which can be considered "public goods". The proper performance of these duties promotes trust in the wider insolvency system; something a purely market driven system may not achieve given the possibility of conflicts of interest, information and power asymmetries. This argument is supported by the work of Dickfos in her discussion of the remuneration of CIPs in Australia. Dickfos considers the importance of regulating CIP costs to address concerns around market failure and information asymmetry (citing Ogus's work on regulation to improve allocative efficiency)[65] for the ultimate protection of potentially vulnerable creditors.[66]

[62] Including the EBRD (n 12) 5.
[63] Baldwin (n 22) 65.
[64] Baldwin, Cave and Lodge, 'Introduction: Regulation – the field and the developing agenda' in Baldwin *et al* eds (n 36), 10; IAIR Principles (n 16) 7.
[65] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) Chapter 3.
[66] Dickfos (n 11) 56.

A difficulty with public interest explanations is identifying who the "public" is.[67] This leads to complexity in determining regulatory policy, as there will be different views. Notions of public interest may simply be "too vague ".[68] This criticism is arguably less obvious in the IP context where not only the creditors are the primary focus of an insolvency for the purpose of distributions, but also the community. The creditors are an easily identifiable section of the public whose interests will be distinct from the interests of other stakeholders, albeit that different classes of creditors within that group may have competing interests.[69] Although less easily identifiable, insolvency law supports important social, legal and economic purposes, the subject of consistent comment throughout the literature and case law.[70]

It is important to acknowledge that regulatory developments are not limited to public interest explanations and this is as likely to be true in relation to IP regulation as to other areas of regulated activity.[71] Baldwin *et al* distinguish interest group theories from public interest theories and identify power of ideas explanations and institutional theories as other drivers of regulatory development.[72] As to interest group theories, regulatory capture is a real possibility for the development of IP regulation (assuming IPs constitute a single insolvency profession), since IPs monopolise insolvency.[73]

[67] Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 MLR 24.
[68] Mike Feintuck, 'Regulatory Rationales Beyond the Economic' in Baldwin *et al* eds (n 36) 41.
[69] Andrew Keay, 'Insolvency Law: A Matter of Public Interest' (2000) 51(4) Northern Ireland Legal Quarterly 509.
[70] Cork Report (n 38) paras 192 and 1734.
[71] Anthony Ogus 'Rethinking Self-Regulation' (1995) 15 Oxford J Legal Stud 97, 98.
[72] Baldwin *et al* (n 22) Chapter 4.
[73] G Stigler 'The Theory of Economic Regulation' (1971) The Bell Journal of Economics and Management Science Vol. 2, No. 1 3-21; Bó (n 56); Ogus (n 65) Chapter 4.

In the UK, it was unrealistic to view IPs as a single insolvency profession in 1986. Since then, qualifying examinations have been standardised, there are fewer RPBs and standards have been raised more generally. IPs can be viewed as members of a distinct profession, albeit that it is difficult to argue that they are a homogenous group when the work of a City IP working on a corporate insolvency is contrasted with that of an IP working on a personal insolvency.[74] This professionalism could lead to monopolistic behaviour. The promotion of collective interests is not an obvious driver of IP regulation at least in the UK, however, as the legislative and regulatory framework is derived from the public interest rationale identified in the Cork Report and the UK model of coregulation (as distinct from self-regulation) indicates a regime specifically seeking to mitigate against such an outcome. The position is less clear in Australia where, given the lack of any default government liquidator, one could argue that the public interest has been abdicated by the state, with IPs providing some support for the public interest of ensuring the winding up of assetless companies.

[74] The authors are indebted to Hamish Anderson for his insights on this point.

More generally, the recent approach of the UK and Australian governments to developing regulation at an institutional level requires consideration: what ideas and theories have prevailed to influence IP regulation? In the UK, this was driven by the Better Regulation Task Force[75] and in Australia through its Regulator Performance Guide (RPG).[76] The UK's better regulation policy aimed to reduce unnecessary regulation and improve outcomes, matters which also concerned the OECD and EU.[77] In the UK, the regulatory function of the Insolvency Service was reviewed against these principles and adjusted to adopt the risk-based approach to regulation recommended in the Hampton Review.[78] Similarly, the Australian principles of regulatory best practice involved "continuous improvement… building trust… risk based and data driven… collaboration and engagement."[79]

[75] This resulted in the publication of *Principles of Good Regulation*. See also the Better Regulation Task Force report to the Prime Minister of March 2005, *Less is More: Reducing Burdens, Improving Outcomes*, Annex B.
[76] Regulator best practice and performance, Deregulation (pmc.gov.au).
[77] OECD/Legal/0278 *Recommendation of the Council on Improving the Quality of Government Regulation* adopted 09/03/1995. See also the OECD's Better Regulation in Europe project.
[78] Insolvency Service, *2009 Annual Review of Insolvency Practitioner Regulation* (March 2010) 2.1; Philip Hampton *Reducing administrative burdens: effective inspection and enforcement* (March 2005) HM Treasury, 1.
[79] Regulator Performance Guide, July 2021.

In both jurisdictions, the better regulation policy has introduced regulatory impact assessments to "inform decision-making" to make regulation "better" and "more rational".[80] Yet the reality of undertaking an impact assessment is that it is almost impossible to make a sensible cost-benefit analysis of alternative regulatory approaches to the one suggested, and political expediency often means that there is only one serious proposal on offer.[81] There are also difficulties with measuring what "better" looks like.[82] Despite these drawbacks, it is clear that, certainly within the UK, recent changes to the regulation of IPs have been based on research and consultation.[83]

[80] Baldwin *et al e*ds (n 36) 264.
[81] Ibid, 271.
[82] Ibid, 271.
[83] BIS Impact Assessment (Consultation) *Insolvency Practitioners Fees Regime*, 4 December 2013 and BIS Impact Assessment (Validation) *Technical changes to IP regulations and the appointment,* 18 February 2015.

In Australia, while a consultation period preceded the 2016 amendments,[84] the extent to which these changes were based on data and research on regulatory options appears to have been limited,[85] and was not of the kind commissioned by the UK government through the Graham Review.[86] The main consideration was given to whether there should be direct government regulation or coregulation. Nevertheless, that consideration was given, their respective merits in the Australian context explored, and reasons offered for the regulatory system ultimately introduced.[87]

These findings suggest that there is an ambition at government level in both jurisdictions, to produce better systems of regulation.[88] In the UK, the Insolvency Service, has developed regulatory practices in line with government recommendations.[89] Likewise in Australia, AFSA and ASIC are required to apply government expectations for regulator performance.[90] Baldwin is nevertheless right that the better regulation policy lacks conceptual clarity.[91]

[84] See the Insolvency Law Reform Bill 2015, Bills Digest no. 82 2015–16.
[85] See the Explanatory Memorandum to the Insolvency Law Reform Bill 2015.
[86] Graham (n 48). On Australia's consultation, see Rosalind Mason, 'Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective' (2015) 3 NIBLeJ 14.
[87] Insolvency Law Reform Bill 2015 (n 84); and Regulation Impact Statement to the Explanatory Memorandum to the Insolvency Law Reform Bill 2015, Chapter 9.
[88] Baldwin *et al e*ds (n 36) 263.
[89] Insolvency Service (n 78).
[90] Since 2014, the government expectations have been set out in the Regulator Performance Framework, which has been replaced in 2021 by the Regulator Performance Guide. The RPG is drafted in general terms and does not clearly relate to the regulation of IPs.
[91] Baldwin *et al* eds (n 36) 273.

