

## Australia

### Appointment

An IP is appointed to all formal insolvency proceedings. Broadly speaking, there are three types of formal insolvency regimes in Australia: liquidation, voluntary administration and receivership. The roles of the IP are different in each case as are their qualifications.

In a liquidation, a liquidator is appointed to take control of the company's property and apply it to discharge its debts as soon as practicable. In a provisional liquidation a court appoints a provisional liquidator to maintain the status quo.

When a company is in voluntary administration, an administrator is appointed to assume control of the company's business with a view to maximising the chances of the business of the company continuing in existence or, if that is not possible, entering into a deed of company arrangement in order to achieve a better return to the company's creditors and members than would result from an immediate winding up of the company.

Where a deed of company arrangement is entered into a deed administrator is appointed. The deed administrator must prepare an instrument setting out the terms of the deed and is a party to the deed.

Where a receivership is a private appointment, a receiver or receiver and manager is appointed by a secured creditor of the company pursuant to a deed of charge.

Courts also have the power to appoint a receiver. A court may appoint a receiver where it appears to be 'just or convenient' to do so. With respect to insurance companies becoming insolvent, IPs who have had previous appointments with such companies are more likely to receive such appointments.

### Qualifications

A liquidator, administrator or receiver must be registered by the Australian Securities and Investments Commission (**ASIC**) as a 'registered liquidator' pursuant to section 1282(2) of the Corporations Act 2001 (**the Act**). Only an 'official liquidator' is able to be appointed as a liquidator by the Court.

Where an application for registration as a liquidator is made under the Act, ASIC must grant the application if:

- (a) the applicant:
  - i) is a member of The Institute of Chartered Accountants in Australia, CPA Australia or any other prescribed body; or
  - ii) holds a degree, diploma or certificate from a prescribed university or other prescribed institution in Australia, which is a course of study in accountancy of not less than three years duration and in commercial law (including company law) of not less than two years duration; or
  - iii) has other qualifications and experience that in the opinion of ASIC are equivalent to the qualifications in paragraph (i) and (ii); and
- (b) ASIC is satisfied as to the experience of the applicant in connection with the winding up of bodies corporate; and
- (c) ASIC is satisfied that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator.

On 20 September 2005 ASIC issued Policy Statement 186 which outlines the approach ASIC will take in evaluating whether an applicant meets the criteria in the Act.

A registered liquidator may apply to be an 'official liquidator', which will mean that he or she is eligible to receive appointments by the Court. The qualifications to become an official liquidator are set out in section 1283 of the Act and expanded in Policy Statement 186.

The qualifications required to be satisfied to act as an IP are set out by laws as well as policy. Section 532(1) of the Act stipulates that a liquidator (which for these purposes includes a provisional liquidator) must be a 'registered liquidator'. The qualifications for a registered liquidator are set out in section 1282(2) of the Act.

Section 448B(1) and (2) of the Act stipulates that an administrator or a deed administrator must be a 'registered liquidator'. The qualifications for a registered liquidator are set out in section 1282(2) of the Act.

Section 418(1) of the Act stipulates that a receiver must be a 'registered liquidator'. The qualifications for a registered liquidator are set out in section 1282(2) of the Act.

## Australia ... continued

In order to become a 'registered liquidator' a practitioner must make an application under section 1279 of the Act and then be found by ASIC to possess the required qualifications.

In terms of experience, ASIC will not appoint a person with limited practical experience to the position of registered liquidator. As a consequence most registered liquidators have a high level of practical experience. As it is usually more senior, experienced practitioners who qualify to become registered liquidators, the level of their tertiary qualifications may also be higher than the minimum level prescribed.

### Selection

Depending on the type of appointment, an insolvency practitioner may be appointed by the company, its members, creditors, a security or chargeholder or the Court.

In the case of a voluntary liquidation, the members of the company appoint a liquidator in a general meeting ('members' voluntary liquidation') or the creditors appoint a liquidator at a creditors' meeting ('creditors' voluntary liquidation').

Where a liquidation is involuntary, the company, a creditor, a member, a director, a liquidator or ASIC apply to the Court for the company to be wound up and the Court appoints a liquidator. It is usual for the applicant who is applying for the company to be placed in liquidation to nominate a particular liquidator and to file a court document indicating that the liquidator who has been nominated consents to the appointment being made by the Court. If no liquidator is nominated, the Court will appoint an 'official liquidator' who is bound to accept court appointments.

A voluntary administration may be initiated by the directors of the company, by its liquidator; or by a person who is entitled to enforce a charge on the whole or substantially the whole of a company's property if the charge becomes enforceable.

A receiver is usually appointed by a secured creditor of the company in accordance with the terms of security documentation (eg mortgage or deed of charge) which gives the secured creditor the right to appoint a receiver in certain circumstances.

Where an applicant seeks the appointment of a Court receiver, the Court may appoint the applicant's nominee. Where a debenture-holder or mortgagee is the applicant, as is commonly the case, the receiver will be his or her nominee. Where no receiver is proposed, the Court may appoint a registered liquidator as receiver.

If the creditors do not select the IP the rights of creditors as far as the choice of insolvency practitioner is concerned will again depend on the type of insolvency.

