Bodies everywhere — the role of professional bodies in regulating insolvency practitioners

Michael Murray *MURRAYS LEGAL COMMENTARY*

The Insolvency Law Reform Act 2016 (Cth) introduced a new regulatory regime for insolvency practitioners which has now been in operation since 1 March 2017. While the registration and discipline committee process has been the subject of some comment[1] and published decisions,[2] less or even no attention has been given to another aspect of the regime whereby numerous professional bodies and government agencies now have a role in the discipline process.

This article examines the roles of these bodies and agencies and how that aspect of the law is being applied. The conclusion is that the new law constitutes legislative overkill, and appears to be without precedent in other professions. Nor do those roles appear to have been acknowledged and accepted by the regulators, the bodies and the agencies concerned. At the same time, given that these roles are now in the law, an expectation may arise that they will in fact be used.

The large number of these bodies and agencies and their different roles necessitate that they be set out in a table, at the end of this article.

The bodies and agencies

Briefly, defined "industry bodies", "professional disciplinary bodies", "Commonwealth entities", and a particular "prescribed body" each has some significant authority, if not responsibility, to monitor and respond to insolvency practitioner misconduct. Thus, the responsibility for the regulation of insolvency practitioners is shared. The regime now accords some statutory recognition of the gatekeeper and reporting responsibility of the professionals to assist in the regulatory process.

This approach is consistent with a current theme in regulation arising from findings of criminal and civil misconduct in the past that were generally known or suspected but which were not revealed until later, when some "scandal" broke. Such revelations have prompted the whistleblowing legislation, the breach reporting responsibilities of professional accountants, and statutory reporting requirements in other areas.

Before examining the provisions, it must be said that the validity of this aspect of the new regulatory regime is questionable. It does not appear to have been based on precedent or submission, and the bodies and agencies have not, on the face of their records, been accepted or acknowledged. It would appear to be an extreme of legislative overreaction. As shown in the table, 15 professional bodies, and many more Commonwealth agencies, now have statutory roles in the regulation of around 700 liquidators and 200 trustees.

In brief comparison, the Australian Securities and Investments Commission (ASIC) now has a more extensive spread of powers over liquidators than over company officers and other individuals whom it regulates.

Section 40-100 industry notices

Section 40-100[3] gives an industry body the legal authority to refer suspected insolvency practitioner misconduct matters to the regulators. The body is protected from liability if it acts in good faith and its suspicion about the misconduct is reasonable (s 40-105). This protection extends to anyone making a decision based on the notice, or anyone providing the information that is included in the notice. The regulators must investigate and inform the industry body of the outcome. Conceivably, such a referral could lead to termination of a practitioner's registration.

None of the industry bodies has all insolvency practitioners in its membership; at the same time, s 40-100 does not confine a referral to a member of the particular referring body — that is, CPA Australia could refer an Australian Restructuring Insolvency and Turnaround Association (ARITA) member's conduct to a regulator.

This raises the question of the quality of the internal processes of the industry bodies — their attention to procedural fairness, independence and transparency — and hence the quality of the matters they might refer. Given that the government has prescribed each of them as having authority under s 40-100 and would have assessed them as capable of taking on such responsibilities, we may assume that such an assessment was done.

In any event, the regulators should properly conduct an initial assessment of any information referred by any

industry body as to how the information was obtained, from whom, and what opportunity, if any, the practitioner had to respond to it. A regulator would want to gather its own evidence rather than rely on that provided by an industry body, even if the body had progressed to the point of acting under its own rules to make a finding against its practitioner member. Regulators have model litigant and other higher standards under the law.

As much as it offers by way of guidance, ASIC says it will assess industry notices using the principles set out in its *Information Sheet 153: How ASIC deals with reports of misconduct*, although that concerns general referrals of concern to ASIC from members of the public.[4]

It would therefore be open to the regulators to not pursue an investigation based on the information provided if they consider that the industry body's s 40-100 notice did not in fact raise any issue. But the regulators would also not want to rely upon information or documents that were tainted, for example from misuse of court process or confidential information, or which did not appear to be substantiated by any reasonable suspicion. Properly, the regulators will merely use that information to prompt and conduct their own investigation.