Against this backdrop, what approach should insolvency academics take to determine what good IP regulation might look like? Finch advocates a system that is "effective, efficient, accountable and fair".[92] Whilst these objectives seem intuitively correct, they do not advance the debate without a rationale to support their validity as criteria for good regulation. By testing their validity against the five criteria for good regulation outlined by Baldwin *et al,* who frame the discussion in terms of legitimacy, it is possible to build on the findings and critique current UK and Australian IP regulation.[93] In this way, the authors will establish, at a high level of generality, whether the UK and Australian systems of IP regulation can be considered good in their current form and whether the proposed changes to a single regulator (in the UK) or a single state regulator (in Australia) might be better.

[92] Finch (n 11).
[93] Baldwin *et al* (n 22) 27.

There are two main reasons why these five criteria should be taken seriously. The first is the "real world" impact of the criteria as criteria that the public would recognise and support.[94] The second reason is that they amount to the crystallisation of years of reflection on, and research into, the regulatory theory literature undertaken by those authors.

Baldwin *et al* recognise that there may be "trade-offs" between the five criteria and that they will not all apply in the same way to every regulatory regime: they are best understood in the round, so that if a particular regulatory regime has aspects that could be ascribed to each of the criteria, it would be reasonable to support it; whereas it would be difficult to justify a regulatory regime that met none of them.[95]

[94] Ibid, 32.
[95] Ibid, 32.

The rationale for the five criteria may be summarised:

a) Legislative authority

If a regulatory regime has a legislative basis, then that regime has validity as the outcome of a democratic process. Difficulties may arise in setting statutory objectives which can be meaningfully implemented, however, where a regulator must apply discretion in exercising their role.

b) Accountability

The difficulties associated with public support for imprecise objectives may be overcome if the regulator is seen to be accountable to a democratically elected institution, such as Parliament. The reality is that not all regulators will be so accountable; the institutions that they report to may be considered unrepresentative or lacking the necessary funding or expertise to hold the regulator to account.

c) Fairness

There is likely to be public support where a regulator is seen to use transparent and fair processes and to act consistently, as this will be seen to be democratic. Nevertheless, such an ambition may be hard to achieve when multi-party interests must be addressed in implementing a regulatory mandate.

d) Expertise

The judgement of an expert should provide the public with confidence in a regulatory regime, although this is not a given as experts become increasingly mistrusted.

e) Efficiency

The public is likely to support an efficient system albeit that efficiency is an elusive construct. Efficiency may be considered in terms of productive or allocative efficiency,

but for the purposes of this paper, it is most usefully understood in terms of the delivery of the specific regulatory mandate.[96]

There is broad overlap between the terminology that Finch uses and the five criteria, with accountability, fairness and efficiency all addressed. Legitimacy is also critical to her argument, and acceptance of the validity of the five criteria of good regulation supports her analysis. For Finch, "legitimation [should be] seen in terms of rationales that reflect both democratic (public) and private rights roots"[97] in order to recognise and respect both the private and public interests that arise on insolvency. How that legitimacy may be achieved is a more complex problem, as different regulatory objectives may compete in a "real world" situation, requiring discretion on the part of the regulator and making it difficult to draft clear objectives within statute that can be measurably implemented by a regulator.[98] Thus regulatory legitimacy as part of the legislative process is not straightforward.

[96] Ibid, 27-31.
[97] Vanessa Finch, 'The measures of insolvency law' (1997) 17 Oxford Journal of Legal Studies 227, 246.
[98] Baldwin (n 22), 28.

IV. IS THE CURRENT REGULATORY FRAMEWORK FOR IPs IN THE UK "GOOD"?

Before the criteria for good regulation are applied to the UK IP system, it is worth reflecting on the definition of regulation adopted in this paper and why the current UK system exists as one of coregulation. Following Black, regulation here is an "intentional use of authority" to affect the behaviour of IPs with reference to "set standards" and that this process will involve both "information gathering and behaviour modification".[99] This aligns with the public interest argument discussed earlier that IPs cannot be trusted to regulate themselves and that a regulatory authority is needed to make them behave well. Yet the UK system has nevertheless retained an element of self-regulation.[100] Why?

The prevailing argument in support of self-regulation by an industry body rather than regulation by an independent regulator is that an industry body has expertise in the field that an independent regulator, removed from the industry setting, cannot match. Consequently, if regulation is managed by industry experts, standard-setting, monitoring, and enforcement processes will be cheaper for the taxpayer.[101] This is set against the downsides of self-regulation (already outlined), namely market failure arising when the industry, left unfettered, adopts undemocratic rules and/or adopts policies that serve its own interests to the detriment of third parties – the latter being the criticism most frequently levelled at IPs. Yet if IPs are a distinct group of professionals with specific expertise, a system of self-regulation would be a valid regulatory choice.

[99] Julia Black 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1, 26.
[100] For a definition of self-regulation, see Julia Black 'Constitutionalising self-regulation' (1996) Modern Law Review 24, 27.
[101] Ogus (n 65).

A single, independent regulator may not only lack the expertise to perform aspects of necessary regulatory activity (in the IP context, this could include detecting undesirable behaviour), but may also face other challenges, such as in the evaluation of the system itself.[102] Smart regulation theory suggests that "networked" systems, which involve a mixture of different organisations with responsibility for different elements of regulatory activity might be the best regulatory systems, despite the potential downside that too many participants may blur lines of responsibility.[103] From this, it is possible to conclude that a system of co-regulation which: (i) has a limited number of participants; (ii) provides clear objectives; and (iii) sets clear lines of responsibility for participants, has the benefit of retaining expertise within the system whilst overcoming the disadvantages associated with self-regulatory systems.

This now needs context. Only individuals can be authorised as IPs in the UK and must be properly qualified.[104] As already noted, UK IPs are usually highly trained professionals with extensive practice experience who have passed examinations, who meet ethical standards, and who are insured and bonded.[105]

[102] Robert Baldwin and Julia Black 'Really responsive regulation' (2008) Modern Law Review 71(1) 59-94.
[103] Ibid.
[104] Section 390 Insolvency Act. Persons who are not qualified include those without security, bankrupts and those lacking capacity.
[105] As discussed in Part 2 of this article and Insolvency Practitioner Regulations SI 2005/524.

