

# The appointment of insolvency practitioners in South Africa: time for change?

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## 1 Introduction

It would be fair to state that the appointment of insolvency practitioners<sup>1</sup> in insolvent estates in South Africa is a controversial subject. This is not due to the complexity of the legislative provisions or their practical application, but due to the continuous allegations of the irregularities that accompany such appointments.<sup>2</sup> That this is so was clearly illustrated by the evidence submitted to the ministerial committee of enquiry into the liquidations industry during 2004 and 2005.<sup>3</sup>

The insolvency profession currently finds itself in total disarray, although thankfully this comes at a time when the economy is strong and insolvencies are at a relative low when seen in a historical context. However, the recent increase in interest rates will in all probability result in increased insolvencies in the near future. The question is how the insolvency profession will respond to the many blows it had to endure over the past five or six years.

One of the most important and controversial aspects of the insolvency profession as it currently finds itself in South Africa, is the appointment procedures for the appointment of insolvency practitioners in insolvent estates. The insolvency profession is, and always has been, one of the few unregulated<sup>4</sup> professions in South Africa. Until the late 1990s, the insolvency profession

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<sup>1</sup> "Insolvency practitioner" is the generic term used in this article to denote the appointment of both trustees (sequestered estates) and liquidators (companies and close corporations in liquidation). The appointment of liquidators of close corporations will not be dealt with here.

<sup>2</sup> The deputy minister of justice confirmed the allegation of irregularities in a recent speech to the Association for the Advancement of Black Insolvency Practitioners. See [http://www.doj.gov.za/2004dojsite/m\\_speeches/sp2005/2005\\_10\\_28\\_assoc\\_black\\_insolvency.htm](http://www.doj.gov.za/2004dojsite/m_speeches/sp2005/2005_10_28_assoc_black_insolvency.htm) (11-07-06).

<sup>3</sup> The minister of justice and constitutional development appointed the ministerial committee of enquiry in July 2004. In February 2005, the committee submitted their report to the minister, but this report has to date not been made public. However, the minister, in her budget speech on 20 May 2005, confirmed the following: "I am pleased to report that the Committee has delivered its final report and has provided me with a comprehensive overview of the problems in the masters' offices and in the liquidation industry. The report also contains recommendations, which have been considered by officials from my Department and Departments of Trade and Industry and Treasury. I am in the process of reporting to Cabinet on the Committee's findings and on the recommendations made by both the Committee and the departmental officials. The report will assist us to achieve our objectives in the masters' offices." See [http://www.doj.gov.za/2004dojsite/m\\_speeches/sp2005/2005\\_05\\_20\\_mabandla\\_bv2005.htm](http://www.doj.gov.za/2004dojsite/m_speeches/sp2005/2005_05_20_mabandla_bv2005.htm) (02-07-06).

<sup>4</sup> By "unregulated" is meant that there is no legislation regulating admission to, or participation in, the insolvency profession. Requirements such as minimum qualifications, practical experience, registration and codes of conduct are non-existent.

was run by a small band of insolvency practitioners scattered amongst the main economic centres of the country. Many will argue that it has never been necessary to regulate the insolvency profession, especially considering the small number of so-called professionals that used to participate in this industry. That this has changed is evident from the dramatic increase in the number of insolvency practitioners “registered” as such with the master of the high court.<sup>5</sup>

This article submits that the unregulated nature of the South African insolvency profession is the underlying cause of the tensions and irregularities that can be found in this industry, as well as the cause of the general ineffectiveness of the South African insolvency system as a whole. In making this submission, the legislative provisions and the practice surrounding the appointment of insolvency practitioners in insolvent estates will be analysed, the attempts at transforming the profession in order to make it more accessible to previously disadvantaged individuals will be discussed, and suggestions for resolving these problems will be made. In addition, the historical context of the regulation of the insolvency profession by the state (*viz* the master of the high court) will be discussed and compared to the regulation of the insolvency profession in two other national jurisdictions, namely Australia and the United Kingdom.

## 2 *Historical development of the supervision of insolvent estates by the master of the high court*

### 2.1 Introduction

By way of introduction it needs to be stated that although the insolvency profession in South Africa is unregulated, the state does to a large extent “regulate” the insolvency profession by way of the many legislative obligations placed on the master of the high court. Before commencing with a discussion of the current manner in which appointments are made under South African insolvency law, it is essential to understand the role of the master of the high court as “regulator” of the insolvency profession. This requires a cursory study of the roots of South African insolvency law, *viz* Roman law, Roman-Dutch law, English law and the law that applied in the Cape Colony at the time.

### 2.2 Roman law

An examination of the supervisory role of the state in early Rome<sup>6</sup> reveals that it was very limited. Private redress traditionally prevailed in Roman law. It was

<sup>5</sup> Although these figures could not be officially verified, it is alleged that prior to 1998 there were approximately 250 insolvency practitioners countrywide. According to figures provided by a member of staff of the master of the high court in Pretoria, there are currently over 2,500 “registered” insolvency practitioners in the Pretoria office of the master alone.

<sup>6</sup> Visser “Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg” 1980 *DJ* 42 45; De la Rey *Mars, The Law of Insolvency in South Africa* (1988) 1-2 1; Stander “Geskiedenis van die insolvensiereg” 1996 *TSAR* 371 371-372. See also Levinthal “The early history of bankruptcy law” 1918 *University of Pennsylvania Law Review* 223 232-233 for a discussion of the historical development regarding execution against the debtor’s person and execution against the debtor’s property.

not until the days of Marcus Aurelius<sup>7</sup> that the so-called self-help culture by creditors was rendered penal among the citizens of Rome.<sup>8</sup>

The *magister* appointed under the *bonorum emptio*<sup>9</sup> was one of the creditors and although the *missio in bona* was granted by the *praetor*, the *magister* was merely an agent of the creditors and was by no means a public officer.<sup>10</sup> Ownership of the estate never vested in him and he acted purely in his own interest and in the interest of those who appointed him.<sup>11</sup> Under the *distractio bonorum*<sup>12</sup> the position was different, as the *praetor* committed the administration of the estate to a *curator bonorum* whose duty it was to dispose of the assets of the debtor in separate lots.<sup>13</sup> The *curator* represented to a limited extent the principle of public interest, which requires that bankruptcy proceedings be conducted on a uniform platform and all creditors obtain an equitable satisfaction of their claim.<sup>14</sup> However, the *curator* never received the status of a public officer charged with conducting of a state-regulated procedure of bankruptcy.<sup>15</sup>

### 2.3 Roman-Dutch law

The first legislation in Holland dealing with bankruptcy was enacted in 1531 by Charles V of Spain.<sup>16</sup> The legislation mentioned the great increase in trade, and debtors had to be compelled to pay their debts and be prevented from evading their liabilities.<sup>17</sup> By all accounts it appears that the Roman law procedure of *cessio bonorum*<sup>18</sup> was in its main features introduced into Holland in approximately the last part of the fifteenth century.<sup>19</sup> The granting of a *cessio* ceased to be a right which the debtor could claim, but was regarded as a privilege which the court could in its discretion grant to the debtor.<sup>20</sup> When the *cessio* was

<sup>7</sup> Emperor Caesar Marcus Aurelius Antoninus Augustus (26 April 121 to 17 March 180 AD) was Roman emperor from 161 AD till his death. He was born Marcus Annius Catilius Severus, and at marriage took the name Marcus Annius Verus. When he was named emperor, he was given the name Marcus Aurelius Antoninus.

<sup>8</sup> Levinthal (n 6) 240.

<sup>9</sup> In approximately 104 BC a *praetor* named Publius Rutilius introduced a process of general execution against the property of a debtor, known as the *bonorum emptio* or *venditio*. The *bonorum venditio* afforded the creditors the opportunity of receiving possession of the debtor's estate (*missio in possessionem*).

<sup>10</sup> Levinthal (n 6) 240.

<sup>11</sup> Stander (n 6) 373.

<sup>12</sup> The *bonorum emptio* and *distractio* constituted the Roman system of bankruptcy, a system which is thought to be the origin and source of all bankruptcy systems.

<sup>13</sup> Swart is of opinion that the *bonorum distractio* is the origin of the South African insolvency system, as it represents the first signs of a collective debt-collecting system. See Swart *Die Rol van 'n Concurfus Creditorum in Suid-Afrikaanse Insolvensiereg* (1990 LLD dissertation UP).

<sup>14</sup> Levinthal (n 6) 241.

<sup>15</sup> Stander (n 6) 373.

<sup>16</sup> One of the great acts of the Spanish king, which stated in its preamble "that it was promulgated in order to check the heresy that was creeping into the provinces, to remedy the expense connected with law suits, and to provide for a pure administration of justice, which would deal equally with rich and poor". See Levinthal (n 6) 246.

<sup>17</sup> Levinthal (n 6) 246.

<sup>18</sup> The surrender of his estate by the debtor exempted him from arrest, imprisonment, slavery and *infamia*.

<sup>19</sup> Dalhuisen I Dalhuisen *on International Insolvency and Bankruptcy* (1986) 1-1-1-17 par 2.02[5]; Wessels *History of the Roman Dutch Law* (1908) 661; De la Rey (n 6) and Stander (n 6) 374.

<sup>20</sup> De la Rey (n 6) 3.

granted by court, the estate was administered by commissioners under supervision of the *scout* and *schepenen*, or local magistrates.<sup>21</sup>

During the eighteenth century it became practice to afford the administration of insolvent estates to chambers known as *Desolate Boedelkamers*, instead of appointing a *curator*.<sup>22</sup> These chambers were entrusted with, *inter alia*, the administration of insolvent estates.<sup>23</sup> In 1777 an important ordinance was passed in Amsterdam<sup>24</sup> which has widely been accepted as the origin of South African insolvency law.<sup>25</sup> The passing of this ordinance is an important milestone in South African insolvency law as it was also the source of the insolvency practice of the Cape of Good Hope at the time of annexation.<sup>26</sup> The main principles of the ordinance were introduced into the various colonial ordinances, and still form the basis of our bankruptcy practice.<sup>27</sup>

## 2.4 English law

English law followed more or less the same pattern as that which was followed on the continent, in the sense that individual debt collection procedures preceded the development of formal insolvency law.<sup>28</sup>

The act of 1831 was responsible for the introduction into bankruptcy of what has been described as “officialism”.<sup>29</sup> The predominant role of creditors in the administration of insolvent estates was reduced by the introduction of officers known as official assignees,<sup>30</sup> who were attached to the London bankruptcy court. This spelt the end for the time being of the court of chancery’s 250-year long jurisdiction over bankruptcy.<sup>31</sup> This system was by no means free of corruption, and was itself abolished in 1869.<sup>32</sup>

The concept of some form of official control over bankrupt estates was re-examined during the period 1869 to 1883. This was in consequence of the scandals that were associated with the administration of bankrupt estates during this period.<sup>33</sup> The Bankruptcy Act of 1883 was a direct response to public dissatisfaction with the administration of bankrupt estates, and introduced a feature of impartial investigation into the insolvent’s affairs.<sup>34</sup> Until the passing of the act of 1883, the system of insolvency administration employed in England involved creditor control over the administration of bankrupt estates.<sup>35</sup> The Bankruptcy Act of 1883 can be credited with devising a new system of joint official and creditor control which has endured until the present day.<sup>36</sup>

<sup>21</sup> De la Rey (n 6) 3.

<sup>22</sup> De la Rey (n 6) 3.

<sup>23</sup> (n 48) below.

<sup>24</sup> Ordinance 1777 (Amsterdam) *Nederlandsche Jaarboeken* 291.

<sup>25</sup> *Fairlie v Raubenheimer* 1935 AD 135 146.