The lodgment of an industry notice about a practitioner could potentially cause undue harm to that practitioner. A right to challenge and seek damages from the industry body in a court is available if the practitioner can show that the suspicion of their misconduct was unreasonable, or was not made in good faith (s 40-105). That presupposes that the practitioner knows of the lodgment. While this is not required under the section, it appears to be, as discussed further, that it should be a matter of public record.

As to the other industry bodies, the 11 legal bodies, their interests appear more distant and one must query their inclusion in this regime. Their memberships would not generally include insolvency practitioners, even if their members might also be members of the accounting bodies or ARITA.

In so far as the circumstances of such a legal referral are conceivable, a Tasmanian lawyer could bring a bankruptcy trustee's conduct to the attention of the Law Society of Tasmania which may itself then refer the matter to the Australian Financial Security Authority (AFSA), by way of a s 40-100 industry notice.

Confidentiality

One important extension of the law is to allow certain bodies to share confidential conduct information with the regulators.

The "professional discipline bodies" are authorised to receive confidential information about the misconduct of their members from the two regulators, AFSA and ASIC. As these discipline bodies are one and the same as the industry bodies, if an industry body has lodged a s 40-100 industry notice, the regulator may then wish to share confidential information with that body about its referral.

The law in relation to confidentiality is different between corporate and personal insolvency, and, as will be explained, it is also different as to whether that information goes on the public record.

Section 127 of the ASIC Act — prescribed professional disciplinary body, another prescribed body, a prescribed function, a Pt 2 committee

Section 127 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) requires ASIC to protect confidential and protected information from public access. There are then exceptions listed.

Under s 127(4), where ASIC is satisfied that particular information:

> (d) will enable or assist:
>
> (i) a *prescribed professional disciplinary body* to perform one of its functions; or
>
> (ii) *another prescribed body* to perform a *prescribed function* in relation to registered liquidators [emphasis added] …

then disclosure to the relevant body is permitted. Conditions may be imposed.[5]

By way of brief interpretation, a prescribed professional disciplinary body is the same as an industry body, another prescribed body is ARITA, and a prescribed function is that of ARITA's disciplinary function concerning its members.

Section 12(4) of the Bankruptcy Act — prescribed professional disciplinary body

The complex drafting under the ASIC Act compares with s 12(4) of the Bankruptcy Act 1966 (Cth) which allows the Inspector-General to disclose what would otherwise be confidential information, also to the same prescribed professional disciplinary body, if the Inspector-General is satisfied that the information will enable or

assist the body to exercise any of its powers or perform any of its functions. In contrast to the corporate regime, there is no reference to ARITA as a separate prescribed body.

Apart from the inconsistency between personal and corporate insolvency, if in the course of its investigations of an insolvency practitioner, a regulator considers that it needs to inform the insolvency practitioner's industry body of certain information, it may do so, and the body may receive that information with legal authority. That does assist a not uncommon circumstance of the regulator and the body, each investigating the one insolvency practitioner without being able to communicate with each other.

Committee referrals — s 50-35

Discipline committees are established under the new law. The law necessarily prohibits disclosure of confidential information by any member of a committee, but there are a number of exceptions.

Relevantly, a discipline committee member can give information obtained during the hearing process to enable or assist a prescribed body to perform its disciplinary function in relation to its members (s 50-35(2)(b)(iv)). Prescribed bodies are one and the same as industry bodies. Oddly, there is no stated requirement for the member to inform the other committee members.

That information could be given in circumstances even where the committee itself has decided that there was no relevant misconduct. The industry body may still receive and use that information, properly obtained from its member on the committee, for its own discipline purposes.

Public record

There is then the question whether any of the application of this new law by the relevant bodies is or should be on the public record.

