



Report of Regulatory Review:

Trustee Registration Provisions: Bankruptcy Act 1966

Insolvency and Trustee Service Australia

ITSA

PREPARED BY:
JOHN HAWKLESS CONSULTANTS PTY LTD
36A BAMBARA CRESCENT
BEECROFT NSW 2119

TEL: 02 9876 2001
FAX: 02 9876 8137

9 December, 1998

Table of Contents

SECTION	PAGE
1. Introduction.....	1
1.1 This Document.....	1
1.2 The Insolvency and Trustee Service Australia.....	1
1.3 Trustees and Bankruptcy.....	1
1.3.1 General.....	1
1.3.2 The Role of the Trustee.....	2
1.3.3 Duties of Trustees.....	2
1.3.4 Responsibilities of Trustees.....	3
1.3.5 Remuneration of Trustees.....	3
1.3.6 Appointment & Registration of Trustees.....	4
1.4 Provisions of the Legislation that have been Reviewed.....	4
1.5 Need for the Review.....	4
1.6 Content of the Review.....	5
1.7 Approach Used in Undertaking the Review.....	5
1.7.1 General.....	5
1.7.2 Key Assumptions Used.....	6
1.7.3 Need for Clear Specification of Objectives.....	6
1.7.4 Selection of the Option that has the Greater Economic Efficiency.....	6
1.8 Options Identified.....	7
2. Background: Statement of the Problem.....	8
2.1 Size of the Trustee Industry and Activity Indicators.....	8
2.1.1 Number of Trustees.....	8
2.1.2 Number of New Trustees per Year.....	8
2.1.3 Registered Trustee Involvement in Bankruptcy.....	9
2.1.4 Involvement of 'Small Business' in Trustee Industry.....	10
2.1.5 Charges.....	10
2.1.6 Registration Process.....	10
2.1.7 Re-Registration Process.....	11
2.2 Incidence and Trends in Bankruptcy in Australia.....	11
2.3 Causes of Bankruptcy.....	12
2.3.1 Business.....	12
2.3.2 Non-Business (Consumer).....	12
2.3.3 Typical Bankrupt.....	12
2.4 Impact of Bankruptcy on the Community.....	13
2.4.1 The Australian Experience.....	13
2.4.2 The Experience Overseas.....	14
2.5 Market Failure.....	15
2.5.1 The Free Market.....	15
2.5.2 The Existence of 'Externalities'.....	16
2.5.3 Buyer Ignorance.....	16
2.5.4 High Transaction Costs.....	17
2.5.5 Summary.....	17
2.6 Who are those Affected by the Problem and its Solutions?.....	17
2.6.1 List of Groups Affected.....	17
3. Background: Actions by Australian Governments.....	18
3.1 ITSA.....	18
3.1.1 The Role of ITSA.....	18
3.1.2 Objectives of ITSA.....	20

Table of Contents

3.1.3	The Structure of ITSA.....	20
3.2	Review of Corporate Insolvency Regulation in Australia	20
3.3	National Competition Policy	21
3.3.1	General.....	21
3.3.2	Agreements by Governments.....	21
3.3.3	Impact of Trustee Registration	23
4.	Consultation Outcomes: The Opinions of Stakeholders.....	24
4.1	Views of the Industry (Registered Trustees).....	24
4.1.1	Perceived Advantages of the Existing Registration Régime	24
4.1.2	Perceived Disadvantages of the Existing Registration Régime.....	25
4.2	Views of Consumers (Creditors)	26
4.3	Views of The Bankruptcy Discussion Group – Melbourne	27
4.4	Views of Financial Counsellors	29
4.5	Views of General Public	29
4.6	Views of ITSA.....	29
4.7	Key Issues Identified from Consultation	30
5.	Statement of the Objectives and of Options.....	31
5.1	The Objectives to be Achieved	31
5.2	Identification of Options.....	31
6.	Assessment of Impacts of each Option	32
6.1	General Approach	32
6.1.1	Base Year for Dollar Values	32
6.1.2	Costs and Benefits of Options	32
6.1.3	Identification of the Benefits of each Option	32
6.1.4	Identification of the Costs of each Option	32
6.2	Possibility of Registering Trustees under the Corporations Law.....	32
6.3	Option 1: Maintain the Status Quo	33
6.3.1	Description.....	33
6.3.2	Costs - Quantitative	34
6.3.3	Costs – Qualitative	35
6.3.4	Benefits.....	36
6.4	Option 2: Repeal all Legislation and Do Nothing Further by Government	36
6.4.1	Description.....	36
6.4.2	Costs - Quantitative	36
6.4.3	Costs - Qualitative	36
6.4.4	Benefits – Quantitative	37
6.4.5	Benefits – Qualitative.....	37
6.5	Option 3: Repeal all Legislation and Government to support Self-Regulation	37
6.5.1	Description.....	37
6.5.2	Costs - Quantitative	38
6.5.3	Costs – Qualitative	39
6.5.4	Benefits – Quantitative	40
6.5.5	Benefits - Qualitative	40
7.	Conclusion and Recommended Option	42
7.1	Is the Problem a Large One?	42
7.1.1	Number of Trustees and Bankruptcies	42
7.1.2	Current Costs	42
7.2	Is Registration of Trustees Required?.....	43
7.3	Should Registration be by Government or the Industry	44

Table of Contents

7.4	Should Registration be Run by the Industry?	44
7.5	Does the Existing Situation Comply with Competition Principles?	45
7.5.1	Restriction On The Number Of Trustees	45
7.5.2	Barrier as to Fees	45
7.5.3	Unregulated Right to Market Entry	45
7.5.4	ITSA Staff Do Not Have To Be Registered.....	45
7.6	Conclusion as to Review.....	46
7.7	Recommendations	47

ATTACHMENT A: The Consultation Process Undertaken in the Preparation of the RIS

- Attachment A1:** A list of interviewees.
- Attachment A2:** Copy of the advertisement in The Weekend Australian Newspaper.
- Attachment A3:** Copy of the Terms of Reference given to respondents to the newspaper advertisement.

Index of Tables

TABLE.....	PAGE
TABLE 1: NUMBER OF REGISTERED TRUSTEES 1997/98	8
TABLE 2: NUMBER OF NEW TRUSTEES PER YEAR	8
TABLE 3: NUMBER OF NEW ESTATES UNDER ADMINISTRATION 1997/98.....	9
TABLE 4: AMOUNTS HELD BY REGISTERED TRUSTEES 1997/98.....	9
TABLE 5: BANKRUPTCY STATISTICS	13
TABLE 6: NUMBER OF ESTATES UNDER ADMINISTRATION	14
TABLE 7: SUMMARY OF OVERSEAS EXPERIENCE.....	14
TABLE 8: LIST OF THOSE AFFECTED BY PERSONAL BANKRUPTCY AND ITS SOLUTIONS.....	17
TABLE 9: AIMS AND EXPECTED OUTCOMES OF ITSA.....	20
TABLE 10: ANNUAL QUANTITATIVE COSTS TO INDUSTRY	42
TABLE 11: ANNUAL COSTS TO GOVERNMENT.....	43

1. INTRODUCTION

1.1 This Document

This document is the Report of a review of the Trustee Registration provisions of the Commonwealth Bankruptcy Act 1966 and associated legislation.

The focus of the Review is on the registration of trustees involved in personal insolvency (consumer and business) administered by the Insolvency and Trustee Service Australia (ITSA). The Review does not consider corporate insolvency administered by the Australian Securities and Investment Commission (ASIC).

1.2 The Insolvency and Trustee Service Australia

The Insolvency and Trustee Service Australia is a national government agency responsible for helping to protect the community from the impact of personal financial failure and for countering unlawful activities.