<sup>26</sup> Wessels (n 19) 668.

<sup>27</sup> Visser (n 6) 45.

<sup>28</sup> Dalhuisen (n 19) par 2.02 [8] 1-39. See also Burdette *A Framework for Corporate Insolvency Law Reform in South Africa* (2002 LLD dissertation UP) 27.

<sup>29</sup> Duns *Insolvency: Law and Policy* (2002) 25.

<sup>30</sup> also registrars and deputy registrars of bankruptcy.

<sup>31</sup> Duns (n 29) 25.

<sup>32</sup> See report of the *Review Committee on Insolvency Law and Practice* Chairman Sir Kenneth Cork GBE Cmnd 8558 (1982) (Cork report) 18.

<sup>33</sup> Cork report (n 32) 18.

<sup>34</sup> Cork report (n 32) 19.

<sup>35</sup> as provided by the Bankruptcy Act 1869.

The 1883 act was also responsible for the establishment of the office of the “official receiver”.<sup>37</sup> After the filing of a bankruptcy petition, the court could make a receiving order that authorised the official receiver of the debtors to act pending the appointment of a trustee.<sup>38</sup> The official receiver was required to act under the directions of the board of trade, and in this way was made responsible to parliament.

It is interesting to note the explanation of the objectives of the 1883 act given by the then president of trade, Chamberlain.<sup>39</sup> In the explanation he mentioned as objectives firstly “the honest administration of bankrupt estates”, and secondly “the improvement of the general tone of commercial morality”.<sup>40</sup> Chamberlain argued that the only way to secure these objectives was to ensure that there was an independent and impartial examination into the circumstances of each case. For this reason Chamberlain thought that it was necessary to have a public officer examine the circumstances of each bankruptcy.<sup>41</sup>

The basic philosophy and approach of the 1883 act was not challenged for most of the twentieth century. It retained its influence right up to the time of the comprehensive assessment of bankruptcy law under the Cork report<sup>42</sup> in 1982. The act of 1883 was later replaced by a series of bankruptcy statutes culminating in the Bankruptcy Act of 1914,<sup>43</sup> which codified bankruptcy law and remained in force until 1986 when it was repealed by the Insolvency Act of 1985.<sup>44</sup>

From the above it is evident that English insolvency law was, until the eighteenth century, a system which was mainly regulated by creditors. Since the nineteenth century this system of private sequestration developed into a system where the administration was mainly regulated by the state.<sup>45</sup>

## 2.5 Early Cape law

As a result of the *Vredestraktaat van Amiens* of 1802, the Cape of Good Hope, after having been under British control for almost seven years, again came under the control of Holland.<sup>46</sup> The Batavian Republic immediately requested that the *asiatische raad* prepare a report making suggestions about the post of governor-general, as well as the eventual management of the Cape in consideration of the new *volksplanting* in the Cape.<sup>47</sup> The person responsible for the

<sup>36</sup> Cork report (n 32) 19.

<sup>37</sup> (n 248) below.

<sup>38</sup> Duns (n 29) 29.

<sup>39</sup> Joseph Chamberlain (8 July 1836–2 July 1914) was a British statesman. In his early years he was a successful businessman, a radically minded Liberal, a campaigner for educational reform and he became president of the board of trade. See Tolmie *Corporate and Personal Insolvency Law* (2003) 11.

<sup>40</sup> Heath “Insolvency law reform: the role of the state” 1999 *NZ Law Review* 569.

<sup>41</sup> Heath (n 40) 569.

<sup>42</sup> (n 32).

<sup>43</sup> The Muir Mackenzie Committee of 1908 was perceived as a tidying-up operation, and led to the Bankruptcy Act of 1914.

<sup>44</sup> Fletcher *The Law of Insolvency* (1996) 6.

<sup>45</sup> Stander (n 6) 376.

<sup>46</sup> De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap de Goede Hoop* (1923) 77.

<sup>47</sup> De Villiers (n 46) 78.

compilation of the report was Jacobus Abraham de Mist,<sup>48</sup> who had been a member of the *asiatische raad* since 1795. With the enactment of the *Vredes-traktaat van Amiens* on 27 March 1802, the Batavian Republic appointed De Mist as commissioner-general of the Cape.<sup>49</sup>

After settling in the Cape, De Mist wrote a letter to the justice council<sup>50</sup> on 24 March 1803, and for the first time his idea of creating the *desolate boedelkamers* is mentioned.<sup>51</sup> Although he had complete authority to act as he wished, De Mist compiled a report to the *asiatische raad* setting out the necessity of creating a *desolate boedelkamer* in the Cape. In this report he mentioned the fact that all insolvent estates were then administered by a *sequester* who was also the temporary secretary of justice. The *sequester* was responsible for the administration of between 300 and 400 estates, the execution of civil sentences and, as a member of the justice council, this office also formed part of the judiciary. The *sequester* was therefore responsible for both the administration of justice and the enforcement of the law.<sup>52</sup>

De Mist had the foresight that the *desolate boedelkamers* should operate according to an official ordinance. However, at the time of the establishment of the *boedelkamers* the ordinance had not yet been finalised, and as a temporary measure De Mist issued a so-called provisional instruction<sup>53</sup> to the appointed members on 22 April 1803, setting out the procedures and jurisdiction of the *boedelkamers*.<sup>54</sup> On 22 May 1804 De Mist received a draft of the ordinance<sup>55</sup> prepared on his request by the justice council, and soon afterwards the official ordinance<sup>56</sup> regulating the functions and procedures of the *desolate boedelkamer* was published.<sup>57</sup> This ordinance, known as the *Provisionele Instruksie*, represented the first concrete and substantial insolvency law in the Cape of Good Hope.<sup>58</sup> The ordinance issued by De Mist was largely based on the principles found in the ordinance of Amsterdam 1777,<sup>59</sup> which has been widely accepted as the origin of South African insolvency law.<sup>60</sup> It is interesting to note that although the instructions relating to the *desolate boedelkamers* were founded on the ordinance of Amsterdam,<sup>61</sup> they differed in two important respects, namely that creditors did not feature in the administration of the

<sup>48</sup> De Mist had to act according to a formal instruction issued by the Batavian Republic, which had as its basis his report, and together with the instruction form the basis of the Batavian rule between 1803 and 1806. It is also to these two important documents that we owe the existence of the so-called *desolate boedelkamers*.

<sup>49</sup> De Villiers (n 46) 78.

<sup>50</sup> *Raaden van justitie*.

<sup>51</sup> De Villiers (n 46) 84.

<sup>52</sup> De Villiers (n 46) 90.

<sup>53</sup> *Instructie voor de Commissarissen van de Desolate Boedels*.

<sup>54</sup> De Villiers (n 46) 96.

<sup>55</sup> Ordinance known as *De Concept Ordonnantie op de Gerechtelijke Beheering van Boedels en op de Executie van Civiele Vonnissen*.

<sup>56</sup> This ordinance was known as the *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer van 1804*. See De Villiers (n 46) 105.

<sup>57</sup> De Villiers (n 46) 105.

<sup>58</sup> De Villiers (n 46) 107.

<sup>59</sup> *Nederlandse Jaarboeken* (1777) 291.

<sup>60</sup> *Fairlie v Raubenheimer* (n 25) 146.

<sup>61</sup> It should be noted that under the ordinance the charge of the insolvent estates was granted to curators or trustees chosen by the creditors themselves, acting under the supervision of the *desolate boedelkamer*.

insolvent estate, and secondly that creditors could not apply for the sequestration of the debtor's estate.<sup>62</sup>

In 1806 the Cape was again under British rule, but this had no immediate effect on legal developments in the Cape.<sup>63</sup> The *desolate boedelkamers* supervised insolvent estates until 1818, at which time they were abolished and replaced<sup>64</sup> by a *sequestrator* who had the same jurisdiction and function as its predecessor. The ordinance issued by De Mist remained unchanged, and for the next fourteen years it remained the main source of insolvency law in the Cape.<sup>65</sup>

A mere nine years after its commencement the office of the *sequestrator* was abolished, leaving a huge amount of outstanding debt claimed to be due to estates under administration.<sup>66</sup> In 1827 the British government issued the first Royal Charter of Justice, and the justice council was replaced by the supreme court of the Cape of Good Hope.<sup>67</sup> *Inter alia* the court had to make provision for the post of a master of the supreme court,<sup>68</sup> which took over the functions of the official *sequestrator* and also possessed many of the functions of the Amsterdam commissioners<sup>69</sup> serving in the *desolate boedelkamers* in Holland.<sup>70</sup>

A few other statutory developments followed,<sup>71</sup> until the master was firmly established in its current form by the 1916 Insolvency Act,<sup>72</sup> the predecessor of the current 1936 Insolvency Act.<sup>73</sup>

## 2.6 Union legislation

In 1916 the parliament of the Union of South Africa repealed all the existing insolvency statutes in the various provinces and substituted them with the 1916 Insolvency Act,<sup>74</sup> a uniform law assigned to apply throughout the (then) Union of South Africa.<sup>75</sup> The 1916 Insolvency Act provided for the master of the supreme court<sup>76</sup> to appoint, in matters where a custodian was required, a

<sup>62</sup> Burton *Observations on Insolvent Law of the Colony* (1829) 8.

<sup>63</sup> De Villiers (n 46) 105.

<sup>64</sup> GG (04-12-1818).

<sup>65</sup> De Villiers (n 46) 105.

<sup>66</sup> Burton (n 62) 29.

<sup>67</sup> Theal *Records of the Cape Colony* (1898).

<sup>68</sup> Ordinance 64 of 1829 introduced the master of the supreme court into our insolvency system. In its present form the institution of the master of the high court can be defined as a public servant who is charged, *inter alia*, with control over the administration of insolvent estates. S 1 of the Administration of Estates Act 66 of 1965 defines "master" in relation to any matter, property or estate, as the master, deputy master or assistant master of the high court who has jurisdiction in respect of the matter, property or estate.

<sup>69</sup> Wessels (n 19) 670.

<sup>70</sup> The development of the master of the high court as regulator of insolvency law in South Africa is not merely linked to the development of insolvency law, but also to the historical influences of the institution referred to as the *weeskamer* or orphan chamber.

<sup>71</sup> Ordinance 64 of 1829, which wove together English and Dutch principles and was later repealed by Ordinance 6 of 1843.

<sup>72</sup> 32 of 1916 (hereinafter referred to as the 1916 Insolvency Act).

<sup>73</sup> 24 of 1936 (hereinafter referred to as the Insolvency Act).

<sup>74</sup> This act was in essence an adaptation of the old Cape Ordinance. For a useful commentary on the 1916 Insolvency Act and the impact of the 1926 amendments, see Nathan *South African Insolvency Law* (1928).

<sup>75</sup> De la Rey (n 6) 6; Stander (n 6) 377.

<sup>76</sup> (n 68).

*curator bonis* to take care of and have custody of the insolvent estate.<sup>77</sup> With the authority of the master the *curator bonis* had the powers to collect debts, sell or dispose of property and carry on business in connection with the estate.<sup>78</sup> The more usual course, however, was for the court to appoint a provisional trustee.<sup>79</sup> The provisional trustee had the powers of a final trustee, but was unable to take legal action without the court's permission and could not realise any of the estate assets without the permission of the master.