An IP can only be authorised if a member of a RPB.[106] RPBs have direct responsibility for authorising and regulating IPs and ultimate regulatory oversight of IPs lies with the Insolvency Service which regulates the RPBs. To obtain the status of an RPB and be permitted to authorise and regulate IPs, the body must regulate the practice of a profession; demonstrate that it has rules in place to ensure that the IPs it regulates are fit and proper persons, appropriately qualified, trained and experienced; and demonstrate that its rules for authorising and regulating IPs will meet the four statutory regulatory objectives.[107]

1. The Regulatory Objectives

The first objective requires RPBs to have systems in place for regulating IPs that ensure fair treatment and consistency.[108] The second objective promotes an independent and competitive IP profession whose services are reasonably priced and whose members act fairly and with integrity;[109] the third objective is to maximise and make prompt returns to creditors;[110] and the final objective is to protect and promote the public interest.[111] In addition to the statutory objectives, non-statutory principles for monitoring IPs have been agreed between the Secretary of State and the RPBs.[112]

[106] Section 90A Insolvency Act 1986. The RPBs are The Institute of Chartered Accountants of England and Wales ("ICEAW"), the Chartered Accountants Ireland (CAI), the Insolvency Practitioners Association ("IPA"), and the Institute of Chartered Accountants in Scotland ("ICAS"). In 2016, the SRA and the Law Society of Scotland stopped regulating IP solicitors for the IP aspects of their work, rendering IP solicitors subject to a sub-system of co-regulation. The Insolvency Service has also ceased to directly authorise IPs. The Association of Chartered Certified Accountants ("ACCA") outsourced its regulatory work to the IPA and relinquished its RPB role in December 2019.
[107] Section 391 Insolvency Act 1986.
[108] Sections 391C(3)(a) and 391(4) Insolvency Act 1986.
[109] Section 391C(3)(b) Insolvency Act 1986.
[110] Section 391C(3)(c) Insolvency Act 1986.
[111] Section 391C(3)(c) Insolvency Act 1986.
[112] The Insolvency Service 'Principles for monitoring insolvency practitioners' 8 April 2014 and 'Memorandum of Understanding'.

The Secretary of State can sanction an RPB that fails to discharge its functions[113] by imposing a financial penalty, publishing a reprimand or revoking the RPB's authority.[114] In public interest cases, the Secretary of State may apply to the court for a sanctions order against either the IP or the authorising RPB .[115]

The Insolvency Service monitors RPBs to assess the authorisation and monitoring of IPs, complaints handling, disciplinary outcomes and bonding arrangements. The Insolvency Service makes recommendations for improvements where necessary and undertakes follow-up visits to assess the extent to which matters have been resolved.[116]

[113] Section 391D Insolvency Act 1986.
[114] Sections 391F, 391J and 391L Insolvency Act 1986.
[115] Sections 391P and 391R Insolvency Act 1986. This power is significant as it enables the oversight regulator to directly regulate the IP.
[116] Insolvency Service, Insolvency Practitioner Regulation Section. The latest annual review is discussed below (n 134).

The self-regulatory element of the co-regulatory structure is the relationship through which the RPBs regulate their IP members.[117] The RPBs satisfy their statutory objectives through compliance with the Memorandum of Understanding entered into between the Secretary of State and the RPBs and the Principles for Monitoring IPs. RPBs must ensure that their IPs complete an annual return and RPBs must also undertake formal monitoring visits. Compliance is measured against SIPs, the Ethical Code and common law as well as to the particular regulations of the professional body concerned, including client money regulations, professional indemnity insurance and continuing professional development requirements.[118] The current structure can cause problems for IPs who are professionals in two disciplines: a solicitor who is an IP will be regulated by the SRA and an RPB, raising the prospect of double jeopardy and in addition to potential sanctions from the Secretary of State.

Having outlined the framework, to what extent can –it be considered "good"?[119]

[117] See (n 106). On 1 January 2022, there were 1541 UK IPs of whom 1254 were taking appointments: see UK Insolvency Service, *Annual Review of Insolvency Practitioner Regulation*, 5.
[118] See for example the ICAEW guidance. An updated Insolvency Code of Ethics was published on the Insolvency Service on 3 May 2020 Some of the changes were informed by the revised and restructured International Ethics Standards Board of Accountants (IESBA) Code of Ethics.
[119] Baldwin *et al* (n 22), 27.

The legislative mandate for the Secretary of State to authorise the RPBs and oversee their regulatory practice is clear, with RPBs required to meet the four statutory objectives discussed above.[120] The legislation is also explicit that the RPBs are accountable to the Insolvency Service, an executive agency of government, so giving the system democratic credibility.[121] This credibility has been enhanced since the Insolvency Service ceased to be a direct regulator of IPs so that its role became one of pure oversight. Its procedures are fair and transparent, as are those of the individual RPBs through their own published regulations, by-laws and ethical codes.[122] The process for managing the relationship between the RPBs and the Secretary of State is evidenced in a Memorandum of Understanding and between IPs and RPBs in the Principles for Monitoring IPs. The appointment of RPBs that are representatives of the IP profession, means that the expertise to oversee the work of IPs and ensure its alignment with the RPB objectives, is present within the system.

[120] Insolvency Act 1986.
[121] Ibid.
[122] See, for example, the ICEAW website: https://www.icaew.com/.

More difficult to determine is whether the fifth, "efficiency" criterion is met. This paper cannot explore notions of efficiency in detail, but some consideration is required to understand what, is meant by efficiency, with reference to the specific regulatory mandate being considered. Baldwin discusses this criterion with reference to three, economic conceptual efficiency "norms": productive efficiency (production of the same or increased amount with lower inputs), allocative efficiency (improving things for at least one party without making things worse for others) and dynamic efficiency (the encouragement of innovations).[123] Each of these efficiency norms may be relevant to a greater or lesser extent in any particular regulatory framework, depending upon the objectives of the regulation in question.

[123] Baldwin *et al* (n 22) 31. See also C. Veljanovski 'Economic Approaches to Regulation' in Baldwin *et al* eds (n 36) 17-38; A Renda 'From Impact Assessment to the Policy Cycle: Drawing Lessons from the EU's Better-Regulation Agenda SPP Technical Paper' University of Calgary, Volume 9, Issue 33, October 2016; Centre for European Policy Studies ("CEPS") Final Report *Assessing the Costs and Benefits of Regulation* (December 2013).

The regulatory objectives set for RPBs reflect each of these norms. Productive efficiency is achieved in the regulatory system by targeting only cases that need action (no "wasted" investigations)[124] and in making prompt returns to creditors (money returned is invested elsewhere).[125] Allocative efficiency is achieved by maximising returns to creditors,[126] through fair charging structures[127] and through the protection and promotion of the public interest (and therefore consumers and users more generally).[128] The objective of ensuring a competitive and independent IP profession[129] implies an element of dynamic efficiency as achieving this requires innovation and development. One efficiency aspect could, potentially, be improved on: Baldwin and Black note that "unproductive fragmentations" within networked regimes can result in poor regulatory outcomes.[130] Whether this is a significant problem in the IP context is unclear. The number of RPBs has been reduced recently; efficiency could be improved if they were reduced further.[131]

[124]Sub-sections 391C(3)(a) and 391(4) Insolvency Act 1986.
[125] Section 391C(3)(c) Insolvency Act 1986.
[126] Section 391C(3)(c) Insolvency Act 1986.
[127] Section 391C(3)(b) Insolvency Act 1986.
[128] Section 391C(3)(c) Insolvency Act 1986.
[129] Section 391C(3)(b) Insolvency Act 1986.
[130] Baldwin and Black (n 102) 41.
[131] In recent years the Solicitors Regulation Authority, the Association of Chartered Certified Accountants and the Insolvency Service have all been removed as RPBs.