ITSA provides a range of bankruptcy, trustee and related services, advice and regulation.

1.3 Trustees and Bankruptcy

1.3.1 General

Under the Bankruptcy Act, the affairs of a person who has become bankrupt are handled by a bankruptcy trustee.

Once bankrupt, persons cannot sell or deal with most of their property. Only the bankruptcy trustee can dispose of property for the benefit of creditors. In this context, property means anything of monetary value belonging to the bankrupt person at the date of bankruptcy.

Interest in the family home, land, money in bank accounts, vehicles exceeding approximately \$5,000 in value, stocks and shares are all included.

If a bankrupt person earns above a set amount then regular compulsory payments must be made to the bankruptcy trustee for the benefit of creditors.

1.3.2 The Role of the Trustee

The role of the trustee in bankruptcy has been described in the following terms ¹:

The getting in, administration and distribution of a bankrupt estate is often a long and intricate task requiring close attention to accounts and sometimes the running of a business. All this requires executive and commercial expertise. Registered trustees are, therefore, usually chartered or public accountants.

The trustee is the representative of the creditors and has the duty to administer the estate in their interests, subject to the Bankruptcy Act and to other legislation, to the directions of the court and meetings of creditors. The trustee must act with due dispatch and have adequate knowledge and understanding of the bankrupt estate. The trustee should apply to the court for directions where there is a real doubt, not reasonably capable of solution by reference to the committee of inspection or meetings of creditors, and especially if, after taking competent legal advice, there is a real doubt on a legal question.

Trustees, although not strictly officers of the court, are treated as subject to the standards of behaviour to be expected from such an officer. Thus they must be completely honest and impartial in the exercise of any discretions vested in them. They are governed by the law relating to trustees in general, except in so far as their position is modified by the Act or other special legislation.

1.3.3 Duties of Trustees

The duties of Trustees are expressed in the Bankruptcy Act and include:

1. Notifying creditors of a bankruptcy.
2. Determining whether the estate includes property that can be realised to pay dividends to creditors.
3. Reporting to creditors within 3 months of the date of the bankruptcy on the likelihood of receiving a dividend before the end of the bankruptcy.
4. Providing information regarding the administration of the estate to a creditor who makes a reasonable request.
5. Determining whether a bankrupt has transferred property and if that transfer is void against the trustee.

¹ D Rose QC, cited in the Report titled "Review of Regulation of Corporate Insolvency Practitioners" (June 1997).

6. Taking appropriate steps to recover property for the benefit of the estate.
7. Ensuring the bankrupt discharges his duties.
8. Consideration of any offences committed by the bankrupt and referring such to relevant agencies.
9. Efficient administering of the estate.
10. Exercising power in a commercially sound manner.

1.3.4 Responsibilities of Trustees

When all of the property has been collected and realised the trustee must determine the claims of creditors, declare a final dividend and distribute the funds to creditors according to their order of priority as laid down in the Act.

The creditors may appoint a committee of inspection, consisting of three to five creditors or their representatives, for the purpose of advising and superintending the trustee.

The trustee is accountable for his or her actions and is required to maintain books and records that document conduct.

The trustee is personally liable for all debts incurred by him or her as trustee.

The trustee in investigating transactions and entities deemed to be controlled may seek certain orders to assist in the conduct of the investigation. However, the substance of the investigation is one requiring an understanding of business transactions combining both accounting and legal perspectives.

In addition, there are other procedural duties outlined in the Bankruptcy Act 1966.

1.3.5 Remuneration of Trustees

The remuneration of a registered trustee is usually fixed by resolution of the Creditors. The remuneration usually is based on hourly rates recommended by the Insolvency Practitioners Association of Australia (IPAA). The trustee may be remunerated by way of a commission based on a percentage of the money received, but the percentage may not exceed a prescribed quantum specified in the Act and Regulations².

If the creditors fail to fix the remuneration of a trustee then the trustee is to be remunerated at 80% of the scale of charges published by the IPAA.

² Bankruptcy Act 1966 Subsection 162(2), and the Bankruptcy Regulations Clause 8.07.

Trustees may not accept any other benefits or derive any other financial advantage from estate transactions or give up their remuneration to debtors or others³.

1.3.6 Appointment & Registration of Trustees

The Bankruptcy Act makes provision for matters associated with bankruptcy trustees appointment and registration.

These matters include:

- Appointment of Trustees.
- Qualifications, Experience, Knowledge and Abilities of Trustees.
- Registration of Trustees.
- Termination of Registration of Trustees.
- Consent of Trustee to act.
- Remuneration of Trustees.
- Committee procedures when considering application for registration, and termination of registration, of a Trustee.

1.4 Provisions of the Legislation that have been Reviewed

The Provisions of the legislation that have been reviewed are:

- The Bankruptcy Act 1966: Division 1 of Part VIII.
- The Bankruptcy Regulations: Divisions 1, 1A and 2 of Part 8,
- The Bankruptcy Regulations: Part 15, and
- The Bankruptcy (Registration Charges) Act 1997.

1.5 Need for the Review

ITSA must review the Trustee registration provisions of the bankruptcy legislation as part of the Commonwealth Government's systematic review of all regulatory legislation.

The aim of the review is to identify and assess any matters such as social and economic impacts of a range of regulatory options proposed in response to a regulatory objective.

³ Bankruptcy Act 1996 Subsection 165.

The Report of any Review of legislation is to include:

- The objectives of the legislation and related regulations.
- Identification of any restrictions on competition, and any costs to, and benefits for, business.
- Analysis of the likely effects of the restrictions on competition and the economy generally.
- Assessment of the impact and costs and benefits of the restrictions, including impacts on small business and whether such costs can be reduced.
- Assessment whether the objectives of the legislation/regulation can only be achieved by restricting competition.
- Consideration of the costs and benefits of Alternatives for achieving the same result, including non-legislative approaches.
- Determination of the preferred Alternative to regulation, if any.
- Examination of the mechanisms to increase the efficiency of any preferred regulation including minimising the costs of compliance and paper burden on small business.

1.6 Content of the Review

The Review reported herein comprises the following Sections:

1. Problem Identification.
2. Actions of Government in Response to the Problems.
3. The Consultation Process.
4. Specification of the Desired Objectives.
5. Identification of Options.
6. Assessment of Impacts of each Option.
7. Consultation Process.
8. Conclusion and Recommended Option.
9. Implementation and Review Issues.

1.7 Approach Used in Undertaking the Review

1.7.1 General

The approach used in undertaking the Review has been based on the document titled “*Guide to Regulation*” issued by the Office of Regulation Review (ORR), Industry Commission, in October, 1997.

The review is required by administrative decision of Government as part of a review of existing regulation, proposed new regulation and proposed treaties involving regulation, that will affect business, or which will have a significant indirect affect on business, or which will restrict competition.

The economic costs and social aspects are to be considered together with consideration of optional ways of meeting regulation objectives. The option that produces the greatest net public good is then chosen.

This process provides for the Review and public consultation prior to regulating as part of the mechanism by which the option which produces the greatest net public good can be chosen. The ORR Guidelines detail provisions applying to the Review.

1.7.2 Key Assumptions Used

A number of 'key assumptions' have been made in conducting the cost-benefit analysis. These assumptions are noted in the text as they are made.

Because of the need to make these assumptions, the actual dollar values of the costs and benefits of the various Options reported herein should be treated with caution.

At the same time, however, the methodology that has been adopted of assessing the costs and benefits of the Options *incremental* to Option 1, the status quo Option, means that, since the assumptions have been made consistently across all Options, the expression of the *relative* merits of each of the Options is valid.

1.7.3 Need for Clear Specification of Objectives

The objectives of the alternative proposals must be clearly specified in outcome terms.