The appointment of a provisional trustee was done by way of a petition by the master or a creditor to the court, and was contained in the petition for sequestration of the debtor's estate.<sup>80</sup> The court had a discretion to appoint a provisional trustee, and was not bound to have regard to the wishes of any of the creditors. In fact, in some instances the court disregarded the person nominated by the creditors and appointed a person chosen by itself.<sup>81</sup> Generally, however, the wishes of the majority of creditors prevailed<sup>82</sup> and the court appointed the nominated applicant if such person was supported by a substantial body of creditors.<sup>83</sup> Where the application was supported by none of the creditors, or an insignificant number of them, but the circumstances revealed urgency, the court made the appointment but reserved leave to the creditors to have the appointment set aside.<sup>84</sup>

The 1916 Insolvency Act was amended by Act 29 of 1926 and Act 58 of 1934. These amendments to the 1916 Insolvency Act made provision for the master to appoint a *curator bonis* in circumstances where only a notice of surrender, in the case of a petition for voluntary surrender, had been published.<sup>85</sup> This amendment added to the powers of the master to appoint a *curator bonis* after a provisional sequestration order had been granted in terms of section 17 of the 1916 Insolvency Act.<sup>86</sup>

On 1 July 1936 the 1916 Insolvency Act was replaced by the current Insolvency Act 24 of 1936.<sup>87</sup> The 1936 Insolvency Act conferred on the master the power to appoint a provisional trustee,<sup>88</sup> but failed to state how such an appointment should be made. This effectively conferred on the master an unfettered discretion to appoint a person of choice as the provisional trustee of an insolvent estate.

<sup>77</sup> s 17 of 1916 act.

<sup>78</sup> Nathan (n 74) 70.

<sup>79</sup> s 57 of the 1916 act.

<sup>80</sup> Nathan (n 74) 196.

<sup>81</sup> Nathan (n 74) 197.

<sup>82</sup> *Ex Parte Reid* 1922 CPD 62.

<sup>83</sup> Nathan (n 74) 197.

<sup>84</sup> Nathan (n 74) 197.

<sup>85</sup> S 5 of the amendment act of 1926 amended s 6 of the 1916 act by adding ss (3) and (4).

<sup>86</sup> s 17 of the 1916 act.

<sup>87</sup> Burdette (n 28) 15. It is important to note that however complete the Insolvency Act 24 of 1936 may be, it did not totally repeal the common law in respect of South African insolvency law, and that English law played an important role in the development of our insolvency law.

<sup>88</sup> s 18(1). See par 3.2.1 below.

### 3 *The current manner in which trustees and liquidators are appointed by the master of the high court*

#### 3.1 Introduction

It is interesting to note that the provisions contained in the Insolvency Act and the Companies Act are completely out of step with what actually takes place in practice when it comes to the appointment of trustees and liquidators. The procedures followed in practice for the appointment of provisional trustees and liquidators are, to say the least, unsatisfactory, in that there is very little consistency in the manner in which the criteria for the making of provisional appointments are applied in the various masters' offices around the country.

At this point it is important to point out that a distinction must be made between the making of provisional and final appointments by the master. The provisions for the making of final appointments have to an extent become obsolete due to the fact that it very rarely happens that creditors will vote for the appointment of a trustee or liquidator at the first meeting of creditors. This is due to the fact that the making of provisional appointments has superseded the procedure for the making of a final appointment.

As already pointed out above,<sup>89</sup> the courts used to appoint a provisional trustee or *curator bonis* for the purpose of taking control of the insolvent's estate in cases where it was deemed appropriate.<sup>90</sup> The court would normally, but not always, make an appointment on the basis of the wishes of creditors. Since South Africa has a creditor-friendly insolvency system, the wishes of creditors carry a lot of weight in the administration of insolvent estates. This can be seen from many of the provisions contained in both the Insolvency Act and the Companies Act. The whole purpose, for example, of convening creditors' meetings is for the trustee or liquidator to obtain instructions from the creditors regarding the manner in which the estate in question must be wound up.

#### 3.2 Statutory provisions providing for the making of appointments by the master

##### 3.2.1 The Insolvency Act 24 of 1936

Section 18(1) of the Insolvency Act makes provision for the appointment of a provisional trustee by the master of the high court. Section 18(1) reads as follows:

"As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the master *may*, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee."<sup>91</sup>

<sup>89</sup> par 2.6 above.

<sup>90</sup> It is interesting to note that the court no longer has the power to make a provisional appointment – see *eg Goldfields Training Co (Pty) Ltd v Schutte* 1956 3 SA 1 (O); *Gilbert v Bekker* 1984 3 SA 774 (W).

<sup>91</sup> as amended by s 3 of Judicial Matters Amendment Act 16 of 2003 – emphasis added.

From the wording of this subsection it is clear that the legislature intended that the appointment of a provisional trustee should be an extraordinary appointment, the word *may* indicating that it was not the intention that such an appointment should be made in all cases.<sup>92</sup> Sadly, the section does not state what criteria the master should apply when making the appointment, and for this reason the making of provisional appointments falls solely within the discretion of the master. It has been stated that the master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice.<sup>93</sup>

Section 54 of the Insolvency Act contains the rules for the election of a final trustee at the first meeting of creditors. In terms of section 54(2) of the Insolvency Act, any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, and who voted at such meeting, shall be elected as the trustee of that estate. Its bears mentioning that section 54(1) states that the creditors may elect one or two trustees at the first meeting of creditors. The reason for this is that the voting rules in section 54 are taken a step further due to the fact that it may happen that no one person has the majority of the votes in both number and value. It frequently occurs that one person obtains the majority of the votes in value (especially those trustees who enjoy the support of the larger creditors such as banks), while another person obtains the majority of the votes in number. In such a case both persons will be elected as (co-) trustees of the estate in question.

Considering the rather detailed provisions relating to the appointment of a final trustee, it is rather surprising to find an absolute lack of rules<sup>94</sup> relating to the appointment of provisional trustees. This further entrenches the view that the appointment of a provisional trustee was meant to be an extraordinary appointment by the master.

It is also worth mentioning the provisions of section 18(4) of the Insolvency Act, which provide for the appointment of the provisional trustee as final trustee when no person has been elected as the final trustee at the first meeting of creditors. Section 18(4) reads as follows:

“When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the master has appointed a provisional trustee in the estate in question, the master shall appoint him as trustee on his finding such additional security as the master may have required.”

Finally, it is to be noted that the master has the discretion to appoint a co-trustee at any time if he or she deems it appropriate in the circumstances.<sup>95</sup> This

<sup>92</sup> See also *Kunst et al Meskin Insolvency Law and its Operation in Winding-up* (loose-leaf ed, issue 19) 4-1.

<sup>93</sup> *Lipschitz v Watrus* 1980 1 SA 662 (T) 671. See also *Meskin* (n 92) par 4.1 4-1. Considering the fact that exercising such a discretion amounts to an administrative action by the master, it is doubtful whether the master still has an “unfettered discretion” in view of the provisions of s 5(1) of the Promotion of Administrative Justice Act 3 of 2000. At the very least the master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

<sup>94</sup> Although there are no legislative rules for the appointment of provisional trustees, the master has developed a set of criteria for this purpose – see par 3.3 below.

<sup>95</sup> s 57(5) of the Insolvency Act.

brings to three the total number of trustees that may be appointed in estates under sequestration.<sup>96</sup>

### 3.2.2 The Companies Act 61 of 1973

Section 368 makes provision for the appointment of a provisional liquidator in the case of a company being wound up by the court or by resolution.<sup>97</sup> Section 368 reads as follows:

“As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the master *may*, in accordance with policy determined by the Minister, appoint *any suitable* person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.”<sup>98</sup>

Even though the section is similarly worded to section 18(1) of the Insolvency Act, Meskin<sup>99</sup> is of the opinion, with reference to section 361(1) of the Companies Act, that section 368 intends that the master should ordinarily make such an appointment. This is probably due to the fact that the section provides for the property of the company to fall under the custody and control of the master *until the appointment of a provisional liquidator*. Despite the wording of section 361(1), it is nevertheless submitted that provisional liquidators are also supposed to be appointed as extraordinary appointments, although a far more cogent case can be made for the appointment of a provisional liquidator than for the appointment of a provisional trustee.

One important difference between the wording of section 368 of the Companies Act and section 18(1) of the Insolvency Act is that section 368 requires the appointment of a “suitable person” as provisional liquidator. By “suitable” is meant an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially.<sup>100</sup>

As far as the election of a final liquidator is concerned, the rules for the election of such a person are the same as those provided for in the Insolvency Act,<sup>101</sup> although there is one major difference in that the separate meetings of members and creditors may nominate and elect different persons for appointment as final liquidator, and in such a case the master must appoint both such persons.<sup>102</sup>

Finally, the master has the authority to appoint a co-liquidator at any time should he or she deem it “desirable”.<sup>103</sup>

<sup>96</sup> This is of particular interest considering that the master has on occasion appointed more than three trustees to administer the estate in question.

<sup>97</sup> This article only deals with appointments made by the master in the case of a company being wound up by the court, although similar rules apply in the case of a company being wound up voluntarily by resolution.

<sup>98</sup> as amended by s 16 of Judicial Matters Amendment Act 16 of 2003 – emphasis provided.

<sup>99</sup> (n 92). See also par 3.2.1 above.

<sup>100</sup> See *eg Murray v Edendale Estates Ltd* 1908 TS 17 22; *In re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536 537-539; *Wolstenholme v Hartley Farmers Agricultural Co-operative Co Ltd* 1965 4 SA 73 (SR); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W) 614; *Krumm v The Master* 1989 3 SA 944 (D).

<sup>101</sup> s 364(2) of the Companies Act.

<sup>102</sup> s 369(2) of the Companies Act.

<sup>103</sup> s 374 of the Companies Act.

### 3.3 Non-statutory criteria used by the master to make appointments

#### 3.3.1 The “master’s panel” of trustees and liquidators

Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees,<sup>104</sup> it does not categorically state who should be appointed by the master as a provisional or final trustee. By contrast, the Companies Act requires that a “suitable person” should be appointed by the master as provisional or final liquidator,<sup>105</sup> although this act also contains a list of disqualifications.<sup>106</sup>

It is quite disconcerting that nothing has ever been done to regulate the insolvency profession by establishing certain minimum criteria that aspirant trustees and liquidators have to comply with prior to being appointed as a trustee or a liquidator. Be that as it may, the master, of his own accord, commenced the use of a register to which he could add the names of persons who, in his view, qualified for appointment as a trustee or liquidator. In time this became known as the “master’s panel” of trustees and liquidators. To this day no person whose name does not appear in the register may be appointed as a trustee or a liquidator in an insolvent estate.

In order for one’s name to be added to the register, or in order to be placed on the “master’s panel”, prospective trustees and liquidators have to make application to the relevant master’s office. Although each master’s office has a different *modus operandi* when it comes to the placement of prospective trustees and liquidators on the panel, the procedure usually consists of the submission of certain documentation to the master, and a subsequent interview of the candidate by a panel consisting of personnel from the master’s office, and one or more practising liquidators who represent either AIPSA<sup>107</sup> or AABIP<sup>108</sup> (or both).

The documentation that is required is usually submitted in terms of a checklist dealing *inter alia* with the following aspects of the administration of estates: the applicant’s experience in the field of insolvency (usually contained in a *curriculum vitae* submitted by the applicant); the applicant’s infrastructure, such as office space, telephone and facsimile facilities, personnel, etc; the applicant’s ability to provide short-term insurance (security); the applicant’s formal and other qualifications, if any.

The purpose of the interview is to determine whether or not the person has the requisite knowledge and infrastructure, and to determine whether or not the person is “fit and proper” to act as an insolvency practitioner. Acquiring the AIPSA Diploma in Insolvency Law and Practice<sup>109</sup> would normally be an

<sup>104</sup> See s 55 of the Insolvency Act for a list of these disqualifications.

<sup>105</sup> s 368 of the Companies Act.