Corporate insolvency

Section 1274 of the Corporations Act 2001 (Cth) requires ASIC to keep such registers as it considers necessary.

A person may inspect any document *lodged* with ASIC, excluding various listed documents. An "industry notice" under s 40-100 is to be *lodged* with ASIC by any of the "industry bodies". It is not excluded from public access by s 1274. This has prompted comment from one industry body that it may not use the industry notice process. While investigative processes are not typically open to public inspection, nor the person the subject of the investigation, the section would not work unless the insolvency practitioner concerned was made aware of the notice having been lodged.

On what ASIC register these industry notices would appear is not clear, but under s 15-1, ASIC *may* publicly record on the Register of Liquidators other information if it is relevant to a liquidator's registration or practice. Whether or not ASIC makes public a s 40-100 industry notice on the Register, the industry notice may be accessible under s 1274.

In the absence of any prior notification, it could therefore be that the first time an insolvency practitioner knows their conduct is under question is when it appears, without notice to them, on the ASIC register; or after, say, a journalist reveals that some action is being taken.

Personal insolvency

The Bankruptcy Act does not have any comparable confidentiality regime. The only relevant register is the Register of Trustees under s 15-1 on which the Inspector-General *may* include other information relevant to a trustee's registration or their practice. There is a discretion to make that information publicly available.[6]

Industry bodies

It is not clear what registers are established, if any, by the industry bodies and what processes they have for issuing industry notices. Conceivably, they could have their internal processes for notifying the practitioner concerned, with some natural justice or other process enshrined.

Many industry bodies do have registers of their own discipline hearing outcomes.[7] Accountants also have their ongoing "quality assurance reviews" through their professional bodies. Insolvency practitioners who are also members of ARITA are required to provide their professional body review report to ARITA. None of this is public unless and until it progresses to some discipline outcome. Information from these reviews may form the source of a s 40-100 industry notice.

Transparency of how the member oversight and discipline process works is important in this area — to maintain confidence on how the standards of any profession are enforced, and to allow external review of the fact that due process is followed. In contrast, the application of the process itself in relation to an individual member is generally kept private, although that varies. Chartered Accountants Australia and New Zealand (CAANZ) hearings are generally open to the public.

Why insolvency practitioners?

Insolvency practitioners are given significant powers and responsibilities, more so than other comparable professionals. They have fiduciary duties and statutory responsibilities to creditors, and duties to act in the

public interest. They can demand documents and information, and cause individuals to be publicly examined under oath in court, handle large sums of other people's money, and make quasi-judicial determinations of creditors' claims. They are subject to oversight by the courts, from whom they need to seek approval for certain actions, and before whom they bring proceedings, and have proceedings brought against them. They can be the subject of direction by creditors, and regulators have significant powers to direct and sanction their conduct, and media attention can be intense.

It is therefore not unreasonable that they are subject to a high degree of regulation and oversight, but also protection and support in the role that they play. That level of regulation has always existed, and this was increased further by the Insolvency Law Reform Act.

Regulatory models

The two main alternative models of professional insolvency regulation are:

- regulation by an independent government regulator or
- co-regulation by one or more professional body(ies) overseen by an independent government regulator

Australia now has a hybrid system of co-regulation that is not full co-regulation, nor full regulation.

The reasons for and history of this perceived need for increased regulation go back for some time. Suffice to say, in introducing the new law, the 2015 Explanatory Statement summed up the government position. It noted that co-regulation between a profession and government can "reduce the regulatory burden where stakeholders have confidence that the profession will effectively regulate their members, not protect them either explicitly or implicitly".[8]

However, it was noted that:

> Given the current deficiency in confidence in the insolvency industry, allowing practitioner registration and discipline decisions to be the exclusive purview of the industry would be unlikely to receive the support necessary from other stakeholders.[9]

That under-confidence was reported by ASIC's surveys, although it was not reported by AFSA, in relation to largely the same regulated practitioners/trustees in bankruptcy. Nevertheless, in the interests of harmonisation, the regime applies to trustees as well.