The starting point and the most crucial aspect for the evaluation, is the specification of the objectives in outcome terms. No appraisal of any regulation can be meaningful unless the objectives are clearly defined.

1.7.4 Selection of the Option that has the Greater Economic Efficiency

The Option that has the greater economic efficiency will then be identified.

In all cases the Options will be judged against the 'Base Case' or 'Do Nothing' Option. In the case of the impact analysis referred to herein, it is Option 1 that will be the Base Case. Option 1 assumes that the status quo is maintained, that is, the current legislative régime specifying matters associated with the registration of trustees remains in force. For any of the other Options to be selected, they must be shown to have greater economic benefit than Option 1.

If no other Option has an economic benefit greater than Option 1 then that Option, the continuance of the existing regulatory régime, should continue.

If more than one of the other Options has greater economic benefit than Option 1 then the Option that has the highest economic benefit is chosen.

1.8 Options Identified

The Options identified in this Review were:

- Option 1. Maintain the Status Quo, that is, continue with the existing legislative régime.
- Option 2. Repeal Trustee registration provisions of the legislation and do nothing further by Government or Industry.
- Option 3. Repeal Trustee registration provisions of the legislation - Government to support Industry Self-Regulation with Consumer Education, and maintain surveillance of industry regulation scheme.

2. **BACKGROUND: STATEMENT OF THE PROBLEM**

2.1 Size of the Trustee Industry and Activity Indicators

2.1.1 Number of Trustees

The following Table shows the number of registered trustees in Australia by State and Territory in 1997/98:

Table 1: Number of Registered Trustees 1997/98

STATE	NUMBER
New South Wales	48
Victoria	55
Queensland	43
South Australia	20
Western Australia	35
Tasmania	6
Australian Capital Territory	6
Northern Territory	2
TOTAL:	215

2.1.2 Number of New Trustees per Year

The following Table outlines the number of new trustees per Year registered under the **Bankruptcy Act 1966** since January 1, 1994, and those rejected.

Table 2: Number of New Trustees per Year

Calendar Year	Registered	Rejected ⁴
1994	5	N/A
1995	7	N/A
1996	9	N/A
1997	10	2
1998	12	4

⁴ ITSA (Inspector General In Bankruptcy) took over the trustee registration function from the Federal Court as of 16 December 1996. Therefore, rejection details only available for the period since 16 December 1996.

2.1.3 Registered Trustee Involvement in Bankruptcy

(a) Administrations

In 1996/97 registered trustees undertook the administration of 1,233 bankruptcies under Parts IV and XI, out of a total of 21,830. The private sector was thus involved in some 5.5% of the total. The other 94.5% of bankruptcy administrations were undertaken by ITSA. Registered trustees undertook the administration of 507 Part X arrangements.

(b) Number of New Estates Under Administration

The following Table shows the number of estates under administration by Registered Trustees in each State and Territory in 1997/98:

Table 3: Number of New Estates under Administration 1997/98

STATE	BANKRUPTCIES	PART X
New South Wales	1,070	68
Victoria	1,147	180
Queensland	1,297	136
South Australia & Northern Territory	574	26
Western Australia	197	92
Tasmania	96	3
Australian Capital Territory	80	2
TOTAL:	4,461	507

(c) Amounts Held by Registered Trustees

The following Table shows the amount of funds held by Registered Trustees in each State and Territory in 1997/98:

Table 4: Amounts Held by Registered Trustees 1997/98

STATE	BANKRUPTCIES	PART X
New South Wales	\$4,131,711	\$2,400,190
Victoria	\$3,024,356	\$4,394,896
Queensland	\$3,813,096	\$2,272,749
South Australia & Northern Territory	\$744,733	\$347,088
Western Australia	\$1,708,982	\$969,126
Tasmania	\$371,937	\$34,058
Australian Capital Territory	\$125,777	\$61,954
TOTAL:	\$13,920,592	\$10,480,061

2.1.4 Involvement of 'Small Business' in Trustee Industry

In this Review we have defined 'Small Business' in the terms used by the Department of Workplace Relations and Small Business as a business that employs less than 100 people in the 'manufacturing' sector or which employs less than 20 people in the 'services' sector.

Information on the number of employees in the various trustee businesses in Australia is not available (many are part of large accounting firms) but some of the 215 registered trustees would fall into the category of 'small business' as defined above.

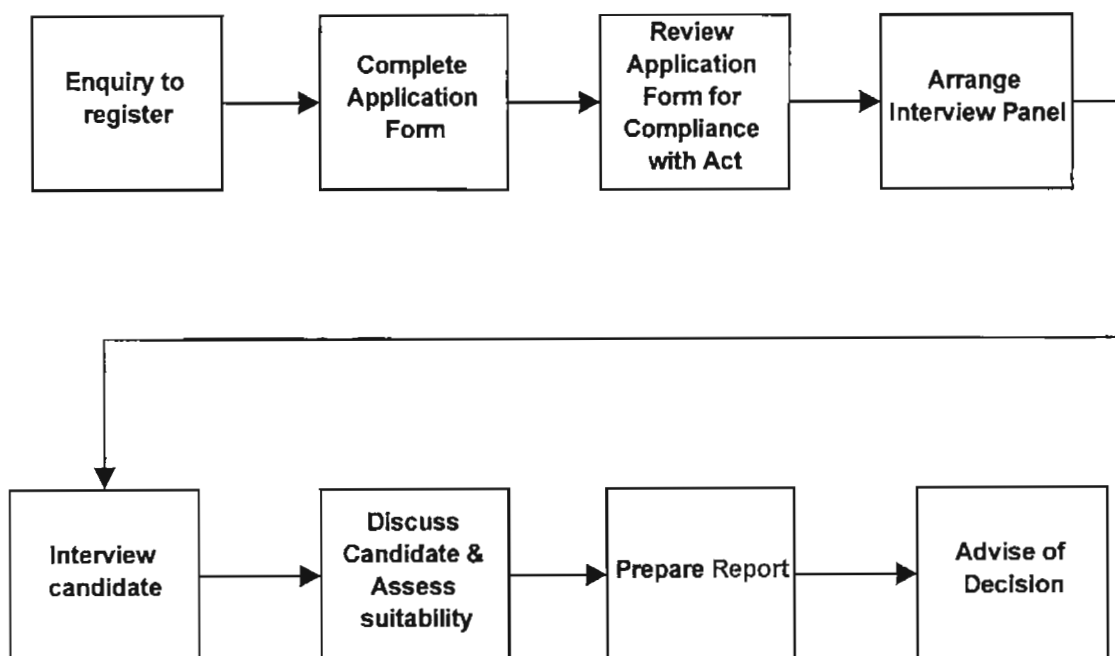
2.1.5 Charges

Charges applicable to registration of trustees are:

- \$1,500 on application for registration (non refundable)
- \$1,000 on issue of the registration certificate.
- \$1,000 on extension of term at the end of each three years.

2.1.6 Registration Process

The diagram below outlines the key activities involved in the registration process. It is noted that the registration interview panel is comprised of a representative of the I-GB and the IPAA.