<sup>106</sup> s 372 of the Companies Act.

<sup>107</sup> AIPSA is the acronym for the Association of Insolvency Practitioners of Southern Africa, a voluntary member organisation representing the interests of insolvency practitioners.

<sup>108</sup> AABIP is the acronym for the Association for the Advancement of Black Insolvency Practitioners, a voluntary member organisation that caters for the needs of Black insolvency practitioners.

<sup>109</sup> During the 1980s members of AIPSA commenced a course that could be attended by its members. Initially the course was presented on an *ad hoc* basis, but in 1995 the Rand Afrikaans University (as it was then known) and the University of Pretoria took over the presentation of the course. Currently the course is presented by the University of Johannesburg and the University of Pretoria. Although the course is known as a “diploma” course, it is not an official qualification at either of the universities. The “diploma” is issued by AIPSA, with the lectures being presented under the auspices of the above-mentioned institutions.

additional recommendation for any prospective insolvency practitioner seeking to be placed on the panel.

While this system no doubt goes a long way towards ensuring that suitable persons are appointed to act as trustees and liquidators, it is far from perfect and it is submitted that the element of subjectivity by members of the interviewing panel plays too great a role in determining who should and who should not become insolvency practitioners. The main point of concern here, though, is that the master's so-called panel does not have any legal status whatsoever.

### 3.3.2 The "requisition system"

In terms of section 20(1)(a) of the Insolvency Act, the estate of an insolvent vests first in the master and then in the trustee (once one has been appointed). In terms of section 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the master, and then of the liquidator (once one has been appointed). This is important in the context of the making of provisional appointments by the master in insolvent estates.

In 1977 the then master of the supreme court in Pretoria issued a directive<sup>110</sup> stating that due to the fact that the estate vested in the master (or fell under his custody and control), and due to the fact that the master could not sufficiently protect the interests of creditors until such time as a trustee or liquidator had been appointed at the first meeting of creditors, the master was implementing a system whereby a provisional trustee or liquidator would be appointed, as far as possible, in all insolvent estates. By making such an appointment the master would be divested of the estate and the appointee could take the necessary steps to protect the interests of creditors in that particular estate.<sup>111</sup>

However, the master obviously also wants to avoid a situation, as far as possible, where one person would be appointed as the provisional trustee or liquidator, and another as the final trustee or liquidator at the first meeting of creditors. It is desirable, as far as is practicable, to have some form of continuity in the persons that are appointed as both provisional and final trustee or liquidator. In order to assist the master in appointing a person as the provisional trustee or liquidator who would in all probability also be elected as the final trustee or liquidator, the master introduced what is today known as the "requisition system".<sup>112</sup>

The requisition system entails the submission of nominations by the creditors of the estate as to who should be appointed as the provisional trustee or liquidator of the estate. In order to allow the creditors sufficient time to lodge their nominations, the master will usually not make a provisional appointment

<sup>110</sup> The "directive" was sent to all insolvency practitioners by the master in the form of a letter, informing them that the master would in future ask for nominations from creditors prior to making a provisional appointment.

<sup>111</sup> The making of an appointment is the most effective means of protecting the interests of creditors, which of course is what has been intended by the legislature. See *Meskin* (n 92) par 4.1 4-1 and the authority quoted therein in n 6 4-3.

<sup>112</sup> For a discussion of the reasons for the introduction of the requisition system, see *Meskin* (n 92) par 4.1 4-2.

until 48 hours have elapsed from the moment of the granting of the sequestration or liquidation order by the court.<sup>113</sup>

The requisitions (nominations) by the creditors are then scrutinised in order to determine which insolvency practitioner has received the majority of the votes in both number and value. In most cases, but not always, the person or persons with the majority of votes in number and value are then appointed as the provisional trustee(s) or liquidator(s). To the consternation of many insolvency practitioners, the master did not always appoint the person or persons with the majority of support of the creditors. Any complaints by the nominated insolvency practitioners in this regard would be met by the argument that the master is not bound by the requisitions and has an unfettered discretion to appoint any person as the provisional trustee or liquidator. In some cases the master would even appoint a person or persons who received no nominations from creditors at all, once again in terms of the unfettered discretion granted to the master in terms of the provisions of the various acts.

One of the problems with this system is that the master is supposed to have an unfettered discretion as to who is appointed as the provisional trustee or liquidator.<sup>114</sup> It has always been the master's view that the requisitions are used as a guide only, and that appointments are not issued as a matter of course to the person who has received the majority of the support in number and value. It occurs frequently that the master is accused of acting mechanically when making provisional appointments in terms of the nominations made by creditors, and the courts have even been known to criticise the master for doing so.<sup>115</sup> When the department of justice issued a policy document relating to the appointment of previously disadvantaged individuals,<sup>116</sup> which effectively obliged the master to appoint certain persons as trustees and liquidators in estates above a certain value, further problems arose as regards the master exercising an "unfettered discretion" when making provisional appointments.

To summarise, the requisition system was introduced in 1977 in order to obtain from creditors an indication as to who they would have supported for appointment, as liquidator or trustee, at the first meeting of creditors. This the master then uses as a guide to determine who should be appointed as the provisional trustee or liquidator. The master is not bound by the requisitions, due to his or her unfettered discretion, and can appoint some, all or none of the persons nominated by the creditors.

Unfortunately there have been continuous allegations of irregularities regarding the application of the requisition system in practice, *eg* the submission of false requisitions and the duplication of requisitions in various estates. It is submitted that the application of the requisition system in practice is flawed, and the following aspects can be pointed out as inherent weaknesses of the

<sup>113</sup> This is the practice in the office of the master of the high court in Pretoria. Other offices of the master do not necessarily follow this *modus operandi*, *eg* the Cape Town office which will make an appointment as soon as possible after the granting of a sequestration or liquidation order.

<sup>114</sup> (n 93).

<sup>115</sup> It should be clear that the master can hardly be said to be exercising his or her discretion when appointments are made mechanically in terms of a system whereby the creditors nominate a provisional trustee or liquidator. However, it has to be emphasised that the master merely wishes to appoint a person as trustee or liquidator who will in all probability have been elected by the creditors at the first meeting of creditors.

<sup>116</sup> This issue is dealt with in more detail in par 3.3.3.

system. Requisitions are not made under oath,<sup>117</sup> which makes the content of many of them questionable, to say the least. The requisition system encourages active touting amongst insolvency practitioners, in that creditors are actively canvassed for their support in the 48 hours following the granting of a sequestration or liquidation order. There is no credible system at the master's office for the monitoring of the submission of requisitions, which often results in submitted requisitions being "lost" in the system. There is no way of verifying the requisitions that are submitted in the 48-hour period, which allegedly results in false requisitions being submitted. The requisition system has no legal status.<sup>118</sup>

### 3.3.3 The policy document issued by the minister of justice and constitutional development

It is fair to state that the insolvency profession in South Africa has always been dominated by (white) male practitioners.<sup>119</sup> Even after democratisation in 1994, the insolvency profession continued to be dominated by white male insolvency practitioners without any noticeable transformation regarding race or gender.

In the late 1990s the department of justice and constitutional development realised that the insolvency industry had not transformed, and set about finding a manner in which this could be done quickly and effectively. The solution was introduced in the form of a "policy document" issued by the department.<sup>120</sup> In essence the policy document states that in all estates above R5 million, the master is obliged to appoint a previously disadvantaged individual as co-trustee or co-liquidator, even if such person does not have the support of the creditors. The policy document also describes who qualifies as a previously disadvantaged individual, which essentially amounts to the designated groups as set out in the Employment Equity Act of 1998.<sup>121</sup> The idea behind the policy document is to ensure that previously disadvantaged individuals are co-appointed with experienced practitioners who can in turn train the previously disadvantaged individual's co-appointment in the art of administering insolvent estates – an in-house training of sorts. Once the previously disadvantaged individual has gained sufficient experience, he or she can then take appointments on his or her own. To this end, the master of the high court created a special panel for previously disadvantaged individuals' appointments.

<sup>117</sup> The importance of this is that creditors may only vote for the appointment of a trustee or liquidator at the first meeting of creditors if they have proved their claims. Claims are proved under oath in terms of s 44 of the Insolvency Act. By appointing a person on the basis of requisitions, the nominating creditors have not yet proved formal claims, under oath, and in many instances these nominating creditors do not prove claims at all. This in effect means that the provisional trustee or liquidator, who is eventually appointed as the final trustee or liquidator, does not necessarily have the majority, or any, support of the creditors who do eventually prove their claims.

<sup>118</sup> See *Meskin* (n 92) par 4.1 4-2 and n 7B 4-4.

<sup>119</sup> This was recently confirmed by the deputy minister of justice in a speech to AABIP. See n 2 above.

<sup>120</sup> It is not clear when the policy document was implemented for the first time. The original policy document is termed "Policy: Strategy on/procedures for appointment of liquidators and trustees", and is undated. The document would appear to have been implemented in 1998 or 1999. The document deals not only with the appointment of trustees and liquidators, but also *inter alia* with topics such as training and the lodging of requisitions.

<sup>121</sup> Act 55 of 1998.

While the objectives of the policy document are indeed noble, they have to date not been achieved in practice. The simple reality of the matter is that experienced practitioners resent the fact that they are obliged to train inexperienced practitioners, and also that they have to share their fees with their previously disadvantaged co-appointees. Besides the fact that the exercise has to a large extent been a failure in practice, allegations of fronting by established practitioners in order to obtain appointments via the previously disadvantaged individual panel have also become rife.<sup>122</sup>

An additional problem that surfaced as a result of the introduction of the policy document was the fact that it limits the master's discretion to make provisional appointments. After all, it can hardly be said that the master is exercising an "unfettered discretion" when he or she is obliged to appoint certain persons as co-provisional trustee or liquidator in terms of a departmental policy document. However, this problem has since been solved by introducing a number of amendments to the provisions of the Insolvency Act and the Companies Act that provide for the master to apply the policy document when exercising his discretion in the making of appointments.<sup>123</sup> One concern is that the legislative amendments provide for the application of a policy document that has been accepted and approved of by parliament. To date this has not been done, although the master continues to apply what seems to be a revised policy document making provision for the appointment of pdis in all estates (not only those in excess of R5 million), and which does not recognise white women as previously disadvantaged individuals.<sup>124</sup>

### 3.4 Conclusion

From the above it is clear that the making of provisional appointments in South Africa has been the cause of a number of unsatisfactory practices when determining who should be appointed in a particular estate. From the legislative provisions it is clear that provisional appointments are meant to be extraordinary appointments, and that the actual election of a trustee is supposed to take place in an orderly, regulated manner at the first meeting of creditors. In essence the master has shifted the appointment procedure away from the first meeting of creditors, to a period very soon after the granting of a sequestration or liquidation order, at a time when no formal claims have been proved. This system has obviated the need to conduct a proper election of a trustee or liquidator at the first meeting of creditors, as envisaged by both the Insolvency Act and the Companies Act.

It is clear that the system used to make provisional appointments is flawed and open to abuse. The continued use thereof has resulted in confusion and unhappiness amongst many insolvency practitioners, and has undermined the confidence that both the public and creditors have in the insolvency profession.

<sup>122</sup> (n 2).

<sup>123</sup> S 368 was amended, and s 15(1A) inserted, by s 16 and 15 respectively of the Judicial Matters Amendment Act 16 of 2003. The amendments make provision for the minister to determine the policy for the appointment of, *inter alia*, provisional liquidators.

<sup>124</sup> (n 116).