Whatever the validity of any view of that deficiency in confidence, that deficiency has driven the introduction of this regulatory regime.

Comparable regimes

In contrast, the UK has a system of true co-regulation, with the recognised professional bodies performing the registration and main regulatory tasks in respect of their respective members, under the oversight of the UK Insolvency Service. Each body is required to have processes allowing a proper assessment and investigation of complaints, timely responses, and disciplinary procedures that ensure fair and consistent outcomes.[10]

New Zealand is considering a similar model to that of the UK, with much of the regulatory infrastructure already existing under the accreditation system established by CAANZ and the Restructuring, Insolvency and Turnaround Association of New Zealand. The lower cost of co-regulation is also a consideration.[11]

Overkill and lack of proportionality?

In contrast, Australia's model relies on extensive regulation, and now private and public body regulation.

The term regulatory overkill comes to mind based on the mathematical outcomes of the number of possible referrals by and to the various bodies, and their potential crossovers and circularity, and on the limited evidence on which the reform is based. Even limiting the bodies to ARITA and the three accounting bodies may have been acceptable.

What all this means in reality may be another thing. A review of industry body and Commonwealth entity website and published guidance on this new regime revealed nothing of note, apart from some minor references, from the regulators — this despite what one may assume was relevant consultation before the regime was implemented.

If that is the case, it may say something about the value of this new law, and it may also be unwise. While the various bodies might have no enforceable statutory responsibility to use industry notices or refer confidential misconduct information, there could well be a community expectation that they will in fact promote and use their new authority in the spirit apparently intended.

In other words, if things do go wrong in some way, and some insolvency practitioner scandal breaks, it may not be the regulators who are criticised, but the relevant industry body.

Professional bodies, government agencies and their roles

Constituent bodies	Body defined as:	Statutory authority of the body	Apparent purpose of the body's role
A	**Right to lodge s 40-100 industry notices**		
• ARITA • CPA Australia • CAANZ • Institute of Public Accountants • NSW Bar Association • Law Society of NSW • Victorian Legal Services Commissioner • Victorian Legal Services Board • The Bar Association of Queensland • Queensland Law Society • Legal Practice Board of Western Australia • Law Society of South Australia • Legal Profession Conduct Commissioner of South Australia • Law Society of Tasmania • The Law Society of the ACT • Law Society Northern Territory	"industry bodies" Insolvency Practice Schedule (Bankruptcy) (IPSB), s 40-100 Insolvency Practice Rules (Bankruptcy) 2016 (Cth) (IPRB), r 40-1 Insolvency Practice Schedule (Corporations) (IPSC), s 40-100 Insolvency Practice Rules (Corporations) 2016 (Cth) (IPRC), r 40-1	They may lodge s 40-100 industry notices with the regulators, AFSA and ASIC, reporting on suspected insolvency practitioner misconduct.	In conducting their own complaints processes, the industry bodies may consider that some misconduct referred to them warrants regulator attention.
B	**Release of confidential information by AFSA to professional disciplinary bodies and Commonwealth entities**		
As above (A)	"professional discipline bodies" Bankruptcy Act, s 12(4)(b) Bankruptcy Regulations 1996 (Cth), reg 2.05	They may receive confidential misconduct information from AFSA.	In conducting its own investigations, AFSA may want to share confidential information with an industry body about the conduct of a particular trustee member.
All Commonwealth departments and other defined entities	"Commonwealth entities"	They may also receive confidential conduct information from AFSA.	In conducting its own investigations, AFSA may want to share confidential information with a Commonwealth entity about the conduct of a particular trustee practitioner.