2.1.7 Re-Registration Process

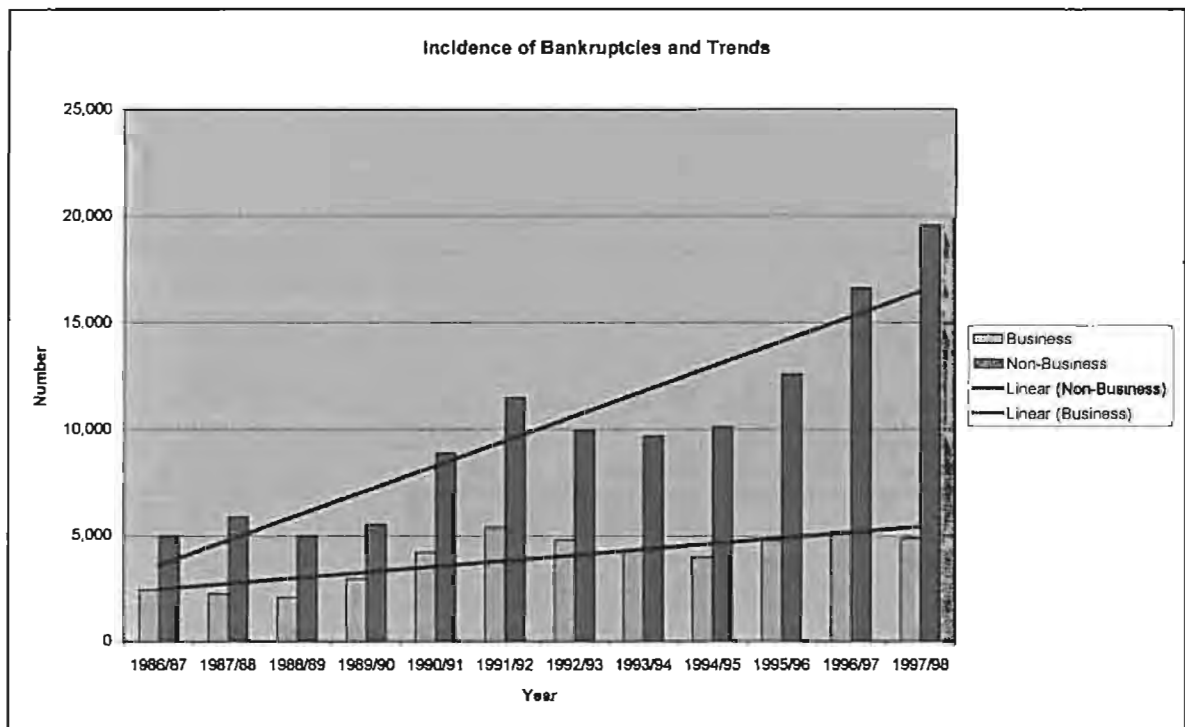
Trustees must make application to ITSA every 3 years for re-registration pursuant to Section 155C and pay the prescribed fee. The Inspector-General may then grant an extension of registration under Section 155D of the Act.

The Inspector-General may request written explanation from a trustee as to whether the trustee is qualified to continue and may request the committee to make a recommendation under Section 155H of the Act.

2.2 Incidence and Trends in Bankruptcy in Australia

The Chart below shows the incidence and trends of personal insolvency in Australia, both business and non-business.

Trend lines show that both categories of bankruptcy are increasing with non-business bankruptcy increasing at a faster rate than business.



2.3 Causes of Bankruptcy

2.3.1 Business

'Business'-related bankruptcy is where an individual's bankruptcy is directly related to his or her proprietary interest in a business or company.

The following are the major causes of Business bankruptcy in Australia ⁵:

- Economic conditions.
- High interest payments.
- Excessive drawings.
- Failure to keep proper books of account.
- Gambling and speculation.
- Bad debts.
- Lack of business ability.
- Lack of initial working capital.
- Personal reasons such as ill health.
- Seasonal conditions such as flood or drought.

2.3.2 Non-Business (Consumer)

'Non-Business'-related bankruptcy is where the bankrupt's occupation and cause of bankruptcy is not related to any proprietary interest in a business or company.

The following are the major causes of non-Business bankruptcy in Australia:

- Unemployment.
- Absence of health insurance to cover ill health.
- Adverse litigation.
- Domestic discord.
- Excess use of credit facilities.
- Gambling and speculation. Liabilities incurred on guarantees.

2.3.3 Typical Bankrupt

It is likely that the "typical" bankrupt will:

- Be single with no dependents
- Be male aged under 35
- Be unemployed
- Owe creditors less than \$15,000; and
- Have an income of less than \$10,000

⁵ Annual Report by the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act 1966, 1 July, 1996 – 30 June, 1997.

Unemployment is likely to be the cause of bankruptcy.

There is also an 8% chance that a bankrupt would have been bankrupt before.

Such typical bankrupts are likely to be eligible for an early discharge from bankruptcy under Section 1495 of the Bankruptcy Act, such early discharge being after a period of six months, that is, considerably less than the normal 3 years.

2.4 Impact of Bankruptcy on the Community

2.4.1 The Australian Experience

(a) General

The following Table outlines the recent trends in bankruptcy together with the method of administration.

Table 5: Bankruptcy Statistics

	1994-95	1995-96	1996-97	1997-98
Administered by Official Trustee ⁶	13,043	16,047	20,597	23,282
Administered by Private Trustees	1,089	1,277	1,233	1,126
Total Number of Bankruptcies	14,132	17,324	21,830	24,408
	('000)			
Funds Realised Official Receiver	\$30,829	\$40,714	\$28,806	\$24,091
Dividends Paid Official Receiver	\$12,982	\$12,405	\$10,711	\$13,561
Funds Realised Registered Trustee	\$29,070	\$26,426	\$27,748	\$30,725
Dividends Paid Registered Trustee	\$5,080	\$10,384	\$7,708	\$7,055

(b) Estates Under Administration

The Table below shows the number of estates of bankrupts under administration by the Official Trustee in Bankruptcy and by Registered Trustees.

⁶ The Official Trustee is the title given to ITSA in the Act in its role as trustee of bankrupt estates.

Table 6: Number of Estates under Administration

	1995/96	1996/97	1997/98	1995/96	1996/97	1997/98
	By the Official Trustee			By Registered Trustees		
Opening Balance	5,525	5,472	4,674	3,917	4,096	4,433
Received During Year	21,001	23,877	25,096	1,264	1,379	1,217
Finalised During Year	(21,054)	(24,675)	(24,675)	(1,149)	(1,042)	(988)
Closing Balance	5,472	4,674	4,435	4,032	4,433	4,461

2.4.2 The Experience Overseas

Information is held by ITSA about international practice concerning the:

- Extent of government involvement in administration of bankrupt estates;
- Qualifications and experience of non-government sector persons involved in bankrupt estate administration;
- Role of Governments in licensing or registering a person to administer the estate of individuals;
- Government involvement in monitoring quality of performance.

A summary of this information is provided in the table below.

Table 7: Summary of Overseas Experience

Country	Private Practitioners Used?	Government Registration?	Industry Self Regulation?	Government Regulation of Qualifications & Experience?	Government Monitoring of Quality?
United Kingdom	Yes	No ⁷	Yes	Yes	Yes
Northern Ireland	Yes	Yes	Yes	Yes	Yes

⁷ However, Government certification of industry standards is required.

Country	Private Practitioners Used?	Government Registration?	Industry Self Regulation?	Government Regulation of Qualifications & Experience?	Government Monitoring of Quality?
United States	Yes	Establish, maintain and supervise Chapter 7 trustee panels. Supervise Chapter 12 & 13 panels.	Yes	Yes	No ⁸
Hong Kong	Yes ⁹	No	Yes	No	No
Canada	Yes	Yes	No	Yes	Yes
New Zealand	No	N/A	N/A	N/A	N/A
Malaysia	No	N/A	N/A	N/A	N/A
Thailand	No	N/A	N/A	N/A	N/A
Jersey	No	N/A	N/A	N/A	N/A
Singapore	No ¹⁰	No	No	Yes	Yes
Finland	Yes	No	Yes	No	No

2.5 Market Failure

2.5.1 The Free Market

Central to the capitalist economic system is the free market. In a market where perfect competition exists, goods and services will be exchanged at minimum price and where neither the seller nor the buyer is disadvantaged. Perfect competition exists where there is a large number of potential sellers of goods and services, a large number of potential buyers of those goods and services and a high order of knowledge among both buyers and sellers of what goods and services are in the market place, their quality and their price.