#### 4 Regulation of the insolvency industry in the United Kingdom and Australia

##### 4.1 Australia

###### 4.1.1 General

Australian insolvency legislation is dealt with in dual statutes.<sup>125</sup> Individual (or consumer) bankruptcy<sup>126</sup> is dealt with in the Bankruptcy Act<sup>127</sup> and corporate insolvency is dealt with in part 5 of the Corporations Act.<sup>128</sup> However, unlike the position in South Africa,<sup>129</sup> Australian corporate insolvency law is completely separate from the law regulating the insolvency of individuals.<sup>130</sup> Each of the two statutes regulating consumer bankruptcy and corporate insolvency contains its own complete set of rules that can be applied to the administration of that specific type of entity or individual.<sup>131</sup>

In October 2005 the federal government<sup>132</sup> published a package of insolvency reforms for commentary.<sup>133</sup> One of the areas addressed in the proposed reforms is an increased regulation of insolvency practitioners in relation to disclosure requirements, independence and remuneration.<sup>134</sup> The reforms have been developed having regard to the recommendations of a number of recent reviews of the corporate insolvency framework in Australia.<sup>135</sup>

###### 4.1.2 Regulating body

According to one commentator, bankruptcy is an area where great potential for fraud, self-dealing and the diversion of funds exists. Bankruptcy also directly affects many people, not just those who might have been involved in the particular events or circumstances which led to the bankruptcy. The responsi-

<sup>125</sup> See Burdette (n 28) 89-95.

<sup>126</sup> In Australia the term "bankruptcy" is used to refer to the process which involves dealing with the affairs of an individual, and "liquidation" or "winding-up" refers to the process dealing with the affairs of an insolvent corporation.

<sup>127</sup> Bankruptcy Act of 1966 (Cth).

<sup>128</sup> Corporations Act 2001.

<sup>129</sup> Under South African law the Insolvency Act also applies to companies that are wound up under the Companies Act 61 of 1973, and which are unable to pay their debts. S 339 of the Companies Act makes the Insolvency Act 24 of 1936 applicable in such cases, a feature not found in Australian legislation. See Burdette (n 28) 136.

<sup>130</sup> Despite the matter having been considered prior to its report, the Australian Law Reform Commission, in a report commonly known as the Harmer Report (Australian Law Reform Commission Report No 45 *General Insolvency Inquiry*) did not consider it a "major issue" that needed to be decided, and consequently a unified act was never introduced. See also Burdette (n 27) 91.

<sup>131</sup> Key *Insolvency, Personal and Corporate Law and Practice* (1998) 361.

<sup>132</sup> It was done by Pearce, parliamentary secretary to the treasurer.

<sup>133</sup> It is anticipated that draft legislation will be circulated for public comment in 2006.

<sup>134</sup> See <http://www.aar.com.au/pubs/insol/04-07-06> for a discussion of the recent proposals.

<sup>135</sup> Specifically, the reforms are based on the findings of the following reviews and inquiries into the corporate insolvency framework: the 1997 *Review of the Regulation of Corporate Insolvency Practitioners*; the 1998 corporations and markets advisory committee (CAMAC) report *Corporate Voluntary Administration*; the 2000 CAMAC report *Corporate Groups*; the 2004 CAMAC report *Rehabilitation of Large and Complex Enterprises*; the 2004 parliamentary joint committee on corporations and financial services (PJC) report *Corporate Insolvency Laws: A Stocktake* and the 2004 report of the Hardie special commission of inquiry.

bility on the person appointed to represent the competing interests of those people is therefore substantial.<sup>136</sup>

#### 4.1.2.1 Personal insolvency

The inspector-general is in charge of the general administration of bankruptcies in Australia.<sup>137</sup> He or she<sup>138</sup> heads the Insolvency and Trustee Service Australia<sup>139</sup> (ITSA), which forms a branch of the attorney-general's department.<sup>140</sup>

ITSA is an executive agency within the attorney-general's portfolio with the responsibility of administering and regulating the personal insolvency system. One of ITSA's responsibilities is to administer bankrupt estates on behalf of the official trustee.<sup>141</sup> Another of these responsibilities is to regulate private bankruptcy trustees and the official trustee. These two responsibilities are managed and fulfilled independently of each other.

The independent bankruptcy regulation branch of ITSA has the responsibility of regulating insolvency practitioners. The bankruptcy regulation branch licences private bankruptcy trustees, monitors debt agreement administrators, inspects the systems and files of practitioners, investigates complaints about their activities and applies sanctions when appropriate.<sup>142</sup>

As mentioned,<sup>143</sup> ITSA also administers, as the official trustee, personal bankruptcies,<sup>144</sup> part IX debt agreements<sup>145</sup> and part X personal insolvency agreements<sup>146</sup> when private bankruptcy trustees or other administrators are not appointed.<sup>147</sup>

<sup>136</sup> Gallagher "The role of regulators in insolvency regimes" a paper presented at the IAIR Colombo Conclave, Sri Lanka 13-15 February 2004.

<sup>137</sup> This position is established by s 11 of Bankruptcy Act of 1966.

<sup>138</sup> ITSA is headed by the chief executive and inspector-general in Bankruptcy in the national office located in Canberra.

<sup>139</sup> See <http://www.itsa.gov.au> (04-07-06) for the official website of the insolvency and trustee service Australia (ITSA).

<sup>140</sup> Keay (n 131) 21.

<sup>141</sup> The official trustee is a corporation solely created by s 18 of the Bankruptcy Act 1966. The official trustee is the trustee of an estate whenever no registered trustee consents to act.

<sup>142</sup> See s 179 of Bankruptcy Act 1966.

<sup>143</sup> (n 141).

<sup>144</sup> Bankruptcy is a legal status offering protection from further action by creditors whose debts are "provable in bankruptcy". A person can become bankrupt by filing a debtor's petition, a statement of affairs, and an acknowledgement of having read the prescribed information with the official receiver. The bankrupt's trustee will either be a registered trustee, if he has agreed in writing to be the trustee prior to the person becoming bankrupt, or the official trustee (represented by ITSA).

<sup>145</sup> A part IX debt agreement is a simple method for debtors to negotiate a binding compromise with their creditors. Debt agreements represent a low-cost flexible alternative to bankruptcy. A debt agreement involves a person in debt proposing a deal with his or her creditors. The debt agreement proposal may be accepted or rejected by creditors. ITSA handles the voting process. A proposal is accepted if a majority of creditors with 75% of the value of debts vote in favour of the deal. All creditors with provable debts are bound, even those who voted against the proposal. Debt agreements are negotiated compromises.

<sup>146</sup> Part X of the Bankruptcy Act provides a process by which a debtor may make a proposal to his or her creditors, which they consider and vote upon at a formal meeting. It is an alternative to bankruptcy. Once accepted, the proposal is binding on the debtor and all creditors in respect of their unsecured provable debts. It enables the debtor and creditors to come to a mutually agreed compromise in a relatively simple manner, without reference to the court. On 1 December 2004 a new part X, called a personal insolvency agreement (PIA), was introduced to replace the existing regime of three types of agreements: a deed of assignment, a deed of arrangement and a composition.

<sup>147</sup> (n 141).

#### 4.1.2.2 Corporate insolvency

In regard to corporate insolvency law, the Australian securities and investments commission (ASIC) is the regulatory authority responsible for administering the corporations legislation.<sup>148</sup> ASIC's powers are obtained from the Australian Securities and Investments Commission Act 2001.<sup>149</sup> The Investments Commission Act 2001 provides for the establishment of the Australian securities and investments commission, a corporations and market advisory committee, and certain other bodies.

#### 4.1.3 Procedure for registration as trustee or liquidator

##### 4.1.3.1 Personal insolvency

To become a registered trustee, a person must lodge an application with the inspector-general in bankruptcy.<sup>150</sup> The application must be accompanied by an application fee<sup>151</sup> and certain documents which are listed in the Bankruptcy Regulations.<sup>152</sup>

Once a properly-made application has been received with the application fee, the inspector-general will convene a committee to consider the application.<sup>153</sup> The committee will consist of the inspector-general's delegate, an officer of the Australian public service (APS) and a registered trustee nominated by the Insolvency practitioners association of Australia (IPAA).<sup>154</sup> The committee will consider the application, including all the supporting documents, and interview the applicant.<sup>155</sup> The applicant may also be asked to sit for an examination.<sup>156</sup>

The committee will decide, within 60 days<sup>157</sup> of the interview, whether or not to register an applicant as a trustee and provide reasons for its decision to both the applicant and the inspector-general. To complete the registration process, the applicant, if successful, must pay a registration charge<sup>158</sup> and evidence that he or she has obtained, or will obtain, professional indemnity insurance.<sup>159</sup>

The committee's decision is based on the criteria of qualifications, experience, knowledge and abilities of the applicant as prescribed by section 155A(2)(a) of the Bankruptcy Act of 1966.<sup>160</sup> If an applicant is not satisfied

<sup>148</sup> Corporations Act 2001; Australian Securities and Investments Commission Act 2001; Insurance Contracts Act 1984; Superannuation (Resolution of Complaints) Act 1993; Superannuation Industry (Supervision) Act 1993; Retirement Savings Accounts Act 1997; Life Insurance Act 1995; Medical Indemnity (Prudential Supervision and Product Standards) Act 2003.

<sup>149</sup> Act 51 of 2001.

<sup>150</sup> s 154A of the Bankruptcy Act of 1966.

<sup>151</sup> currently AU\$1 500 in terms of s 4 of the Bankruptcy (Registration Charges) Act 1997.

<sup>152</sup> Bankruptcy Regs 1996 – Reg 8.02.

<sup>153</sup> s 155(1) of the Bankruptcy Act 1966.

<sup>154</sup> s 155(2) of the Bankruptcy Act 1966.

<sup>155</sup> On 1 December 2004, new eligibility requirements for solicitor-controlling trustees were introduced. Bankruptcy reg 8.35(1)(f) provides that for subsection 188(2A) of the Bankruptcy Act 1966, a person (other than the official trustee or a registered trustee) is not eligible to act as a controlling trustee if the person has not by 1 December 2006: (i) become a full member of the insolvency practitioners association of Australia; or (ii) satisfactorily completed a course in insolvency approved by the inspector-general.

<sup>156</sup> s 155A (1A) of the Bankruptcy Act 1966.

<sup>157</sup> s 155(1) of the Bankruptcy Act 1966.

<sup>158</sup> currently AU\$1 000 as provided for in s 5 of the Bankruptcy (Registration Charges) Act 1997.

<sup>159</sup> s 155C of the Bankruptcy Act 1966.

<sup>160</sup> Keay (n 131) 27.

with the committee's decision to refuse an application, he or she may apply to the administrative appeals tribunal (AAT) for a review of the decision.<sup>161</sup>

For the purposes of section 155A(2)(a) of the Bankruptcy Act of 1966, the following qualifications, experience, knowledge and abilities are prescribed in relation to an applicant for registration as a trustee:

- “(a) completion of the academic requirements for the award of a degree, diploma or similar qualification from an Australian university or college of advanced education, or other Australian tertiary institution of an equivalent standard, being a degree, diploma or similar qualification granted to a person who has completed:
  - (i) a course of study in accountancy of not less than 3 years' duration; and
  - (ii) a course of study in commercial law of not less than 2 years' duration;
- (b) engagement in relevant employment on a full-time basis for a total of not less than 2 years in the preceding 5 years;
- (c) the ability to perform satisfactorily the duties of a registered trustee immediately after registration.”<sup>162</sup>

Once the relevant fee has been paid and the existence of professional indemnity insurance confirmed, the registration officer will register the successful applicant on the national personal insolvency index (NPII)<sup>163</sup> and issue him or her with a certificate of registration for a period of three years.<sup>164</sup>

#### 4.1.3.2 Corporate insolvency

The Australian securities investments commission (ASIC) released its new policy statement on the registration of registered liquidators and official liquidators on 30 September 2005.<sup>165</sup> The policy replaces the previous ASIC policies that were introduced in 1992 (and minimally updated in 1997).<sup>166</sup>

Policy statement 186 details the application process to become a registered liquidator or official liquidator and is a significant ASIC policy update,<sup>167</sup> as it is the result of the first substantive review of liquidator registration following the introduction of part 5.3A of the Corporations Act in 1993. Importantly, the new policy statement also explains the ongoing obligations of registered liquidators and ASIC's expectations of liquidators.<sup>168</sup>

Policy statement 186 updates ASIC's guidelines on the operation of section 1282(2) of the Corporations Act. Under this section, ASIC must satisfy itself that an applicant for registration as a liquidator has the appropriate qualifications, has winding-up experience, is capable of performing the duties of a liquidator and is a “fit and proper” person to be a registered liquidator.<sup>169</sup>

<sup>161</sup> s 155A(7) of the Bankruptcy Act 1966.