2. Measuring the Regulatory Objectives

Regulatory objectives are set so that their achievement can be measured, and the UK RPB objectives were set to improve confidence in the regulatory regime for IPs. They are significant because the legislative power to create a single regulator for IPs is predicated on a failure to achieve this improvement in confidence – something which the Insolvency Service's 2019 consultation paper acknowledged "is a difficult concept to measure".[132] A limited response to that consultation led the UK government to note that it has been "difficult to draw conclusions as to the impact of the current objectives in shaping the effectiveness of the regulatory framework", a finding which suggests that the statutory test for moving to a single regulator has not definitively been made out. [133]

It is beyond the scope of this paper to fill the gap and determine the impact of the current objectives on the regulatory framework. Nevertheless, it is useful to reflect upon some recent data.

In 2021, the Insolvency Service received 15 complaints about RPBs [134] and 810 complaints were received by the Complaints Gateway of which 423 were referred to the RPBs. RPBs also addressed 76 complaints from other sources.[135]

[132] Insolvency Service "Call for Evidence: Regulation of insolvency practitioners; Review of current regulatory landscape" (n 26) 13.
[133] UK Government (n 24).
[134] Nine were rejected and six are ongoing. See Insolvency Service, *Annual Review of Insolvency Regulation 2021*, 1 June 2022 pp 22-23 available at <www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review>.
[135] Ibid, 17.

The detail that sits behind these complaints is not always visible, making it difficult to assess the seriousness and scale of problems, although the discussions and report of the All-Party Parliamentary Group (APPG) on Fair Business provide some insights.[136] The APPG raised concerns about the conflicts of interest arising in appointments where an IP works for a firm that also acts for the bank involved in the case, and whether the interests of a bank may prevail in insolvency outcomes. The Insolvency Service response on this point referred to the difficulty of balancing the risk of a conflict of interest with the need to appoint an effective IP who could pick up and manage a complex case quickly: it is inevitable that costs will increase if the pre-advisory and post-appointment costs are charged to different firms, causing a commensurate reduction in the value of the insolvent estate.[137] This point is significant, because it illustrates the importance of expertise in the system – something which a co-regulatory system retains.

[136] APPG Fair Business Banking *Resolving Insolvency: Restoring Confidence in the System* September 2021, p24: https://www.appgbanking.org.uk/wp-content/uploads/2021/10/Resolving-Insolvency-141021-1.pdf and https://www.appgbanking.org.uk/wp-content/uploads/2021/09/Resolving-Insolvency-Report-Launch-Summary.pdf. Note that the APPG is an interest group and the report is not an official publication of the House of Parliament or its committees. See also Sikka, P. '*The UK insolvency industry is corrupt and reform is long overdue'* 22 October 2021 www.leftfootforward.org.

[137] APPG Report Launch Summary (n 136) 3.

The Insolvency Service provided some context to the debate, referring to "roughly 20,000 insolvencies per year with around 8,000 complaints about IPs of which 450 were passed through to regulators, representing 1% of insolvencies". Responding to the APPG report, the Insolvency Service noted that "a lot" of the evidence was historical and that the Insolvency Service had since changed, although the APPG argued that its findings showed a trend of poor IP behaviour. [138] This suggests a failure to meet the second and fourth RPB objectives in relation to IPs alleged lack of independence and failure to act fairly and with integrity and in the public interest.

From the personal insolvency perspective, the high cost of funding Individual Voluntary Arrangements ("IVA"s) has also led to criticisms of IPs who have been seen to exploit their clients by charging high fees; something which would also fall short of the second and fourth RPB objectives.[139]

Whilst there are legitimate areas of concern as to the behaviour of IPs in certain situations, on the basis of the evidence available, it is difficult to draw a firm conclusion that the existing system of regulation is failing, even if there is room for improvement in what is a very small profession. Routine monitoring visits in 2021 led to four IPs having their licences restricted and the issue of 23 advisory notices, but no IPs were referred to disciplinary committees; targeted monitoring visits led to two IPs having their licences removed and one having their licence restricted.[140] Although it is difficult to assess how effective the Insolvency Service is in its oversight regulation, no sanctions have been imposed by the Secretary of State against a failing RPB.[141]

[138] Ibid.

The reality is that some matters are complained of which are attributed to IPs, but which lie outside the scope of IP regulation. It is an unpleasant fact of insolvency that there will be insufficient funds to repay all creditors in full and that some parties will lose out: the interests of secured and priority creditors will always rank ahead of the interests of unsecured creditors, because that is how the priority rules work. It is not clear how moving to a single regulator would result in a system of "better" regulation. Similarly, there may be other solutions for contentious matters - such as excessive fee-charging by volume IVA providers, or the inappropriate use of pre-packs - that do not require a re-modelling of the current regulatory structure.

[139] John Briggs 'Statements of Insolvency Practice: the current consultation by the JIC' (June 2020) South Square Digest.

[140] Insolvency Service, *Annual Review of Insolvency Regulation 2021* (n 134) section 3.2; in January 2021, only 1288 of the 1570 IPs were taking appointments; by January 2022, this had dropped to 1254, (n 134) 5.

[141] See, for example, the review of the ICEAW's complaints handling process conducted between February and May 2020 https://www.gov.uk/government/publications/report-on-the-institute-of-chartered-accountants-in-england-wales-complaints-handling-process/temp#executive-summary. The report found that the ICAEW was "on track" to meet previous recommendations, p1. Similarly, the *IPA Monitoring Report: Visit 21-25 June 2021* published February 2022, found that "In response to previous findings and recommendations… good progress had been made… to ensure that the complaints and monitoring teams were working collaboratively", p3. Nevertheless, the Insolvency Service was criticised last year by Lord Sikka on several fronts, including delays in pursuing the directors of Carillion: https://hansard.parliament.uk/Lords/2021-10-19/debates/4FFE756C-F7F4-42F2-AF95-59FF235B7059/Rating(Coronavirus)AndDirectorsDisqualification(DissolvedCompanies)Bill.

V. IS THE CURRENT SYSTEM OF REGULATION OF IPs IN AUSTRALIA "GOOD"?

Despite the introduction of a more harmonised approach in 2016, the bifurcated nature of IP regulation in Australia continues for constitutional and historical reasons,[142] with many Australian IPs registered as both trustees and liquidators. [143] Harmonisation extends to common but separate legislative structures for both the registration and discipline of both CIPs and RTs.[144] IP applicants must complete an interview process and must have prescribed qualifications and relevant senior experience.[145]

The law requires ASIC and AFSA to work together "cooperatively" in regulating the conduct of IPs who are both CIPs and RTs.[146] However, neither ASIC nor AFSA have to share their committee experience and expertise and so separate approaches to the assessment of IP suitability and conduct may develop as other, stronger influences ensure that regulation remains separate.

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[142] When Australia federated in 1901, the federal Parliament was granted a specific power, to be exercised concurrently with the state Parliaments, to make laws with respect to 'bankruptcy and insolvency': s 51(xvii) Commonwealth Constitution. The former colonies' diverse personal insolvency laws continued in existence for some years until replaced by comprehensive federal bankruptcy legislation. Even though the grant of power to legislate on 'insolvency' was wide enough to extend to the liquidation of companies, Australia's limited conferral of power on the federal parliament in respect of corporations (s 51(xx) Commonwealth Constitution), and the adoption of the nineteenth century English approach of including corporate insolvency provisions in the general corporations legislation, meant that for most of the last century corporate insolvency was a matter of state jurisdiction. It is only since mid-2001, that the current federal corporations legislation commenced, based on a referral of their concurrent powers by the states.