Under such circumstances rational buyers will shop around until they find the goods or services they want at the minimum price on offer. Sellers with higher prices will be forced to lower their prices or withdraw from the market. Those sellers who

⁸ Although a sanction process exists.

⁹ However, only 1% of bankruptcies handled by private practitioners.

¹⁰ While there is provision for private practitioner involvement, 100% handled by the government.

remain in the market will have minimised their costs and thus also have minimised the consumption of scarce resources.

The free market can fail the debtor and creditor affected by bankruptcy for a number of reasons, including:

- The existence of 'externalities'.
- Buyer ignorance of the skills and ethical background of persons holding themselves out to administer bankrupts estates.
- The high transaction costs associated with negotiating a price, and
- Time lag between incurrance of debt and its effect.

2.5.2 The Existence of 'Externalities'

An 'externality' occurs if third parties pay a price for the consumption of a good or service that is not borne as a cost by the supplier.

Thus, for example, if a borrower is charged higher interest on a loan as a result of high debtor default rates then this borrower pays the price for the bankruptcies of others and the supplier (in this case, the lender) in effect, breaks even.

In effect, this externality reduces the costs to the supplier. If these external costs do not return to the supplier as a 'market signal', then encouragement to decrease the propensity to supply loans to high-risk clients is reduced.

2.5.3 Buyer Ignorance

The role of a Trustee in Bankruptcy is a position of trust. There is some degree of risk to creditors involved in such a position and fraudulent misappropriation of bankrupt estates has occurred in a tiny minority of cases.

Ethical conduct is an attribute of bankruptcy administration associated with reduced risk or chance of fraudulent appropriation of assets. If consumers can ascertain the level of risk associated with a specific Trustee prior to appointment and understand the true risks to asset distribution, then they could choose among competing trustees to obtain the preferred level of ethical conduct. In doing so, consumers could express their willingness to pay for varying levels of performance. A market for performance attributes would exist, with the cost of risk (including the 'personal' costs of taking precautions) balanced against its value to consumers.

However, ethical conduct is usually not ascertainable directly. Consumers do not always have complete information about the potential conduct of trustees when they procure bankruptcy services. Furthermore, if they are treated unfairly or the

trustee fails to follow the due process outlined in the Bankruptcy Act 1966, they may have difficulty recognising the fact.

This lack of information creates 'market failure'. Trustees would have less incentive to provide greater levels of competence and ethical conduct since consumers will not pay for an attribute that they cannot verify.

2.5.4 High Transaction Costs

Another aspect of this market failure is that the transaction costs of reaching agreement between buyer and seller on a level of risk and the price premium for that risk are high.

Although the current legislative and legal systems may determine who is responsible or at fault for the failure to appropriately administer the estate of a bankrupt, the costs of actually deciding who is at fault are often very high. High transaction costs associated with negotiating agreements and the difficulty of assigning liability mean that private markets may fail to achieve the preferred level of probity.

2.5.5 Summary

These market failures - external costs, the lack of information about quality of performance and the high costs of achieving agreements - create a public problem.

This problem is the fundamental justification for government intervention in the personal insolvency market to improve the quality and ethics associated with estate administration and ensure public confidence in the system.

2.6 Who are those Affected by the Problem and its Solutions?

2.6.1 List of Groups Affected

The Table below lists the main groups in the community who are affected by bankruptcy. The views of these parties are outlined in Section 4 below.

Table 8: List of Those Affected by Personal Bankruptcy and its Solutions

1. Creditors
2. Bankrupts and their families
3. Trustees
4. IPAA Members
5. Accounting Profession
6. Legal Practitioners
7. General Community who may end up paying higher interest charges.

3. BACKGROUND: ACTIONS BY AUSTRALIAN GOVERNMENTS

3.1 ITSA

The Commonwealth Government Authority responsible for the administration of the Bankruptcy Act 1966 and associated legislation is the Insolvency and Trustee Service Australia (ITSA).

3.1.1 The Role of ITSA

The role of the ITSA is to ¹¹:

1. Support the general administration of the bankruptcy system by:
 - Giving people in financial difficulty information about bankruptcy and its alternatives;
 - Encouraging people considering bankruptcy to seek independent financial counselling prior to bankruptcy;
 - Issuing bankruptcy notices, accepting debtors' petitions and declarations of intention to present debtors' petitions, examining debt agreement proposals to ensure that they benefit creditors, and registering Part X arrangements;
 - Maintaining public records and a publicly accessible register of all bankruptcies and personal insolvencies in Australia, known as the National Personal Insolvency Index (NPII);
 - Delivering community education and information about personal bankruptcy and its alternatives;
 - Assisting bankruptcy trustees to obtain information and recover property;
 - Investigation and reporting possible offences under the Bankruptcy Act;
2. Handle personal bankruptcy as a safety net, when private bankruptcy trustees are not appointed;
3. Give policy advice to government on personal bankruptcy and insolvency, drawing on regular consultation with our clients and stakeholders.

¹¹ From the ITSA Business Plan 1998-2001, page 4.

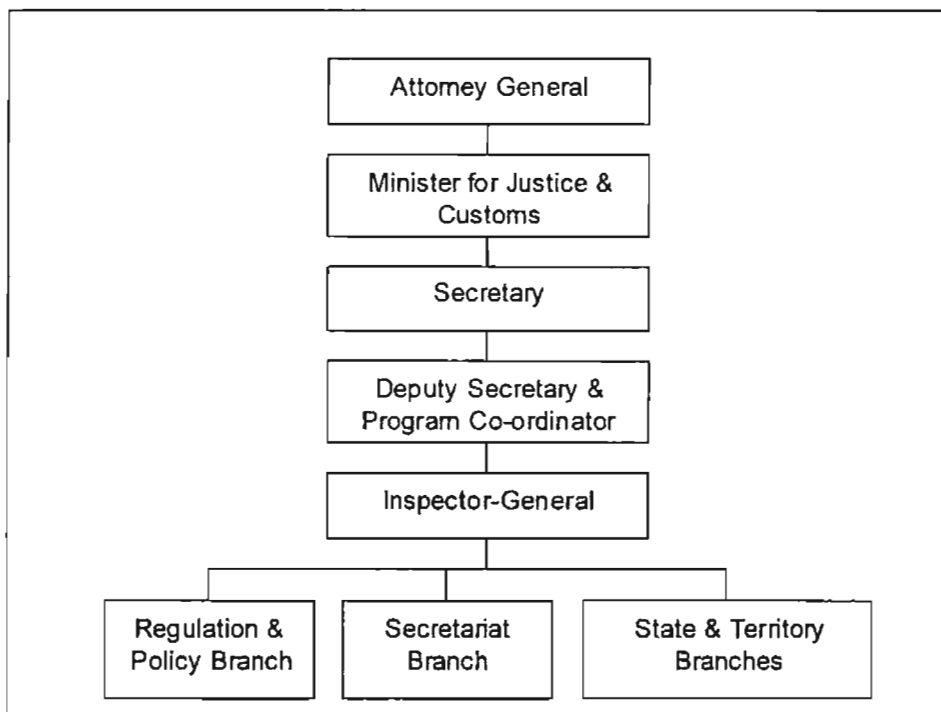
The Inspector-General in Bankruptcy also has a regulatory role. Regulators employed by the Inspector-General independently inspect the administrations of all bankruptcy trustees (Private Trustees and the Official Trustee) and investigate complaints to achieve high national standards. The Inspector General also registers private bankruptcy trustees.