<sup>162</sup> Bankruptcy Regs 1996 – reg 8.02.

<sup>163</sup> The NPII is a database that stores the bankruptcy records, and specifically details, of trustees. See Keay (n 131) 19.

<sup>164</sup> s 155D of the Bankruptcy Act of 1966.

<sup>165</sup> Policy statement 186 external administration – liquidation registration .

<sup>166</sup> Policy statement 40 registration of liquidators – experience criteria and policy statement 24 registration of official liquidators.

<sup>167</sup> ASIC is required by part 9.2 of the Corporations Act to register as liquidators those applicants who satisfy the criteria contained in s 1282(2) of the Corporations Act and are not disqualified from managing corporations under part 2D.6 of the act.

<sup>168</sup> See Quinlan “ASIC introduces a new policy on liquidator registration” 2005 at <http://www.aar.com.au> (30-06-06).

<sup>169</sup> Criteria contained in s 1282(2) of the Corporations Act.

The new criteria in policy statement 186 regarding the base qualifications set out in section 1282(2)(a) of the Corporations Act, are principally concerned with defining what is an “equivalent” qualification for applicants who have not graduated from an Australian university course with standing certification.<sup>170</sup> These new criteria are likely to be of interest principally to applicants whose qualifications were not gained in Australia.

The changes to the level of experience required for liquidator registration are the most significant aspect of policy statement 186. Section 1282(2)(b) of the Corporations Act prescribes that ASIC must be satisfied as to the experience of an applicant for registration in connection with corporate winding-up, and the previous policy statement 40 defined the relevant experience as: five years in public practice; a wide range of experience in external corporate administration under the direction of an official liquidator for a continuous period of at least three years; and full-time supervision of external corporate administration for at least two consecutive years during the five years prior to the application.

The new criteria in policy statement 186 address experience somewhat differently. In relation to section 1282(2)(b) of the Corporations Act, the new criteria simply state that ASIC will assess the applicant’s winding-up experience as part of the broader “personal” capacities in relation to section 1282(2)(c) of the Corporations Act.<sup>171</sup>

The first part of section 1282(2)(c) of the Corporations Act requires that the applicant must be “capable” of performing the duties of a liquidator. The basis ASIC used for these criteria in policy statement 186 follows the decision of *Re Lofthouse and ASIC*,<sup>172</sup> where the AAT held that capacity “refers not simply to a person’s technical abilities but also to the more ephemeral quality of judgment”.<sup>173</sup> ASIC now interprets this requirement as referring to the “overall capacities that enable a person to perform adequately and properly the duties and functions” of a registered liquidator. Policy statement 186 now defines “capability” as “personal” and “practical” capacities.

The final part of section 1282(2)(c) of the Corporations Act 2001 requires that applicants for registration as liquidators be “fit and proper” persons. ASIC interprets a “fit and proper” person as having an overall capability of performing the duties and functions of a liquidator, and overall honesty, integrity, good reputation and personal solvency.<sup>174</sup>

Policy statement 186 represents a comprehensive and significant change in

<sup>170</sup> s 1282 (2)(a)(iii) of the Bankruptcy Act 1966. If the applicant relies on s 1282(2)(a)(iii) he or she must satisfy ASIC that qualifications and experience taken together have provided the applicant with the knowledge that would have been gained from an Australian three year full-time bachelor’s degree that includes a three year course of study in accountancy, and a two year course of study in commercial law.

<sup>171</sup> Policy statement 186.18-20.

<sup>172</sup> 2004 AATA 327.

<sup>173</sup> par 74.

<sup>174</sup> Policy statement 186 notes that ASIC’s above approach is consistent with current case law, including *Davies v Australia Securities Commission* (1995) 131 ALR 295, and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. ASIC does not regard a person who is disqualified from managing corporations to be a “fit and proper” person to be registered as a liquidator, regardless of any specific permissions granted to that person to manage corporations.

ASIC's approach to liquidator registration.<sup>175</sup> In particular, applicants for liquidator registration will now have to show greater levels of experience than under the previous policies, with the experience criteria increasing from three years of corporate insolvency, including two years working at a very senior level, to five years' total experience, including three years working at a very senior level.<sup>176</sup> In addition, applicants for registration will now have to satisfy ASIC that they have access to certain resources and procedures that are considered necessary for the conduct of external administrations.<sup>177</sup>

These changes were not received with much surprise in Australia, as they largely followed the policy proposal that was released by ASIC in the last part of 2004. However, ASIC has since emphasised that it will be monitoring the continuing experience and levels of practice resources closely.

## 4.2 United Kingdom

### 4.2.1 General

The Insolvency Act 1986<sup>178</sup> was a significant piece of new legislation, implementing the most comprehensive review of bankruptcy in the United Kingdom in over a century.<sup>179</sup> Its provisions were largely based on the recommendations contained in the so-called Cork report.<sup>180</sup> It affected a radical reconstruction of the law relating to both personal and corporate insolvency.<sup>181</sup>

Further reforms<sup>182</sup> have since been implemented, including the Enterprise Act 2002,<sup>183</sup> which resulted in the restriction of the use of the procedure of administrative receivership.<sup>184</sup> The corporate provisions of the Enterprise Act 2002 came into force on 15 September 2003, and provide for streamlined administration proceedings, the eventual abolition of administrative receiverships, and the

<sup>175</sup> Another key consequence of these changes is that the practical difference between registered and official liquidators has now effectively been eliminated. The requirements of experience and practice capability under policy statement 186 also affect liquidators' maintenance of their registration, with new ongoing obligations of being a registered liquidator.

<sup>176</sup> Policy statement 186.19.

<sup>177</sup> (n 166). Quinlan "ASIC introduces a new policy on liquidator registration" 2005 at <http://www.aar.com.au> (30-06-06).

<sup>178</sup> Although it received the royal assent and became law on 30 Oct 1985, the government decided to delay implementation of all but a few of its provisions and to draw up a new act, consolidating its provisions with those parts of the Companies Act 1985 dealing with receivership and winding-up. This became the Insolvency Act 1986. The act received royal assent on 25 July 1986 and was brought into force on 29 December 1986.

<sup>179</sup> Sealy *Annotated Guide to the Insolvency Legislation* (2004) 1.

<sup>180</sup> (n 32).

<sup>181</sup> For a detailed discussion of the recommendations included in the Cork report (n 32), see Fletcher (n 44) 18.

<sup>182</sup> See *eg* the Insolvency Act 1994; the Insolvency (no 2) Act 1994; the Insolvency Act 2000 and the Human Rights Act 1998.

<sup>183</sup> The Bill was introduced in the house of commons and received royal assent on 7 Nov 2002.

<sup>184</sup> Administrative receivership, which can often be confused with administration, is the appointment of an insolvency practitioner by a creditor who holds a floating charge over the assets of the company created before 15 Sept 2003.

abolition of the preferential claims of the state (crown) in respect of certain taxes.<sup>185</sup>

The individual insolvency provisions of the Enterprise Act 2002 came into force on 1 April 2004. These provisions introduced an early discharge after one year (if not earlier), restrictions being placed on “culpable and irresponsible” bankrupts, and the lifting of a range of prohibitions, disqualifications and restrictions currently automatically imposed as a consequence of bankruptcy.<sup>186</sup>

An additional consideration when dealing with the working of insolvency law in the United Kingdom is the impact<sup>187</sup> of the EC Regulation on Insolvency Proceedings 2000.<sup>188</sup> Being a regulation, as distinct from a convention or directive, it has immediate force throughout the European Union<sup>189</sup> without the need for ratification or implementation by domestic legislation in the member states.<sup>190</sup> The regulation makes major advances in *inter alia* areas such as ensuring the recognition of court orders without further formalities or winding-up resolutions.<sup>191</sup>

#### 4.2.2 Regulating body

The Cork committee<sup>192</sup> observed that “the success of any insolvency system is very largely dependent upon those who administer it”<sup>193</sup> and that

“while the method of control over the administration of bankruptcy varies from country to country, in almost all bankruptcy systems creditors were originally given the primary responsibility for administrating the process. In country after country however, this had led to scandal and abuse, and exclusive control has been progressively removed from creditors and varying degrees of official control have been introduced as it has increasingly accepted that the public interest is involved in the proper administration of the Bankruptcy system.”<sup>194</sup>

The scheme of regulation of insolvency practitioners in the United Kingdom is one of government-monitored self-regulation.<sup>195</sup> The overall responsibility for

<sup>185</sup> See <http://www.insolvencyreg.org> (30-06-2006) the official website of the international association of insolvency regulators (IAIR) for a list of personal insolvency procedures and corporate insolvency procedures.

<sup>186</sup> McKenzie-Skene “Reforming insolvency law: a comparative study of Scotland and South Africa” 2005 *Nottingham LJ* 17.

<sup>187</sup> See Credit Institutions (Reorganisation and Winding-up) Regulations 2004, which came into force on 5 May 2004. These regulations implement the directive of parliament and the council on the reorganisation and winding-up of credit institutions (2001/24/EC) for all UK credit institutions. These regulations provide that as from 5 May 2004, no winding-up proceedings or reorganisation measures in respect of EEA credit institutions can be undertaken in the UK, except in the circumstances permitted by the regulations. EEA reorganisation measures and winding-up proceedings must be recognised in the UK. See also Insolvency Act 1986 (Amendment) Reg 2002.

<sup>188</sup> Council Reg (EC) no 1346/2000 of 29 May 2000 on Insolvency Proceedings. See Sealy (n 179) 604.

<sup>189</sup> apart from Denmark.

<sup>190</sup> See also s 31-34 for provisions relating to communication between office-holders.

<sup>191</sup> Article 3 deals with jurisdiction.

<sup>192</sup> (n 32).

<sup>193</sup> Cork report (n 32) par 732. See Tolmie (n 39) 208.

<sup>194</sup> Cork report (n 32) par 702.