[143] Based on the registers of liquidators and registered trustees available on the ASIC and AFSA websites on 2 March 2021, these 165 dual licensed practitioners represent only 25% of the 648 registered liquidators and 82% of the 202 registered trustees.

[144] Michael Murray and Jason Harris (n 34).

[145] Inspector-General Practice Statement 13, IGPS 13 Processes for registration of trustees, 1 April 2021; Regulatory Guide 258 Registered Liquidators: Registration, disciplinary actions and insurance requirements (RG 258), 1 March 2017. Disciplinary processes are available before similarly constituted committees.

[146] Corporations Act 2001 (Cth), IPSC s 10-5 and Bankruptcy Act 1966 (Cth), IPSB s 10-5.

Those influences come from the separate departments and ministers to which the regulators are allocated. Liquidators are regulated by ASIC as a minor part of ASIC's overall regulation of Australia's corporations and financial markets, under the auspices of the federal Treasury Department, which governs economic policy. RTs are regulated by AFSA which, while it focuses largely on personal insolvency, falls within the federal Attorney-General's Department, whose brief also encompasses terrorism, anti-money laundering, family law, copyright and the justice system. This does not mean that federal departments and agencies do not apply themselves according to the law, rather, that operational and cultural approaches affect consistency, and efficiency.[147] A "whole of government" approach is a worthy aim, but regulation of a single profession by two different regulators serves to ensure that approach is not adopted.

The separate regulatory aims and approaches of the two regulators are not aligned and do not purport to be.[148] An apparent lack of information sharing between ASIC and AFSA may lead to separate assessments of common IP conduct in the personal and corporate spheres. The only real consistency between ASIC and AFSA is that each operates under laws requiring a direct regulatory approach, and not by way of, as in the UK, any real co-regulation with the profession.[149]

[147] See for example the report *Our public service, our future. Independent review of the Australian Public Service*, 2019 (Chair David Thodey).
[148] For example, for RTs, see AFSA Regulatory Charter, 2 July 2021. For CIPs, see RG 258 Registered liquidators: Registration, disciplinary actions and insurance requirements.
[149] Michael Murray, 'Bodies everywhere – the role of professional bodies in regulating insolvency practitioners' (2018) 19(5) Insolvency Law Bulletin 94.

This in itself raises the questions as to first whether it is a good system and second whether having a single state regulator would lead to a better system of regulation of IPs in Australia.

To what extent then, can the Australian regime be considered "good" when measured against Baldwin *et al's* five criteria for good regulation?

First, the regulators are clearly supported by legislative and constitutional authority.[150] It is the separate laws and regulatory agencies under those laws that raise concerns.

Second, ASIC and AFSA are subject to appropriate schemes of accountability, albeit separate ones. ASIC, as Australia's corporate, markets and financial services regulator, has been and remains subject to significantly more scrutiny than AFSA. It was, for example, following the Financial Systems Inquiry, subject to an organisational capability review, [151] and its statute requires it to be reviewed by a joint parliamentary committee.[152] Both regulators are subject to complaints processes.[153] In relation to their respective responsibilities under legislation, there is a common right of review to the Administrative Appeals Tribunal.[154] Their decisions can also be reviewed by the courts (albeit different ones). General administrative law principles of public administration accountability also apply.[155]

[150] See Justice Robert French, "The referral of state powers - cooperative federalism lives?" [2003] FedJSchol 3.
[151] Report to Government by the Expert Panel, *Fit for the future: A capability review of the Australian Securities and Investments Commission* (2015).

Third, the relevant procedures are fair, accessible, and open and administrative law principles of procedural fairness apply to statutory procedures[156] such as administration of the registration and regulatory oversight of IPs. Review mechanisms, including oversight by the relevant courts, are in place for various decisions by ASIC and AFSA in administering their statutory authority to investigate and discipline IPs. There is evidence of due process, and coordination, through joint meetings of AFSA, ASIC and of ARITA and publication of the minutes of those meetings.[157]

[153] Ombudsman Act 1976 (Cth).
[154] See for example, Bankruptcy Act 1966 (Cth) s 149K and s 149Q.
[155] Peter Cane, *Administrative Law* (5th ed OUP 2011) 12-13.
[156] Mark Robinson QC, *Administrative Law: the Laws of Australia* (1st ed Thomson Reuters 2016) para [2.7.1150].
[157] See ARITA website.

Fourth, the question of expertise must be carefully assessed. Public sector employees particular in regulatory agencies, tend not to promote their expertise except at the higher levels. ASIC's lead corporate insolvency officer is an experienced registered liquidator[158] and the various Inspector-Generals in Bankruptcy have had considerable public sector management expertise.[159] Both agencies employ lawyers and accountants and have staff with some years' insolvency experience. However, the merits of employing people with insolvency expertise can be counteracted by concerns about 'regulatory capture', whereby industry experts employed by the regulator bring cultural or professional biases in favour of the industry.[160] Regulation is also increasingly seen as a profession that is distinct from the particular industry regulated, requiring professional regulators to demonstrate a wide range of skills and specialist knowledge.[161] Regulatory and behavioural theories usefully cross industry boundaries and allow new approaches to develop;[162] mere experience in the insolvency industry may not be enough to properly regulate IPs. Nevertheless, insolvency expertise is scrutinised through administrative challenges to decisions made under statute by ASIC or AFSA staff in court and tribunal judgments, although the data on the quality of the decisions and process is limited.

[158] See ASIC website.
[159] Information on those employed at ASIC generally is available at Linkedin; and more so of those employed at AFSA.
[160] A Freiberg, *Regulation in Australia* (The Federation Press 2017) 492.
[161] Ibid. 497ff.
[162] Ibid.

Fifth, the question of whether Australia's regime to regulate IPs is efficient can more readily be addressed, in the negative. A reason for the various recommendations for a single state regulator in Australia has been the apparent inefficiency of having two regulators, applying what are now largely harmonized laws and rules, under a single professional body code of conduct, in respect of practitioners who are often registered as CIPs and RTs; ASIC and AFSA issue separate regulatory guidance, even on matters of commonality such as fees and independence. This is confirmed to an extent by practitioners regulated by both ASIC and AFSA who have compared ASIC's approach unfavourably to that of AFSA.[163]

[163] Streten (n 11) 97, cites one IP who was both a RT and a CIP explaining: "If you've got an issue, you'll pick up the phone and call AFSA and say hey I've got a concern or this creditor is a problem. What do we do? Whereas as a corporate practitioner you will do everything you can to avoid contacting ASIC because their first thought is that we've done something wrong… I think it comes from a misunderstanding as well – there's a real disconnect between ASIC and boots on the ground". Robinson (n 22) also found that "respondents felt strongly about the need for improvement with ASIC's role in the regulatory framework. One significant area of concern was the approach to enforcement and matters that were the subject of disciplinary action by ASIC".