ITSA acts as a special trustee for government agencies. Our role is to:

1. Locate, control and sell property under the proceeds of the Crimes Act and the Customs Act, and protect and sell property for government agencies.

It is noted that ITSA is both regulator, controlling the entry of trustees into the market, and trustee. It will be seen that there is a potential conflict of interest between this small component of its bankruptcy regulation function and its estate administration function.

An outline organisation structure of ITSA within the Commonwealth Attorney-General's Department is given in the Chart below.



3.1.2 Objectives of ITSA

The following Table ¹² shows the Aims and Expected Outcomes of ITSA:

Table 9: Aims and Expected Outcomes of ITSA

AIM	EXPECTED OUTCOME
To develop proposals for relevant and up-to-date personal insolvency laws	Public confidence in the personal insolvency system
To promote high quality national standards of personal insolvency administration	Public confidence in the personal insolvency system
To administer personal insolvencies promptly through an accessible, equitable and value for money service to maximise economic returns to creditors and protect public interest	Public confidence that ITSA delivers quality personal insolvency administration
To provide community access to high standard information on bankruptcy and to exercise statutory powers.	Public confidence in the personal insolvency system
To contribute in cooperation with other agencies, to the enforcement of proceeds of crime remedies	Public confidence that criminals are deprived of the proceeds of crime

3.1.3 The Structure of ITSA

The Inspector-General and Secretariat Branch of ITSA is located in Canberra.

ITSA is represented in the capital cities of each Australian State and Territory as well as Parramatta and Townsville, with each State Office headed by an Official Receiver.

3.2 Review of Corporate Insolvency Regulation in Australia

A number of studies have been performed regarding the regulatory framework in Australia. One primary study ¹³ has been the Review of the Regulation of Corporate Insolvency Practitioners (administered by Australian Securities and Investment Commission).

¹² From the ITSA Business Plan 1997-2000, pages 7-15

¹³ "Review of the Regulation of Corporate Insolvency Practitioners", Report of Working Party, June 1997.

The Working Party made the following recommendations which are also applicable to the personal insolvency industry in Australia:

- The government should examine further the costs and benefits of establishing a merged regulatory framework for personal and corporate insolvency with separate “tickets” for each area of practice.
- If, in the longer term, a merger of the regulatory systems for personal and corporate insolvency proceeds, the registration function should be carried out by a Statutory board (in place of the ASIC and ITSA).
- The entry requirements for registration should be broadened to various combinations of qualifications and experience. In addition, all applicants should be required to successfully complete a specialised course in insolvency practice or demonstrate similar knowledge.
- Membership of a professional body should not be a mandatory entry requirements, but if held, should enable the streamlining of such applications through the membership application process.
- Special exemptions from some or all of the entry requirements should be available, eg. a number of senior lawyers with significant insolvency experience.

As yet, the Government has not announced its view about the Review’s recommendations. The possibility of registering Bankruptcy Trustees under the Corporations Law is discussed at Section 6.2 below.

3.3 National Competition Policy

3.3.1 General

The Commonwealth and all State and Territory Governments have agreed to a National Competition Policy to generate broad-based community benefits and to improve Australia’s competitiveness in international markets.

The National Competition Policy evolved from the recognition that ultimately the ability of the Australian economy to continue to grow, provide sustainable employment and an improved standard of living, depends on how well the productive potential of the economy is utilised.

3.3.2 Agreements by Governments

The National Competition Policy comprises three agreements signed by all heads of government at the Council of Australian Governments in April, 1995.

The agreements are:

- Conduct Code Agreement.
- Competition Principles Agreement, and
- Agreement to implement the National Competition Policy and related reforms.

These Agreements provide the legislative and policy framework for promoting competition and restricting anti-competitive activities by establishing the conditions for fair trade reforms, regardless of individual bargaining power.

- Conduct Code Agreement

This Agreement provides a legislative framework for a Competition Code to achieve and maintain consistent, uniform and complementary competition laws.

- Competition Principles Agreement

This Agreement seeks to create a 'level playing field' on which private and public sector organisations may compete fairly to produce benefits for the community.

Competitive neutrality is to be achieved by removing market distortions resulting from public ownership, removing anti-competitive legislation and restraining monopolistic and exclusive activity.

The Competition Principles Agreement focuses on removing the barriers to competition that have primarily existed in the public sector whereas the Competition Code applies to anti-competitive conduct rules to business when competition is in place.

The additional policy elements contained within this Agreement include:

- Legislation and regulation review.
 - Prices oversight of public monopolies.
 - Competitive neutrality policy and principles.
 - Structural reform of public monopolies, and
 - Access to services provided by means of significant infrastructure facilities.
- Agreement to Implement the National Competition Policy and Related Reforms

This Agreement defines the terms on which States and Territories receive Commonwealth financial assistance payments in return for their support in implementing reforms on time and in the manner intended.

3.3.3 Impact of Trustee Registration

If all trustees with appropriate skills and experience are registered then there is no advantage that one trustee can have over the other because one is registered and one is not. If a trustee is registered this does not prevent him or her from having to compete for insolvency work.

The nature of the insolvency industry is heavily dependent on results, particularly on the returns petitioning creditors receive. Costs incurred in the administrations are also important. Administrative costs are also under the control of the trustee and trustees can derive competitive advantage from their cost control and pricing policies.

4. CONSULTATION OUTCOMES: THE OPINIONS OF STAKEHOLDERS

An extensive interview and consultation program was undertaken with all Stakeholders involved in personal insolvency in Australia.

A list of interviewees is given at **Attachment A1**. An advertisement was placed in The Weekend Australian Newspaper published on 22nd August 1998 calling for comment on the legislation within the terms of reference of this Review. A copy of the advertisement is given at **Attachment A2** and a copy of the terms of reference given to respondents is at **Attachment A3**.

The following is a summary of those views.

4.1 Views of the Industry (Registered Trustees)

4.1.1 Perceived Advantages of the Existing Registration Régime

Trustees perceive the following benefits flowing from the existing legislative régime of registration of private practitioners in Bankruptcy:

- Enables the demonstration of competency and character thus ensuring:
 - Understanding of business and commercial practices – contract law, bankruptcy law, environmental law, employment law.
 - Probity and ethical conduct – reduces entry to market of unethical practitioners.
 - Ability to balance appropriately rights of bankrupt with rights of creditor.
 - Evidence of knowledge of prescriptive “due process” as outlined in the Bankruptcy Act.
- There is community (bankrupts) satisfaction that a régime of competence exists to rehabilitate a debtor with sympathetic approach.
- There is debtor satisfaction that a pool of competence exists from which they may draw trustees;
- Personal insolvency is not just a financial issue, it involves emotional and personal issues making bankrupts easy prey for false promises so requiring sympathetic and ethical practitioners;
- Ensure the existence of a core pool of practicing trustees – re-registration every 3 years means that only people with up-to-date experience are on register;
- The 8% Tax on creditors seen as a reasonable ‘user pays régime’ ;
- ITSA can and does de-register (private bodies may be more loath to do this);

- Professional standards are difficult for the market to measure ;
- Role is akin to an ‘Officer of the Court’ as follows:
 - A Trustee can impose penalties or extend period of bankruptcy if, e.g., there is non-cooperation, hiding assets, etc., by bankrupts.
 - They have coercive powers: they can require the answering of questions, on oath if necessary, (this applies to associates as well as the debtors/creditors themselves) seize books, records and other property, with that property then vesting in the trustee.
 - Ethical pressures can be overwhelming for some people (e.g., unethical trustees could target consumer bankrupts and set up ‘unworkable’ Part 10 arrangements whereby no dividend goes to the creditor and social security payments are diverted to the trustee – registration targets the maintenance of these ethical standards).
- Registration as a barrier to entry:
 - In the absence of a barrier to entry, the régime would have to rely on detecting errors after they had occurred and then correct them rather than preventing bad practices in the first place.
 - The registration process as a barrier to entry is seen as a cost-effective means of ensuring quality.
 - Absence of registration would lead to market failure.
- Having a database of registered practitioners enables monitoring of Trustee activities.