<sup>195</sup> Norris “Insolvency practitioner regulation in the United Kingdom” paper presented at the academics’ meeting of the INSOL congress held in Cape Town on 2 and 3 April 2004.

the administration and supervision of insolvency law in England and Wales rests with the department of trade and industry.<sup>196</sup> The insolvency service<sup>197</sup> is an executive agency within the department of trade and industry under the direction of the inspector-general of insolvency, and is responsible for regulating insolvency practitioners, either directly or through recognised professional bodies.<sup>198</sup>

Most of those who acted as insolvency practitioners prior to the introduction of authorisation contained in the Insolvency Act 1986 were members of professions and were subject to general regulation by their various professional bodies. However, that regulation alone was insufficient to protect the various stakeholders in an insolvency proceeding since there was no restriction on who could act as an insolvency practitioner. Consequently, professional bodies could not prevent poorly qualified members from acting as insolvency practitioners. Even the sanction of expulsion did not prevent them from acting as insolvency practitioners, and those who were not members were not subject to any form of regulation.<sup>199</sup>

The introduction of authorisation and the power of recognition by the secretary of state<sup>200</sup> addressed these difficulties by allowing bodies to regulate which of their members could act as insolvency practitioners, and by regulating their conduct when doing so. The secretary of state's power of authorisation also ensured that the insolvency profession did not become a "closed shop", but that it was kept open to all those who were fit and proper and possessed the appropriate qualifications.<sup>201</sup>

When licensing was first introduced, it was possible for someone who had acted as an insolvency practitioner in the past to obtain a licence on the basis of his or her past experience, without passing the examination that new applicants are now required to take.<sup>202</sup> However, applicants now have to pass the joint insolvency examination, set by the joint insolvency examination board, in addition to a minimum level of experience.<sup>203</sup> The examination process has been one of the manners in which standards in the insolvency profession have been improved.<sup>204</sup>

An applicant may obtain a licence to be authorised to act as an insolvency practitioner in one of two alternative manners, *viz* by virtue of membership of a recognised professional body, or by direct application to the department of trade and industry.<sup>205</sup> In both instances a licence will only be granted if a person has proved that he or she is a "fit and proper"<sup>206</sup> person, and has satisfied the prescribed requirements for education and practical training and experience within the meaning of the Insolvency Act 1986.

<sup>196</sup> Fletcher (n 44) 26.

<sup>197</sup> See <http://www.insolvency.gov.uk> (01-07-06) for the official website of the insolvency service.

<sup>198</sup> s 399-410 of the Insolvency Act 1986.

<sup>199</sup> Norris (n 195) 10.

<sup>200</sup> Darling, secretary of state for trade and industry.

<sup>201</sup> Norris (n 195) 10.

<sup>202</sup> Norris (n 195) 11.

<sup>203</sup> reg 7 of Insolvency Practitioners Regulations 2005.

<sup>204</sup> Fletcher (n 44) 30.

<sup>205</sup> Secretary of state through insolvency service.

<sup>206</sup> reg 6 of Insolvency Practitioners Regulations 2005.

Having granted recognition to the recognised professional bodies,<sup>207</sup> the secretary of state has a continuing duty to ensure that the bodies enforce their professional membership rules, and discipline members who fall below the standards required of insolvency practitioners.<sup>208</sup> The insolvency service therefore has a dual function in regulating its own insolvency practitioners, on the one hand, and “regulating the regulators”, on the other.<sup>209</sup>

Officials at the insolvency service regularly undertake visits to the recognised professional bodies, with the aim of monitoring the procedures that ensure that only fit and proper persons who meet the requirements are granted a licence to practice.<sup>210</sup> Officials also have to satisfy themselves that these bodies have proper procedures in place to investigate complaints against their members.<sup>211</sup>

Section 393(1) of the Insolvency Act 1986 contains the power to grant or refuse the authorisation to act as an insolvency practitioner. Where the secretary of state refuses an application, or withdraws a holder’s authority to act, the applicant or holder will be notified in writing, setting out the reasons for the refusal or withdrawal, and informing the interested party of the date the action will take effect.<sup>212</sup> The person on whom notice has been served may, within fourteen days, respond to the secretary of state who will take such representation into account when making his or her final determination.<sup>213</sup>

Section 396 of the Insolvency Act 1986 introduces a more substantial procedure, which involves referring the case to the insolvency practitioners tribunal.<sup>214</sup> The insolvency practitioners tribunal was established as an independent statutory body by the Insolvency Act, and its function is to deal with cases referred by the secretary of state regarding whether or not an individual should be an authorised insolvency practitioner.<sup>215</sup> The tribunal is not concerned with decisions about authorisations by recognised professional bodies, which have their own review procedures.

The functions of the tribunal in relation to any case referred to it are exercised by three members: a legally qualified chairman and two other members who are experienced in insolvency matters. The tribunal members are drawn from a panel selected, and from time to time revised, by the secretary of state.<sup>216</sup> When the tribunal has concluded its consideration of the evidence, it makes a report stating what the appropriate decision in the opinion of the tribunal would be, and its reasons for that opinion. It is the duty of the secretary of state to decide the matter in accordance with the opinion of the tribunal.<sup>217</sup>

The United Kingdom does not have specialised insolvency courts<sup>218</sup> and

<sup>207</sup> s 391(2) of Insolvency Act 1986.

<sup>208</sup> Fletcher (n 44) 30.

<sup>209</sup> Norris (n 195) 9.

<sup>210</sup> Norris (n 195) 9.

<sup>211</sup> s 391 of Insolvency Act 1986.

<sup>212</sup> Fletcher (n 44) 33.

<sup>213</sup> This mode of recourse is designed to enable relatively minor matters to be adjusted or rectified.

<sup>214</sup> The insolvency practitioners tribunal deals with cases where the secretary of state proposes to refuse an individual’s application or withdraw an existing authorisation and the individual concerned has required the matter to be referred to the tribunal.

<sup>215</sup> s 396-397 of Insolvency Act 1986.

<sup>216</sup> See <http://www.insolvency.gov.uk/freedomofinfo> (04-07-06).

<sup>217</sup> Fletcher (n 44) 34.

<sup>218</sup> s 363 and 373 of Insolvency Act 1986.

jurisdiction in insolvency matters is exercised throughout England and Wales by the high court and the county courts.<sup>219</sup> The role played by the courts is to determine petitions by debtors and creditors for bankruptcy and compulsory winding-up, and to determine issues in insolvencies brought to them by the insolvency service, insolvency practitioners, insolvents, creditors and others.<sup>220</sup> The court does not therefore exercise a supervisory role, and serves merely as a standby authority.<sup>221</sup>

#### 4.2.3 Procedure to be recognised as an insolvency practitioner

A major recommendation of the Cork committee<sup>222</sup> was that every insolvency practitioner should have a minimum qualification, or alternatively be a member of a recognised professional body.<sup>223</sup> A cogent case was made for the introduction of a system of centralised, ministerial control over all persons who are appointed to hold office in insolvency proceedings.<sup>224</sup>

The provisions of the Insolvency Act 1986 are largely based on the recommendations contained in the Cork report.<sup>225</sup> The Insolvency Act 1986 provides that insolvency practitioners should be licensed and that only those persons who are suitably qualified in terms of education, training and experience, and also meet the “fit and proper person” test, should be authorised to act.<sup>226</sup>

The present regulation of insolvency practitioners is derived from an in-built requirement within the Insolvency Act 1986, whereby eligibility to act as an office-holder regarding any aspect of insolvency proceedings is restricted to persons who are qualified within the meaning of the act.<sup>227</sup>

In order to act as an insolvency practitioner within the meaning of the Insolvency Act 1986, a person must satisfy a number of criteria contained in section 390. This section deals mainly with the general requirement to “act as insolvency practitioner”. The criteria of qualifications and experience are further dealt with in subordinate legislation in the form of the Insolvency Practitioners Regulations.<sup>228</sup>

Thus, in relation to a company a person acts as an insolvency practitioner by acting as its liquidator,<sup>229</sup> administrator<sup>230</sup> or administrative receiver,<sup>231</sup> or as

<sup>219</sup> Fletcher (n 44) 30.

<sup>220</sup> Ziegel *Comparative Consumer Insolvency Regimes – A Canadian Perspective* (2003) 115.

<sup>221</sup> McBryde *et al Principles of European Insolvency Law* (2003) 29.

<sup>222</sup> Cork report (n 32) chs 15-17.

<sup>223</sup> (n 240).

<sup>224</sup> Fletcher (n 44) 28.

<sup>225</sup> Fletcher (n 44) 29.

<sup>226</sup> Norris (n 195) 9.

<sup>227</sup> Fletcher (n 44) 29.

<sup>228</sup> issued under s 419 of Insolvency Act 1986.

<sup>229</sup> S 163 of Insolvency Act 1986 defines the term “liquidator”. A liquidator may be appointed in a company under liquidation in terms of a voluntary winding-up; creditor’s voluntary winding-up and a winding-up by court.

<sup>230</sup> S 13 defines the term “administrator”. Administrators can be appointed to a company that is unable, or is likely to become unable, to pay its debts. They can be appointed by any of the following: the courts (upon application by a creditor), the holder of a qualifying floating charge over the assets of the business, or the company or its directors. An administrator’s primary goal is to rescue the company as a going concern. If this is not possible, the administrator will try to obtain a better result for the creditors than would be possible if the company was wound up.

<sup>231</sup> (n 184).

the supervisor of a voluntary arrangement<sup>232</sup> approved under part I of the Insolvency Act 1986. In relation to an individual, a person will be acting as insolvency practitioner by acting as his trustee in bankruptcy,<sup>233</sup> or interim receiver<sup>234</sup> of his property, or as permanent or interim trustee in the sequestration of his estate, or as supervisor<sup>235</sup> of a voluntary arrangement<sup>236</sup> proposed by him and approved under part VIII of the Insolvency Act 1986.

On 1 April 2005 the United Kingdom introduced new insolvency regulations<sup>237</sup> concerning the regulation of insolvency practitioners.<sup>238</sup> Regulation 6 sets out the matters to be taken into account by a competent authority in deciding whether an individual is a fit and proper person to act as an insolvency practitioner.<sup>239</sup>

Regulations 7 and 8 set out prescribed requirements regarding education and training in relation to insolvency practitioners seeking an authorisation from a competent authority. A person will therefore not be able to accept an appointment as an insolvency practitioner if he or she is not authorised to do so by virtue of membership of a professional body<sup>240</sup> recognised under the Insolvency Act 1986.<sup>241</sup>

<sup>232</sup> The directors of the company may take a proposal under part I to the company and to its creditors for a composition in satisfaction of its debts, or a scheme or arrangement of its affairs.

<sup>233</sup> s 292 and 293 of Insolvency Act 1986. Where a bankruptcy order has been made and no certificate for the summary administration of the bankrupt's estate has been issued, it is the duty of the official receiver, as soon as practicable in the period of twelve weeks beginning with the day on which the order was made, to decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate.

<sup>234</sup> s 286 of Insolvency Act 1986. The court may, if it is shown to be necessary for the protection of the debtor's property, at any time after the presentation of a bankrupt's petition and before making a bankruptcy order, appoint the official receiver to be interim receiver of the debtor's property.

<sup>235</sup> The Insolvency Act 2000 inserted a new s 389A into the Insolvency Act 1986, which authorises the secretary of state to recognise bodies that are not licensed insolvency practitioners to act as nominees or supervisors of voluntary arrangements.

<sup>236</sup> s 252 and 253 of Insolvency Act 1986. Application to the court for an interim order may be made where the debtor intends to make a proposal to his creditors for a composition in satisfaction of his debts, or a scheme of arrangement of his affairs. The proposal must provide for some person ("the nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation. This procedure makes provision for a moratorium for the insolvent debtor pending the implementation of a proposal to creditors.

<sup>237</sup> Statutory Instrument 2005 no 524, the Insolvency Practitioners Regulations 2005.

<sup>238</sup> See also Credit Institutions (Reorganisation and Winding-up) Regs 2004, which came into force on 5 May 2004. These regulations implement the directive of the parliament and the council on the reorganisation and winding-up of credit institutions (2001/24/EC) for all UK credit institutions. The regulations provide that as from 5 May 2004, no winding-up proceedings or reorganisation measures in respect of EEA credit institutions can be undertaken in the UK except in the circumstances permitted by the regulations. EEA reorganisation measures and winding-up proceedings are to be recognised in the UK.