It is also likely that the Australian system contains productive inefficiencies. The ideal of "no wasted investigations" is complicated by Australia's parallel regulatory system[164] and evidence of disproportionate investigations of CIPS by ASIC while those of RTs by AFSA are more focused.[165] In respect of productive efficiency through the making of prompt returns to creditors, both RTs and CIPs must attend to their duties, including distribution of available funds, in a timely manner.[166] Failure to do so may be grounds for review of their conduct and regulatory sanctions. Allocative efficiency by way of maximising returns to creditors through requiring fair charging structures applies to both RTs and CIPs. Regulation to ensure a competitive and independent IP profession arguably promotes dynamic efficiency, although innovation, in particular in relation to the use of internet-based applications, is said to be variable across RTS and CIPS.[167]

In conclusion, at this high-level analysis, the Australian regulatory regime for IPs appears to satisfy all of the measures for "good" regulation, except the criterion of efficiency.

[164] Registration and regulation processes are conducted separately; hence, in a case where an IP who was registered both as a trustee and as a liquidator had stolen money from a company in liquidation, separate corporate and personal discipline processes were undertaken to cancel each registration.
[165] The Law Council of Australia submission to the 2015 Capability Review of ASIC referred to a disproportionate allocation of resources to regulating CIPs (e.g. 2018-2019 $7.338m on CIPs c.f. $.850m in registered auditors) and wasted resources on making compulsory s 533 reports to ASIC which only takes action in a very small number of cases.
[166] For example, Insolvency Practice Rules (Bankruptcy) 2016 (IPRB) s 42-135.
[167] Jennifer Dickfos, 'AI and the Insolvency Profession: The State of Play' (2018) 26(4) Insolvency Law Journal 172.

VI. ANALYSIS

Despite a common starting point, the Australian and UK systems have developed differently: in the UK, all IPs fall within the same regulatory structure, in Australia, IPs fall within either or both of the personal or corporate regulatory structure. That Australia is a federation with constitutional constraints upon the jurisdiction of its federal parliament, is one significant difference. In the UK, there is a system of co-regulation, where the work of IPs is overseen by their own RPB regulator and the RPBs are accountable to the Secretary of State through the Insolvency Service as oversight regulator. In Australia, individual IPs are directly regulated by the state, but must be regulated by two separate regulators, one for corporate insolvency and one for personal insolvency, with industry bodies having only minor regulatory roles.

The UK system envisages the possibility of a single regulator if confidence in the UK system is not achieved by 2022. The legislation did not refer to a "single government regulator", so it would have been possible for a new single regulator to be one of the existing RPBs or a new entity set up for the purpose, enabling the current system of co-regulation to continue. Since then, the government has concluded that its preferred option is to legislate for a "single, independent government insolvency regulator to sit, with appropriate separation of duties, within the Insolvency Service", so leading to direct state regulation.[168] In Australia, there is an argument that abolishing the parallel system and replacing it with a single state regulator would lead to a better system regulation of IPs in Australia. But would either of these proposals result in a better regulatory framework in their respective jurisdictions? As Renda observed, although regulatory alternatives may appear equally effective in theory, "what really matters in practice is the way in which they are enforced, and whether they are easy to comply with, or difficult to deviate from".[169]

1. The UK System

The findings suggest that the existing regulatory framework in the UK is a good system of regulation, as summarised in Table 1.

The legislative determinant for introducing a single regulator is whether there is insufficient "confidence" in the system, measured by the achievement of stated legislative

[168] Insolvency Service (n 24) 15.
[169] A Renda '*Assessing the Costs and Benefits of Regulation'*, Study for the European Commission, Secretariat General (2014), 14.

objectives. Although a lack of confidence has not been established, the UK government has decided to proceed with a single government regulator, concluding that it is not cost-effective to create a new, non-governmental body to regulate such a small profession, nor is it appropriate to transfer this function to an existing RPB.[170] In reaching this conclusion, the UK government has drawn on the IAIR principles and noted that there are different ways to regulate, including via a single regulator, citing Australia as an example.[171] Although there can be some sympathy with the UK government, it is worth noting that New Zealand has recently consulted on IP regulation and ultimately adopted a system of co-regulation with the New Zealand Institute of Chartered Accountants as its sole accredited body and has not adopted the model of its neighbour, Australia.[172] As this paper has illustrated, the Australian model has significant flaws and is not a suitable model for UK.

[170] Insolvency Service (n 24) 16.
[171] Ibid.
[172] New Zealand Insolvency Practitioners Act 2019; New Zealand Office of the Minister of Commerce and Consumer Affairs 'Insolvency Practitioners and Voluntary Liquidations' (2016) https://www.ritanz.org.nz/new-insolvency-regime-comes-into-effect/

As previously discussed, IPs are sometimes singled out for criticism for matters beyond their control and it is difficult to see how the introduction of a single regulator would help. For example, Step Change (a debtor charity) responded to the 2019 Insolvency Service consultation suggesting that it would be better to have a separate regulator to address the problems caused by IVAs, before going on to suggest that the problems actually do not lie with IP regulation as much as with the IVA procedure itself.[173] A separate regulator would not only result in a system of parallel regulation for IVAs separately from and all other procedures (and so generate the kinds of difficulties posed by the Australian system) but would, it is submitted, be the wrong solution for an entirely different problem. There is a genuine issue of concern relating to the high costs charged by some volume providers, yet the introduction of a single regulator for IPs would make no difference to this since "an individual IP may have little or no say over the control of governance of the provider firm"[174]

[173] Step Change Debt Charity 'Response to the Insolvency Service call for evidence on Regulation of insolvency practitioners and Review of current regulatory landscape' October 2019 responses 16 and 18, 8 – 9. It should also be noted here for completeness, that a moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311) can only be obtained from Financial Conduct Authority authorised debt advice providers, who have permission to undertake this regulated activity under Financial Services and Markets Act 2000, or local authorities – not IPs. This brings another layer of complexity into the regulatory discussion.

[174] See Insolvency Service *Monitoring Volume Individual Voluntary Arrangement and Protected Trust Deed Providers* Principles 2 October 2019. See also the FCA Report *The Woolard Review* dated 2 February 2021: The Woolard Review - A review of change and innovation in the unsecured credit market (fca.org.uk).

It is also the case that our insolvency laws and procedures are becoming increasingly complicated. Paterson has observed that the complexity of the range of procedures available in corporate insolvency in the UK can lead to inconsistent results for creditors.[175] While this is an unsatisfactory outcome, it is unclear that a single IP regulator would solve the problems associated with this finding. Similarly, the APPG have suggested that the first objective of insolvency administration (company rescue) is almost never met because of a failure of IPs to do their jobs.[176] Yet this is unlikely to be a failure of the IPs; rescuing a company (as opposed to a business) is often unachievable without "new money" and existing creditors will often be understandably reluctant to throw good money after bad.

This analysis (summarised in Table 2) suggests that – of itself - the introduction of a single regulator in the English system would be unlikely to lead to a better system of regulation than the current one, albeit that it might be equally "good".

a) Additional considerations

There are two aspects of the government's proposals which require further discussion. First, is the suggestion that the new government regulator would have the power to delegate certain functions to other suitable bodies and that the RPBs would retain a role in the regulatory sphere. Depending on how this was formulated, it could retain the advantages of co-regulation and even maintain the status quo. If so, this would be a desirable outcome that:

[175] Sarah Paterson 'Wither (sic) principle in corporate insolvency law?' (2021) 5 JIBFL 322.
[176] Para 3(1)(a) Schedule B1 Insolvency Act 1986; APPG Report (n136) 25-26.