4.1.2 Perceived Disadvantages of the Existing Registration Régime

Trustees perceive the following disadvantages flowing from the existing legislative regime of registration of private practitioners in Bankruptcy:

- Some believe the Committee interview required by the Bankruptcy Act to be unduly onerous (anything up to 4-hour duration) and see a written examination as sufficient as required for liquidators under the Corporations Law.
- Creates a barrier to entry by :
 - restricting entry from other professions experienced in holding trust monies such as real estate agents; and
 - Limiting competition – Bankruptcy registration may be unnecessarily rigorous.
- The 8% distribution of funds seen as a ‘tax’.

- Duplicates professional body standards and controls:
 - Duplicates application for registration as a liquidator.
 - There tends to be a lack of harmonisation whereby the requirements of the Bankruptcy Act and Corporations Law could be combined.

While some of the registered trustees fall into the category of 'small business', the registration process and fee structure is not considered to be a burden to them.

4.2 Views of Consumers (Creditors)

Creditors see a need for Registration of Trustees for the following reasons:

- Trustees are empowered to exercise certain powers under the Act and indeed the Act empowers them to exercise the Act itself. Trustees have very onerous responsibilities, not only to creditors but also to debtors, the public and the courts. Trustees act as an extension of the law.
- It is, therefore, the view of creditors that registration of trustees is an absolute necessity. Some form of review and acceptance of a person's credentials and expertise prior to registration will ensure certain minimum performance criteria are met. This helps to develop certainty and confidence both within the creditor community and also gives a form of protection to the debtor community.
- It is believed that the law should embody an examination of the financial standing, character, expertise and experience of a prospective trustee prior to appointment. Since the trustee exercises the law, then that law should have a responsibility for that trustee.

Creditors were also requested to provide their views on whether alternatives to the registration of Trustees by law were acceptable, such as Industry Self-Regulation. Their views are as follows:

- Self-regulatory régimes do not have the same remedial powers dealing with breaches as a statutory regime.
- The statutory régime is overseen by an independent body whereas self-regulation is only as good as the members participating.

Impact on Competition:

- If one were to adopt a commercial viewpoint, a trustee becomes a trustee with a view to profit from the appointment and should, therefore, be required to pay fees to cover the cost of such appointment.
- The quantum of fees is relatively minor and is not seen as having an impact on competition.

- The nature of the Insolvency industry is heavily dependent upon results, particularly on the returns petitioning creditors receive. Costs incurred in the administrations are also important. Administrative costs are under the control of the trustee and trustees can derive competitive advantage from maximising efficiencies and effectiveness of their operations.
- Creditors feel that competition is not particularly affected by Registration of trustees. Competition is driven by other factors.

4.3 Views of The Bankruptcy Discussion Group – Melbourne

A detailed submission was lodged on behalf of the Melbourne-based Bankruptcy Discussion Group by Bird Cameron Partners in a letter dated 14th October, 1998.

The following summarises the contents of the submission:

- *Given the position of trust involved and the onerous responsibilities placed on a trustee, the Bankruptcy Legislation, in codifying the registration process, seeks to ensure that trustees are suitably qualified to undertake the varied tasks that each bankruptcy administration may call upon.*
- *The prescribed experience should include relevant employment on a full time basis for not less than 2 years in the preceding 5 years.*
- *Relevant employment includes:*
 - *Assisting a liquidator or trustee in the performance of his or her duties;*
 - *Advising on bankruptcy matters;*
 - *Experience in insolvency matters;*
- *The codification of the registration process set about providing objective criteria under which trustees become registered, the maintenance of registration and the grounds for termination of registration.*
- *The regulatory process seeking to exercise governance on trustees in circumstances of conditional registrations would be severely limited and one could therefore question the effectiveness of the controls.*
- *The trustee's power should be unfettered. Accordingly, such conditional registrations should not be granted.*
- *The Bankruptcy Act as regards the registration of trustees, is concerned to ensure that trustees fulfil the required criteria, namely qualifications, knowledge, prescribed abilities.*
- *To the extent that a person with particular industry expertise and who does not have those other necessary qualifications should not be appointed as a trustee. A trustee may certainly engage the industry expert as a consultant or member of the trustee's staff but the industry expert should not otherwise be considered for registration.*

- *A public servant is unlikely to have the necessary experience to act as a trustee. This is not a reflection on this group of possible applicants as trustees, however as a body it is unlikely that case knowledge and experience in bureaucratic procedures will incorporate the requisite skills of trustees. Further, public servants are likely to lack exposure to commercial judgement and negotiation skills.*
- *If solicitors are to be permitted to register as trustees, only those solicitors that have the specialist insolvency endorsement, accounting qualification and specific knowledge of the Bankruptcy Act may make application for registration.*
- *As with solicitors who have specific insolvency endorsement, liquidators generally would have the requisite qualifications to become registered trustees however specific knowledge of the Bankruptcy Act would be a further pre-requisite to any such application.*
- *In the context of the registration criteria, all applicants to be registered trustees should be members of the Insolvency Practitioners Association of Australia.*
- *It is noted that the reviewing committee comprises a member of the IPAA - Refer Regulation 15.02 of the Bankruptcy Act. The bankruptcy legislation recognises the IPAA as a body that can provide a source of persons suitable to participate in the committee.*
- *Those trustees who are not members of the IPAA should be required to become members of the IPAA as part of the renewal registration process.*
- *Trustees seeking renewal registrations should provide suitable declarations as to on-going and up-to-date professional development.*
- *Generally speaking, registered trustees are not concerned with increased competition.*
- *Increased competition can, for example, lead to efficiency improvements and the provision of cheaper services.*
- *Registered trustees are concerned about the possibility of opening up the industry to new entrants who do not have the expertise, qualifications, experience, resources and independence that are required to act as a registered trustee.*
- *If trustees do not have the above-mentioned attributes, creditors and bankrupts will lose faith in the bankruptcy process which will bring the industry into disrepute.*
- *Creditors and bankrupts may be forced to deal with bankruptcy matters outside the confines of the Bankruptcy Act.*
- *The industry in which registered trustees operate is extremely complex and requires specialist skills. Accordingly, it would be disastrous to allow anyone who may have an interest in bankruptcy matters without the requisite qualifications to act as a registered trustee. No objection is raised to any person who does*

have the necessary attributes applying to become a registered trustee by complying with the relevant terms of the Bankruptcy Act.

- *The IPAA in conjunction with ITSA are the most appropriate bodies to administer the registration of trustees. A government regulatory authority must continue to be involved in this process because of the strong investigative powers granted to trustees. However, ITSA's role can be reduced to operating in an official capacity only by accepting the recommendations of the IPAA.*
- *ITSA should continue to review the work carried out by trustees. It is important that this review process be conducted by a body independent from registered trustees to give bankrupts, creditors and the public faith in the system by knowing that the required checks and balances are in place.*
- *It may be appropriate to utilise a common professional body to be responsible for the registration and monitoring of both liquidators and trustees. The appropriate body would be the IPAA.*

4.4 Views of Financial Counsellors

- Financial Counsellors do not encourage the use of private trustees at all. They state that they believe that ITSA takes a more sympathetic approach to low income earners who become bankrupt.
- The use of Debt Agreements under Part IX of the Act protects the employment of low-income earners' (\$26,918 pa and under) and avoids the stigma of bankruptcy.
- They note that the court can overrule creditor decisions to use a private trustee and appoint ITSA instead.
- More ethical trustees would not want Part IX work anyway – problem is from trustees scratching for work – should be a minimum amount of assets, say \$15,000, before private trustees can get involved.

