

Should lawyers be able to work as insolvency practitioners?

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The question of whether lawyers should be able to act as liquidators has routinely been considered by professional bodies, including the Law Society of SA, over many years.

Back in 2002, then President of the Society, Andrew Goode, led discussions on this issue in SA. The Society identified that, given insolvency work was by and large regulated under the *Corporations Act*, this was a Federal issue and it was appropriate that the Law Council of Australia take charge of any advocacy on this issue.

In 2003, the Society then participated in a Federal Parliamentary Inquiry into Australia's insolvency laws, and advanced the view that lawyers should be permitted to work as liquidators.

Much of the debate between the Law Council of Australia and the Society centred on the criteria for lawyers to be eligible to work as liquidators.

The Law Council's submission to the inquiry, which was informed by Constituent Bodies including the Society, recommended that lawyers with experience in insolvency, corporate and commercial law should be eligible to work as corporate insolvency practitioners.

The argument was that existing entry requirements for registration as liquidators were too restrictive, such that only accountants were likely to fulfil the requirements. Some legal practitioners held the view that some of the work performed by liquidators was legal work which, as non-lawyers, they should not be doing. The upshot, according to the submission, was that people in other professions who had the experience and expertise to be

insolvency practitioners were unjustifiably denied the opportunity to work as insolvency practitioners, which created a barrier to competition.

The Law Council recommended that lawyers should be able to apply for registration as liquidators if they:

- were members of a law society or bar association in Australia;
- held a current practising certificate;
- had five years' experience in legal practice;
- had three years' experience practising predominantly in insolvency, corporate and commercial law; and
- had three years' experience of practice experience working under supervision of a registered liquidator, except for senior lawyers with significant experience in insolvency, corporate and commercial work who would be exempt from this criterion.

The Society at the time opposed this last recommendation that legal practitioners should need to be supervised for three years by a registered liquidator.

These recommendations were never adopted, and the issue more or less fell by the wayside until it was revived in 2010, when the Federal Senate Committee Inquiry into Liquidators and Administrators recommended that lawyers with at least five years' experience in commercial law be eligible to do insolvency work.

However, media reports at the time indicate that the Law Council did not necessarily embrace the recommendation.

The Australian Financial Review quoted then Law Council President, Glenn

Ferguson, as saying: "While there may be some practitioners with qualifications in both accounting and law, one will usually find that those practitioners conduct practice as either accountants or lawyers."

According to the article, the Law Council's Insolvency and Reconstruction Committee did not believe the Senate report gave "sufficient weight to the specialised skills and experience of liquidators, nor does it recognise the benefit of a liquidator seeking independent legal advice on complex issues."

These comments seemed to be a departure from the Law Council's previous views as stated in the 2003 submission.

The Law Council's position was discussed by the Council of the Society, which resolved to investigate whether there was a push from the legal profession nationally to gain access to liquidation work, but these enquiries did not lead to any conclusive answers.

Fast forward to 2018, and there has been little change to the entry requirements for insolvency practitioners, although insolvency laws have continued to undergo significant reforms, many of which are analysed in this edition of the Bulletin by highly experienced commercial lawyers with particular expertise in insolvency.

Of course, the management of insolvent companies and individuals can involve significant legal work, such as providing advice on a number of issues such as tax laws, debt recovery and statutory inquiries, and litigation. But the jury is still out as to whether the profession broadly supports reforms to make it easier for lawyers to act as insolvency practitioners. **B**