> "make[s] use of that mix of regulation and self-regulation that best serves legitimate government purposes and so merits the strongest claims to support". [177]

Second is the proposal for the government regulator to regulate firms whose people undertake IP appointments. The most serious allegations made against IPs are those involving collusion with banks or overcharging for volume work. These are matters which may be beyond the power of an individual IP to address or influence within the scope of their appointment. This proposal means that firms would be held to account by the regulator for any wider client relationship management issues which may affect the public interest. This proposal, if enacted, is likely to bring significant benefits and is to be welcomed.

[177] Baldwin *et al* (n 22) 164.

2. The Australian System

As section 5 demonstrated, the existing regulatory framework in Australia can be said on most criteria to be a good system of regulation, as summarised in Table 3.

The concept of a "single insolvency regulator" in Australia refers to the merger of the roles of each of AFSA and ASIC into a single state regulatory body for all IPs, both CIPs and RTs.

This debate about this is not new: recommendations in 2010 for a single regulator were rejected when the ILRA 2016 harmonised aspects of personal and corporate insolvency laws, leaving the regulatory separation in place. Since then, the debate has changed. The focus is now on ASIC's regulation, specifically the "industry levies" imposed on CIPs, since their introduction in 2017. There are no current suggestions that a separate regulator should be introduced. The issue now is about the way that ASIC regulates and is funded. This is despite evidence of differential outcomes and experiences for the IPs who are regulated by this system, quite apart from the potential for inconsistent outcomes for the individual and corporate insolvents as well as their creditors and other stakeholders.

The current bifurcated regulatory arrangement has applied, since Australia's federation and is accepted. There are legal and policy complications involved in change. Introducing a single state regulator could range in complication depending on (for example), whether it would assume only a regulatory role for RTs and CIPs[178] or also be accompanied by an Official Receiver role for corporate insolvency, as in the UK.[179] From our critical examination, we conclude that a single Australian insolvency regulator would contribute to a good standard of regulation, even if only by comparison with the separate regulation that presently applies. This would involve financial expenditure and substantial legislative and administrative change, at least in the short term.

Nevertheless, criticism of the separate roles should be tested. There may be merit in some concept of "competitive regulation", whereby ASIC and AFSA can be compared with each other. Anecdotal comments suggests that this already happens informally. Data comparisons could be made as to the numbers of complaints upheld, practitioners disciplined and other measurable outcomes.

It is also true that personal and corporate insolvency each have separate laws, and that the nature of their administrations is different. Separate regulation of each arguably makes sense.

[178] We leave to one side, additional complexities in that, under the current legislative regime, 'streamlined' processes (such as the authority of the Official Receiver to issue examination summons, demands for information, and statutory recovery notices, each in aid of recoveries being pursued by RTs) have been a feature of personal insolvency law in Australia for some time. There are few if any comparable process and powers of ASIC. We also do not examine the question of whether this would be established under its own Act or as an Executive Agency within a government Department. As far as the responsible government department is concerned, we would however argue that this should be Treasury to reflect the economic significance of insolvency and its regulation (as occurs already in the UK and NZ).

[179] An issue beyond the scope of this paper.

b) In Response

Although there is force in these arguments, each can be discounted. While there are useful comparisons that can be made at present between the two regulators, the real comparisons are not available. Recent research on Australian IP regulation during COVID-19 found gaps in the regulators' reporting of their respective enforcement tools and powers introduced by the ILRA making it difficult to assess whether the ILRA reforms have met their key legislative objectives.[180]

While ASIC issues a regular report on the standards of CIPs, in terms of their conduct of meetings, complaints, costs of administrations, the reports issued by AFSA on RTs allows no real comparisons. This is largely because while ASIC may decide upon and issue its regulatory priorities, and regulate accordingly, AFSA decides separately upon and issues its own regulatory priorities and regulates accordingly. At least it is not apparent that they do otherwise.[181]

[180] Catherine Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (2020) 28 Insolvency Law Journal 181, 204.

[181] For its 2021 review, see AFSA's Personal Insolvency Compliance Program 2021-22, the Regulatory Charter and the Regulatory Cooperation & Support Policy. Notably the 2021-22 program includes as one of its three foci, "Strengthen trust and confidence in the profession".

Neither report on nor benchmark against the other in respect of their respective regulation of CIPs and RTs. Some may argue that this is necessary given the separate issues that arise in each of personal and corporate insolvency. But those separate issues may well have arisen because of the separate perspectives or each of ASIC and AFSA over time which only serve to mask the reality of the connections between personal and corporate insolvency practice.

It is also relevant to refer to the outcomes of the 2010 Senate inquiry. Although its focus was on ASIC's regulation of CIPs, it heard evidence of what it found was a better process and approach of AFSA in the regulation of RTs.[182] That led to its recommendation of a single regulator, in effect under AFSA control. There are indications, even if anecdotal, that the regulatory approaches of AFSA remain preferred some ten years later. One reason may be that the regulation of RTs is the subject of a single focused regulator and not, as with ASIC, under the control of a regulator with a wide and diverse range of regulated entities.

[182] Senate Economics Committee (n 49) Chapter 10.

It should also be mentioned that the industry bodies charged with some limited degree of co-regulation are not themselves separated in terms of personal and corporate insolvency. In particular, the ARITA Code is largely uniform in its guidance to both CIPs and RTs, even more so since the ILRA 2016 reforms. Where there are particular bankruptcy issues, for example, the Code makes specific reference. Similarly, the same base tertiary accounting and commercial law qualifications allow a person to qualify as a CIP and as an RT, without distinction.

c) Overall Assessment

Our conclusion based on this high-level analysis is that overall, Australia has a "good" system of regulation, except for the significant criterion of "efficiency" and a single state insolvency regulator would provide a better regulation of IPs. Australian constitutional and long-time existing law and practice do present some obstacles, but the benefits of a single state insolvency regulator would outweigh the serious disadvantages of the current system.

But we must acknowledge those obstacles, as to cost and complexity in changing an established legal and operational structure; hence, we offer a practical conclusion, that is, to have both personal and corporate insolvency and their respective regulators under one government minister and department. This should address the criterion of efficiency in serving to align and harmonise the approaches of the two regulators to ensure consistency of approach across the profession and to set and maintain consistent standards. As far as the responsible government department is concerned, we would argue that this should be Treasury to reflect the economic significance of insolvency and its regulation. We note this is the position taken in both the UK and New Zealand.

The authors consider there is little prospect of positive change and increased efficiency without a move to a single administrative arrangement occurring. While this appears to be merely an administrative rearrangement when more substantial change is required, this could in fact be as effective as pursuing long term and complex legal and structural change. Concerns about the silo approach said to be taken in the public sector to tasks and responsibilities split between agencies [183] could be addressed by this arrangement. Corporate and personal insolvency have significant historical and present connections and much of the profession directly or indirectly practises in both. Both agencies and their departmental officers have extensive knowledge of its respective areas of insolvency and the sharing and blending of that knowledge and expertise may only be positive for the regulation of practitioners, and the development of insolvency law and its policy bases. That would also facilitate any substantive legislative attention in the long term if that were found to be required.

[183] The Thodey Review (n 147).

VII. CONCLUDING REMARKS

This paper has applied Baldwin *et al's* criteria of good regulation to determine whether a shift to a single regulator in the UK and Australia would produce a better system for the regulation of IPs than currently exists. The authors recognise that in applying these criteria, they are using a blunt instrument, and that the conclusions discussed here are reached at a high level of generality.