C	**Release of confidential information by ASIC to professional disciplinary bodies and another prescribed body to perform a prescribed function**		
	"professional disciplinary bodies" ASIC Act, s 127(4)(d)(i) Australian Securities and Investments Commission Regulation 2001 (Cth) (ASIC Reg), reg 8AA(1)	They may receive confidential conduct information from ASIC to assist them perform one of their functions.	In conducting its own investigations, ASIC may want to share confidential information with an industry body about the conduct of a particular liquidator.
ARITA	"another prescribed body in relation to a prescribed function" ASIC Act, s 127(4)(d)(ii) ASIC Reg, reg 8AA(2) – ARITA is prescribed in relation to performing a discipline function in relation to one of its members	ARITA may receive confidential conduct information about one of its members.	In conducting its own discipline process, ARITA may receive confidential conduct information to allow it to pursue that process.
D	**Right of discipline committee member to release confidential information**		
As above (A)	A "person" on a discipline committee can release confidential information to enable or assist a body prescribed to perform its disciplinary function in relation to its members. IPSB, s 50-35 IPRB, r 50-100 IPSC, s 50-35 IPRC, r 50-100	A committee member can release confidential committee information to assist their or any industry body in its own disciplinary matters.	To allow confidential discipline committee information to be used for industry body discipline processes.
E	**Right to choose a member on a registration or discipline committee**		
ARITA	a "prescribed body" IPSB, s 50-10 IPRB, r 50-100 IPSC, s 50-10 IPRC, r 50-100	The one prescribed body is ARITA, which can choose trustees and liquidators to sit on registration and discipline committees.	This enables a representative of some of the insolvency profession to be part of the conduct assessment process.[12]

Michael Murray
Murrays Legal Commentary
michael@murrayslegal.com.au
www.murrayslegal.com.au

Footnotes

1. D Castle "Insolvency Law Reform — corporate disciplinary committees and natural justice" (2017) 18(3&4) *INSLB* 73.
2. *Mansfield and A committee convened under section 20-10 Insolvency Practice Schedule (Corporations)* [2018] AATA 1510; and M Osborne, M Murray and B Gleeson *Report of the Committee convened pursuant to Sch 2, s 40-45 of the Bankruptcy Act 1966 to make a decision about Ms Louise Thornson, a Registered Trustee* (5 April 2018) www.afsa.gov.au/sites/g/files/net1601/f/thomson_committee_decision.pdf.
3. All section references are to the Insolvency Practice Schedules to the Bankruptcy Act 1966 (Cth) and the Corporations Act 2001 (Cth), unless otherwise stated.
4. ASIC *Registered liquidators: Registration, disciplinary actions and insurance requirements* Regulatory Guide 258 (March 2017) https://download.asic.gov.au/media/4166077/rg258-published-1-march-2017.pdf. Beyond providing a form (Form 35), the Australian Financial Security Authority (AFSA) does not appear to mention industry notices in its guidance.
5. See also s 127(4EA), (4EB).
6. Insolvency Practice Rules (Bankruptcy) 2016 (Cth), r 15-1.

7. See for example CPA Australia, Outcome of Disciplinary Hearings, www.cpaaustralia.com.au/about-us/member-conduct-and-discipline/outcome-of-disciplinary-hearings.
8. *Explanatory Statement Issued by authority of the Attorney-General: Bankruptcy Act 1966 — Insolvency Practice Rules (Bankruptcy) 2016* (2015) para 201.
9. Above n 8, at para 201.
10. L Conway, UK Parliament House of Commons Library *Regulation of Insolvency Practitioners (IPs)* Briefing Paper No CBP5531 (4 October 2016).
11. Insolvency Review Working Group (NZ) *Review of Corporate Insolvency Law* Report No 1 (July 2016) www.mbie.govt.nz/info-services/business/business-law/insolvency-law-working-group/insolvency-practitioner-regulation-and-voluntary-liquidations/report-no-1-insolvency-practitioners-regulation-and-voluntary-liquidations.pdf. See also the Insolvency Practitioners Bill 2010 (NZ).
12. Although ARITA can "choose" a person for a committee, that person need not be an ARITA member; for example, if there is any issue of conflict between the member and ARITA.