In a members' voluntary liquidation, creditors have no say as to who the liquidator should be, unless the company is insolvent in which case the liquidator must convene a meeting of creditors and the creditors may appoint another liquidator.

In a creditors' voluntary liquidation, the creditors may nominate a person to be the liquidator for the purpose of the winding up. If the person nominated by the creditors is different to the person nominated by the company, the person nominated by the creditors will be the liquidator.

In a voluntary administration, the manner in which an administrator is appointed will depend on how the company is placed into administration.

Where a receiver is privately appointed, the secured creditor will appoint a receiver or receiver and manager pursuant to the terms of the security documents. Other creditors have no say in the choice of the receiver or receiver and manager. However, where there is any doubt about the validity of an appointment, an application to the court made be made for a ruling on its validity.

Where a receiver is appointed by the Court, the Court may appoint the applicant's nominee. Where a debenture-holder or mortgagee is the applicant, as is commonly the case, the receiver will be his or her nominee. Where no receiver is proposed, the Court may appoint a registered liquidator as receiver.

If the creditors are unhappy with the IP that has been appointed in the case of a liquidation proceeding the Court may, on cause shown, remove a liquidator and appoint another liquidator.



## Australia ... continued

Similarly, a creditor may apply to the Court for an order declaring whether or not the appointment of the administrator is valid. A creditor may also apply to the Court for the removal of an administrator and the appointment of someone else as administrator.

In certain circumstances, the company or its creditors may apply to the Court for an order declaring whether or not the appointment of the receiver was valid or whether the receiver has validly entered into possession of the property under the terms of the charge.

### Supervision

The Court and ASIC have supervisory roles which are summarised below.

The Court, the ASIC and the Creditor Committees are the main parties responsible for the supervision of office holders in respect of liquidation, voluntary administration and receivership.

The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

There are also various provisions of the Act which give the Court power in respect of specific matters relating to liquidations.

ASIC may report to the Court any matter which, in its opinion, is a misfeasance, neglect or omission on the part of the office holder.

In addition, ASIC may also refer conduct to the Companies Auditors and Liquidators Disciplinary Board (CALDB). This is a disciplinary board established under the ASIC Act 2001. It will usually be possible in a liquidation or voluntary administration for a creditor to make an application to the Court or to complain to ASIC in respect of a particular matter.

### Independence

Recent legislative reform requires liquidators and administrators to provide creditors with a statement disclosing any 'relevant relationships'. The intent of the reform is to ensure that liquidators and administrators are free of actual and perceived conflict of interest.

### Remuneration

There is no statutory or other restriction as to how an insolvency practitioner's remuneration should be calculated. The Act specifies that a liquidator's remuneration can be 'by way of percentage or otherwise'. In the case of an administrator, the administrator may be called upon to demonstrate in having remuneration fixed if his or her remuneration is 'reasonable'. Recent case law has suggested that in determining if remuneration is reasonable, one should have regard to the number of hours reasonably spent by the insolvency practitioner multiplied by a reasonable hourly rate.

Recent legislative reform requires, before remuneration is fixed, administrators and liquidators to prepare a report to creditors setting out such matters that are required to make an informed assessment whether proposed remuneration is reasonable, including a summary of the major tasks and the costs associated with those tasks.

The usual practice in Australia is for insolvency practitioners to charge out at hourly rates on a time-spent basis. It is usual for the rates to be disclosed in advance and in some jurisdictions it is a requirement that the insolvency practitioner estimate the cost to completion on appointment. With respect to receivers, the Court may fix the amount of the receiver's remuneration. This can extend to a period of time before the order was made. In special circumstances a receiver can be ordered to account for any amount he or she has received in excess of the amount that is fixed.

A provisional liquidator is entitled to receive such remuneration as is determined by the Court.

A liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined, if there is a committee of inspection, by agreement between the liquidator and the committee of inspection, or there is no committee of inspection, by resolution of the creditors or by the Court.

The Court may also review the remuneration set by the committee of inspection or the creditors.

The administrator is entitled to receive such remuneration as is fixed by a resolution of the creditors or, if no remuneration is fixed, such remuneration as the Court fixes on application of the administrator.

## Australia ... continued

---

Where the remuneration is fixed by the creditors, the Court may, on application of the administrator, member or creditor, review the remuneration.

The Court may fix the amount of the receiver's remuneration.

If the creditors do not approve the remuneration in the case of a liquidation or voluntary administration/Deed of Company Arrangement, the Act gives creditors (and members and the liquidator) the ability to apply to the Court for a review of the amount of remuneration of the liquidator.

The creditors do not play a part in approving the receiver's remuneration.

### Regulation

In addition to the regulation of accountants by their own organisations (ICA etc) there are three types of regulation of IPs that could be described as 'external': These are,

- (a) the relevant provisions of the Act.
- (b) the CALDB, which is a disciplinary board established under the ASIC Act 2001.
- (c) the Insolvency Practitioners' Association (IPA)

Most reputable insolvency practitioners take their responsibilities seriously. Insolvency practitioners in Australia work to a high standard. There can be a tension, however, between acting in a cost-effective and commercial manner in the interests of increasing returns to creditors and recovering some fees to cover the practitioner's own expenses and taking the necessary time to comply properly with regulatory requirements and to keep detailed records of that compliance.