Nevertheless, the findings are instructive. Simply moving to a single regulator in the UK in the event of a finding of a lack of confidence in the system under the reserve power will not provide a "magic bullet" to make the regulatory system a better one. It is the authors' view that the existing UK model holds up well to scrutiny: its coregulatory structure has been refined and improved over many years with the reduction in the number of the RPBs and the removal of the Insolvency Service as a direct regulator. The current model blends necessary technical expertise with the ability of an oversight regulator to hold the RPBs (and ultimately the IPs) to account.

Bearing in mind that many of the problems that arise on insolvency are not attributable to the system of regulating IPs but stem from other causes, the introduction of a single government regulator is not likely - on its own – to improve IP regulation. [184] However, if the reality is that the government regulator delegates certain functions to the RPBs this could mean that some of the benefits of co-regulation, including expertise, are maintained. It is also worth noting that some of the problems that arise for stakeholders in insolvencies may be due in part to firm-wide practices and/or the insolvency procedures that IPs are required to implement. The regulation of firms by the government regulator is therefore to be welcomed, although further consideration of the coherence of the insolvency legislation by the legislature is still needed.

Finally, from the perspective of the individual IP, any changes that are made to the regulatory system would do well to address the question of double jeopardy faced by those IPs who are regulated by both their own professional regulator (whether as an accountant or a lawyer) and the new regulator and who will also remain subject to sanction from the Secretary of State.

[184] The same point was made by Hamish Anderson following a review of IP regulation in 1998 'The case for a profession' *Financial Times* (London, 17 February 1998).

The position in Australia is different. There are strong arguments for removing the current parallel system of regulation of IPs. However, as the authors acknowledge, it is unlikely that there is an appetite for this change to take place as it would be seen as expensive to implement, even if the longer-term benefits would likely produce greater efficiencies and costs savings. The authors therefore recommend that both personal and corporate insolvency should be administered under one government minister and department, even if regulated by the two separate regulators. Depending on the level of commitment, this should address many of the efficiency concerns and in serving to harmonise the approaches of the two regulators to ensure consistency of approach across the profession and to set and maintain consistent standards. Whether in the long-term legal change follows need not be examined. For the present, there is little prospect of positive change without at least such a move to a single administrative arrangement occurring. If it were to occur, we would predict that a much more cohesive and focused insolvency profession, and regime, would develop.

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Table 1

Regulatory criteria	**UK: current system**	**Regulatory criteria satisfied?**
Action or regime supported by legislative authority?	Insolvency Act 1986	Yes
Appropriate scheme of accountability?	Insolvency Service as oversight regulator monitoring statutory RPB regulatory objectives • RPB as co-regulator via informal IP monitoring rules • Gateway Complaints procedure	Yes
Procedures fair, accessible and open?	• MoU • Principles for monitoring	Yes
Regulator acting with sufficient expertise?	RPBs are specialists in accountancy and/or IP practice -ICEAW -IPA	Yes
Is the action or regime efficient?	Measured against regulatory objectives Unproductive fragmentations	Yes Possibly

Table 2

Regulatory criteria	**UK: proposed single regulator**	**Regulatory criteria satisfied?**
Action or regime supported by legislative authority?	Insolvency Act 1986	Yes
Appropriate scheme of accountability?	If Insolvency Service as oversight regulator monitoring statutory RPB regulatory objectives • RPB as co-regulator via informal IP monitoring rules • Gateway Complaints procedure	Yes
	If direct state regulation	Yes
Procedures fair, accessible and open?	If co-regulation under existing principles • MoU • Principles for monitoring	Yes
	If direct state regulation • Unknown	Likely
Regulator acting with sufficient expertise?	If an existing RPB	Yes
	If new third party regulator	Unknown
	If direct state regulator	Partial
Is the action or regime efficient?	If an existing RPB measured against regulatory objectives • Increased costs of e.g. transfer of responsibility from other regulator(s)	Less than currently
	If new third party regulator • Costs of set up of new regulator	Less than currently
	If direct state regulator • Costs of set up of new arrangement	Less than currently
	Unproductive fragmentations	No

Table 3

Regulatory criteria	**Australia: current system**	**Regulatory criteria satisfied?**
Action or regime supported by legislative authority?	• Australian Constitution; State Constitutions • Corporate: Corporations Act 2001 (Cth); Australian Securities and Investments Commission Act 2001 (Cth) • Personal: Bankruptcy Act 1966 (Cth)	Yes
Appropriate scheme of accountability?	• Corporate: ASIC is a Commonwealth statutory corporation which reports annually to Parliament and is reviewed regularly by a parliamentary committee as required by its establishing Act as well as by other federal legislation.[185] • Personal: AFSA is an executive agency which reports annually to Parliament as required by federal legislation.[186] • As government bodies, both ASIC and AFSA are subject to formal executive as well as judicial review[187] and subject to administrative law principles.	Yes
Procedures fair, accessible and open?	• Corporate: ASIC publishes an annual report, which from 2021 is to include performance reporting as required under the RPG 2021. • Personal: AFSA reports publicly each year and is also to include performance reporting under the RPG 2021 and on its Insolvency Practitioner Compliance Program. • However, neither reports on nor benchmarks against the other in respect of their respective regulation of liquidators and trustees.[188]	Likely as separate regulators but this has limitations from the perspective of IPs as one profession
Regulator acting with sufficient expertise?	The regulators' insolvency teams are headed by senior persons experienced in corporate insolvency (ASIC) and public sector management (AFSA). What publicly available records of staff employed in each indicate is an experienced and qualified range of staff, in the fields of both insolvency and public sector management and industry regulation.	There is little information available.
Is the action or regime efficient?	The separated, parallel regulation of IPs when acting as CIPs and as RTs lacks efficiency.	No

[185] Australian Securities and Investments Commission Act 2001 (Cth) ss 136 and 243 and Public Governance, Performance and Accountability Act 2013, s 46. Also see, Regulator Performance Guide, July 2021, page 10.
[186] Public Governance, Performance and Accountability Act 2013, s 46.
[187] For example, the 2015 formal review of ASIC (n 161). AFSA may be subject to external scrutiny through agency capability reviews or reports on their operations by the Auditor-General, a parliamentary committee, or the Commonwealth Ombudsman.
[188] It will be interesting to see what, if any, difference the RPG (n 76) will make. It states at 7: "Regulators should take a whole-of-system perspective, building and maintaining collaborative relationships with other regulators to develop a shared understanding of respective roles and responsibilities, and identify gaps and areas of overlap."

Table 4

Regulatory criteria	**Australia: proposed single state regulator**	**Regulatory criteria satisfied?**
Action or regime supported by legislative authority?	This would require specific legislative authority that addressed the constitutional issues.	Likely
Appropriate scheme of accountability?	The same level of accountability would apply to a single state regulator as currently applies to ASIC and AFSA	Yes
Procedures fair, accessible and open?	This could be addressed in the process of establishing a new single state regulator.	Likely
Regulator acting with sufficient expertise?	This could be addressed in the process of establishing a new single state regulator.	Likely
Is the action or regime efficient?	This will depend on the way it is established and implemented (as well as funded).	Likely

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