<sup>239</sup> See Calitz "The role of the master of the high court as regulator in a changing liquidation environment: a South African perspective" 2005 *TSAR* 728 735.

<sup>240</sup> The relevant order is the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764) under which the following bodies are recognised: The chartered association of certified accountants, the institute of chartered accountants of England and Wales, the institute of chartered accountants of Scotland, the institute of chartered accountants of Ireland, the insolvency practitioners association, the law society of Scotland and the law society.

<sup>241</sup> S 391(2) of the Insolvency Act 1986 reads as follows: "A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners – (a) are fit and proper persons so to act, and (b) meet acceptable requirements as to education and practical training and experience."

The new regulations identify strict criteria with regard to the qualifications and experience of a person who wants to be regarded as a “fit and proper” person within the meaning of the Insolvency Act 1986.<sup>242</sup> Thus, apart from setting the requirement<sup>243</sup> that an applicant will have to be a member of a professional body,<sup>244</sup> the regulations also require such an applicant to have passed the joint insolvency examination set by the joint insolvency examination board.<sup>245</sup>

The regulations also lay down the criteria with regard to the experience of the applicant in regulation 7(3) and (4):<sup>246</sup>

“An applicant must either –

- (a) have held office as an office-holder in not less than 30 cases during the period of 10 years immediately preceding the date on which he made his application for authorisation; or
- (b) have acquired not less than 7000 hours of insolvency work experience of which no less than 1400 hours must have been acquired within the period of two years immediately prior to the date of the making of his application and show that he satisfies one of the three requirements set out in paragraph (4).”

The key concept underlying the new insolvency practitioner regulations is that of “acting as insolvency practitioner” within the meaning of the Insolvency Act 1986. Section 388 of the Insolvency Act 1986 supplies a statutory definition of this concept.<sup>247</sup> The provisions of the regulations are therefore made applicable to insolvency practitioners by defining the sphere of proceedings which will be governed by the regulations.

It should be noted that apart from the private insolvency practitioner, a member of the official receiver may also be appointed to administer an insolvent estate.<sup>248</sup> The official receiver is a civil servant employed in the office of the insolvency service, which in turn falls under the control of the department of trade and industry.<sup>249</sup> Section 400(2) of the Bankruptcy Act 1986 confers upon the official receiver the status of officer of the court in relation to which he exercises the functions of his office.<sup>250</sup>

<sup>242</sup> S 389 of Insolvency Act 1986 makes it an offence for one to act as insolvency practitioner when one is not qualified to do so. The word “qualified” refers not only to a professional qualification but to a complex set of requirements.

<sup>243</sup> reg 7(2) of the Insolvency Practitioners Regulations 2005.

<sup>244</sup> (n 240). Each regulatory body publishes a guide to professional conduct and ethics.

<sup>245</sup> or have acquired in, or been awarded in, a country or territory outside Great Britain, professional or vocational qualifications that indicate that the applicant has the knowledge and competence that is attested to by a pass in that examination.

<sup>246</sup> Reg 7(4) reads as follows: “The three requirements referred to in paragraph (3)(b) are –

- (a) the applicant has become an office-holder in at least 5 cases within the period of 5 years immediately prior to the date of the making of his application;
- (b) the applicant has acquired 1,000 hours or more of higher insolvency work experience or experience as an office-holder within the period referred to in sub-paragraph (a); and
- (c) the applicant can show that within the period referred to in sub-paragraph (a) he has achieved one of the following combinations of positions as an office-holder and hours acquired of higher insolvency work experience – (i) 4 cases and 200 hours; (ii) 3 cases and 400 hours; (iii) 2 cases and 600 hours; or (iv) 1 case and 800 hours.”

<sup>247</sup> s 388(1) and 388(2) of the Insolvency Act 1986.

<sup>248</sup> s 32 of Insolvency Act 1986.

<sup>249</sup> Fletcher (n 44) 26.

<sup>250</sup> Fletcher (n 44) 27.

The official receiver will serve as trustee in personal insolvency, or liquidator in compulsory liquidations, where no private sector insolvency practitioner has been appointed. These will normally be in insolvent estates where the assets are insufficient to bear the cost of a private sector appointment.<sup>251</sup>

## 5 *Some thoughts on the way forward for the insolvency profession in South Africa*

### 5.1 Introduction

While it is fair to state that the insolvency profession in South Africa is generally perceived as being corrupt and ineffective,<sup>252</sup> there is no reason why this perception cannot be changed to one of professionalism and effectiveness. There are many honest and well-respected insolvency practitioners who strive to provide a professional service to both the public and the creditors that they serve.

However, it is submitted that this can only occur once the necessary steps have been taken to rid the profession of the unsatisfactory practices that are currently being experienced. The question therefore arises as to how the problems currently experienced by the insolvency profession may be alleviated.

### 5.2 Statutory body or statutory recognition

It is submitted that the first step in bringing about much-needed change to the insolvency industry in South Africa is the establishment of a statutory regulatory body similar to the law society of South Africa (LSSA). Alternatively, the statutory recognition of existing bodies such as AIPSA, AABIP and the LSSA would go a long way to providing these organisations with the statutory backing that is required in order to make them effective.

The latter of these two options is indicated as being the preferred one by the South African law reform commission (SALRC).<sup>253</sup> In terms of the proposals made by the SALRC, only a person who is a member of a professional body recognised by the minister of justice, and who is permitted to act as a member of that body in terms of its rules, may be appointed as a liquidator.<sup>254</sup> In terms of the SALRC's proposals, the minister of justice may from time to time publish the name of a recognised professional body if it appears to the minister that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member is a fit and proper person to be appointed as a liquidator, and meets acceptable requirements for education and practical experience and training.

### 5.3 Qualifications and other entry-level requirements

Currently there are no entry-level requirements in order to practise as an in-

<sup>251</sup> See Tolmie (n 39) 206.

<sup>252</sup> (n 2) and (n 3).

<sup>253</sup> South African Law Reform Commission Project 63 Discussion Paper 86 *Review of the Law of Insolvency* (Draft Insolvency Bill) par 4.7 11. See <http://www.doj.gov.za/salrc/reports.htm> (02-07-06) for a copy of Draft Insolvency Bill.

<sup>254</sup> cl 53(1)(a) of the Draft Insolvency Bill (n 253).

insolvency practitioner in South Africa. While this may have been acceptable in 1936 when the Insolvency Act was promulgated, it is submitted that this is no longer an acceptable state of affairs. Under contemporary South African insolvency law trustees and liquidators are regularly exposed to complex legal and financial problems in practice. For this reason it is submitted that insolvency practitioners should have at least some formal training before being allowed to enter this profession.<sup>255</sup> This does not necessarily entail obtaining a bachelors degree in law or commerce, but should entail at least a specialised training programme in insolvency law and practice.

Additional criteria, such as the completion of one year's articles and the passing of an admission examination, should also be set as criteria prior to persons being authorised to accept appointments in insolvent estates.

Finally, and from a personal point of view, it is submitted that insolvency practitioners should be designated as officers of the court. In fact, it would go a long way towards establishing insolvency practitioners as professionals if all insolvency practitioners were to be declared "fit and proper" by the high court prior to being authorised to practice.

#### 5.4 Scrapping of the requisition system

If the insolvency profession wishes to obtain some modicum of credibility, it is submitted that the requisition system will have to be scrapped in its entirety. The system's inherent weaknesses create fertile ground for manipulation, dishonesty and even fraud. An alternative manner in which provisional appointments can be made must be investigated by the department of justice, preferably as part of the insolvency law reform process that has been underway since the late 1980s. While it is known that the ministerial committee of enquiry into the liquidations industry did make recommendations in this regard, it is not known what the extent of these recommendations are. According to the deputy minister of justice<sup>256</sup> a unified Insolvency Act, dealing with the liquidation of all types of entities, is once again on track, and any workable recommendations made by the ministerial committee of enquiry will be incorporated into this new piece of legislation.

However, considering that the requisition system has been applied in various forms for nearly 30 years, it is almost certain that the more established insolvency practitioners will vehemently oppose the abolition of this system of making provisional appointments. Let us hope, then, that the system will be modified in order to make it less susceptible to manipulation, and that it will become an open and transparent method of making appointments on an urgent basis.

## 6 Conclusion

When one looks at the regulation of the profession in other jurisdictions, such as those discussed in this article, it is clear that South Africa lacks an adequate regulatory framework. Although the South African insolvency profession

<sup>255</sup> It is encouraging to note that the deputy minister of justice shares this view. See (n 2).

<sup>256</sup> (n 2).

needs proper regulation, it is probably not necessary to establish an overregulated environment such as that found in the United Kingdom and Australia.

Any regulation of the insolvency profession needs to take cognisance of the socio-economic realities that prevail in South Africa. In addition, any such regulation needs to be sensitive to an industry that is in dire need of transformation. However, any regulatory measures need to be of an international standard so that foreign investors will have the peace of mind that their affairs will be conducted in an impartial and regulated environment.<sup>257</sup>

The ministry of justice and constitutional development appears to be moving in the right direction, with both the minister and the deputy minister having indicated that proper regulation of the insolvency industry has become a priority. Let us hope that this will happen sooner rather than later.

## SAMEVATTING

### DIE AANSTELLING VAN INSOLVENSIEPRAKTISYNS IN SUID-AFRIKA: TYD VIR VERANDERING?

Die aanstelling van insolvensiepraktisyns in insolvente boedels is 'n kontroversiële onderwerp – nie as gevolg van die kompleksiteit van die toepaslike wetsbepalings nie, maar weens volgehoue bewerings van onreëlmatighede wat met die maak van hierdie aanstellings gepaard gaan. Hierdie artikel het ten doel om die reguleringsfunksie van die meester van die hooggeregshof, as staatsorgaan, en die maak van aanstellings deur die meester ingevolge huidige wetgewing, te ondersoek en krities te bespreek. Daar word aan die hand gedoen dat die onderliggende oorsaak van die huidige probleme in die insolvensiebedryf die ongereguleerde aard van die Suid-Afrikaanse insolvensiebedryf is.

Die geskiedkundige ontwikkeling van die kantoor van die meester word ondersoek met verwysing na die staat se rol by die regulering van die insolvensiebedryf. Daar word ook krities gekyk na die meester se implementering van huidige wetgewing wat voorsiening maak vir die aanstelling van voorlopige kurators en likwidateurs, sowel as na die nie-wetgewende kriteria wat die meester toepas ten einde aanstellings in die praktyk te maak. Die rol van transformasie, wat deur middel van 'n departementele beleidsdokument in werking gestel is, word ook krities bespreek. Na 'n vergelykende ondersoek na die regulering van die insolvensiebedryf in die Verenigde Koninkryk en Australië, word voorstelle gemaak vir die behoorlike regulering van die insolvensiebedryf in Suid-Afrika.

Die gevolgtrekking word gemaak dat die huidige stelsel vir die aanstelling van insolvensiepraktisyns in Suid-Afrika onvoldoende is en dat die probleme wat hiermee gepaard gaan slegs opgelos sal word deur middel van behoorlike regulering en die doeltreffende opleiding en lisensiëring van insolvensiepraktisyns. Hierdie oplossings word blykbaar tans deur die staat ondersoek.

<sup>257</sup> In terms of the World Bank's Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL's Legislative Guide on Insolvency Law, the bodies responsible for regulating or supervising insolvency practitioners should be independent of individual representatives, set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability, and have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively – see Creditor Rights and Insolvency Standard based on the World Bank Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL's Legislative Guide on Insolvency Law found at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20774191pagePK:64065425piPK:162156theSitePK:215006,00.html> (10-07-06).