4.5 Views of General Public

No responses were received from the general public on the Trustee Registration provisions despite the public consultation process implemented including press advertising.

It can therefore be concluded from the lack of response that the matter is not of interest to the general public.

4.6 Views of ITSA

Having a barrier to entry is a very cost-effective means of achieving the Quality of the regime. The trustee is placed in a position where he or she is to sell off assets

for less than they are worth in many cases. There needs to be more accountability than self-regulation could offer.

The Act outlines certain processes to be followed in all bankruptcies, consumer and business related. Given the amount of “cleaning up” that is required in consumer bankruptcies, ITSA’s role in administration is required.

4.7 Key Issues Identified from Consultation

The following are the key issues identified from consultation:

1. Registration of trustees creates a barrier to entry but is considered necessary for the following reasons:
 - Ensures minimum performance criteria is met in terms of qualifications, knowledge and prescribed abilities;
 - Enables monitoring and review.
2. Impact on competition is considered minor from the point of view of the application fees and registration fees charged under the régime.
3. Registration by an independent body is preferable to that by an industry or related body for the following reasons:
 - Remedial powers to deal with breaches.
 - Self-regulatory régimes are only as good as the member participating.
4. Opening up the industry to new entrants who do not possess the expertise, qualifications and experience can be expected to lead to market failure.

5. STATEMENT OF THE OBJECTIVES AND OF OPTIONS

5.1 The Objectives to be Achieved

The objectives to be achieved as a result of legislation controlling the registration of trustees in personal insolvency as described in the Background Sections above are to:

1. **QUALITY:** Ensure that practitioners have appropriate levels of competence and skills.
2. **QUALITY:** Ensure the integrity and independence of practitioners.
3. **QUALITY:** Provide a procedure for effectively dealing with complaints and discipline.
4. **QUALITY:** Assurance to bankrupts and Creditors that administrations will be handled competently.
5. **TIMELINESS:** After bankruptcy, quickly gather available funds from bankrupts' estates and then distribute funds to creditors.

5.2 Identification of Options

The following Options have been identified as the focus of the regulatory review reported herein and to meet the Objectives expressed above:

- Option 1. Maintain the Status Quo, that is, continue with the existing legislative régime.
- Option 2. Repeal Trustee registration provisions of the legislation and do nothing further by Government or Industry.
- Option 3. Repeal Trustee registration provisions of the legislation and Government to support Industry Self-Regulation with Consumer Education, and maintain surveillance of industry regulation scheme.

6. ASSESSMENT OF IMPACTS OF EACH OPTION

6.1 General Approach

6.1.1 Base Year for Dollar Values

All dollar values of costs and benefits given in this Review are normalised to 1998 dollar values.

6.1.2 Costs and Benefits of Options

All costs and benefits are identified and, where possible, quantified in dollar terms. These costs include costs to government, industry and to consumers.

The identification and quantification of these costs was obtained by a study of local and overseas literature and from face-to-face consultation with Stakeholders.

Costs and benefits considered include those currently being incurred by the existing legislative régime. This is a fundamental requirement of the RIS methodology in that a 'do nothing' option is identified and all costs and benefits of the other options are expressed incremental to this 'do nothing' option.

6.1.3 Identification of the Benefits of each Option

The benefits of each of the Options are identified. These benefits are quantified in monetary terms where possible. Where monetary quantification cannot be undertaken then qualitative benefits have been included and assessed.

In many cases, it will be understood that 'benefits' resulting from regulation reveal themselves as *reductions in costs*. Thus, there are cases below where no 'benefits' are stated to exist when the various Options are analysed. In these cases, the 'benefits' of the various Options are revealed when they are analysed in comparison with each other and with the 'status quo' option.

6.1.4 Identification of the Costs of each Option

The costs of each of the Options have been identified and quantified in monetary terms where possible.

Where monetary quantification cannot be undertaken then qualitative costs have been included and assessed.

6.2 Possibility of Registering Trustees under the Corporations Law

Before proceeding with a detailed review of the Options, the possibility of Registering Trustees under the Corporations Law is discussed.

It is possible that action could be taken by Government to repeal the existing legislative régime with Trustees instead being registered under Section 1282 of the Corporations Law.

It is assumed that, if so, ITSA would maintain its Bankruptcy Regulation role of Routine Inspections, Special Investigations, Monitoring and liaison.

A number of qualitative costs have been identified as follows:

- Under the Corporations Law, the registration process adopted does not allow for industry representation on the registration interview panel although ASIC could incorporate such a mechanism by administrative action or amendment to the Corporations Law.
- The Corporation Law would need to be amended to cater for the inclusion of clauses dealing with the registration of trustees in bankruptcy.
- It may take time for ASIC to build a sufficient body of knowledge to be able to adequately assess the skills and knowledge of applications for registration.

There are no quantitative benefits associated with this possibility.

The key benefits of this approach would be:

- Removal of duplication of legislation covering the registration of Insolvency practitioners; and
- Removal of the perceived conflict of interest between ITSA's registration role and that of Official Trustee performing some 95% of bankruptcy administrations.

On balance, this approach would pay only lip service to the Competition Policy principles. Legislation would continue to exist to control the registration of Trustees, the only difference being that the registration would be under the Corporations Law and not the Bankruptcy Act.

For this reason and for the qualitative costs listed above, this approach has been rejected without further detailed analysis.

6.3 Option 1: Maintain the Status Quo

6.3.1 Description

Option 1 assumes that no action is taken by Government and the existing legislative régimes are maintained.

6.3.2 Costs - Quantitative

(a) Business

The Costs to business comprise the following categories:

- Costs of Experience and Training

To become registered the applicant must satisfy the regulators they have gained a significant amount of experience and formal training to enable the satisfactory performance of the trusteeship roles and responsibilities.

This experience and training comes from a variety of educational and experiential sources and is not possible to quantify these costs in dollar terms. However, it would be significant for each individual.

For example, to be a competent trustee requires executive and commercial expertise, to be able to administer estates, to have a knowledge of the Bankruptcy Act and other legislation and, in summary, to have all of the personal and professional characteristics expected of an officer of a court.

In addition, the regulator must be satisfied as to their standard of ethics.

- Cost of Registration

Registration costs include the following depending on the stage which the applicant proceeds through the registration process:

- The application fee is \$1,500 and assuming that there are 12 applications are made per year, then the total annual cost of applications is \$18,000.
- The registration fee is \$1,000 and assuming that 10 applicants are accepted per year, then the total annual cost of registration is \$10,000.
- The renewal fee is \$1,000 payable every three years. There are 205 trustees and thus the annual cost of renewal is \$68,333.

Total costs are thus \$96,333 per annum.

In addition, applicants would, according to their own perceived need, devote some time to preparation for the interview and devote time to submitting for the interview itself. The cost of this time devoted to registration cannot be quantified.

(b) Commonwealth Government Costs

ITSA costs include the following:

- Staff – 2.5% of the 17 staff in the “Bankruptcy Regulation” program amounting to \$28,000 per annum.
- Half a day of two persons per application – average 12 per annum or 12 days per annum amounting to \$3,023 per annum.

Other costs include:

- Transcripts of interviews – even though all interviews are recorded, a transcript is not always obtained - \$2,390 was spent in the last financial year.
- Travel costs for interviews – on average the cost of less than one airfare as other ITSA work is performed during such a visit – say 10 time \$300 or \$3,000 per annum.
- Maintenance of computer database – minimal.

Total estimated costs per annum are \$36,413.

(c) Total Quantifiable Costs of Compliance

The quantifiable costs of compliance is made up of the costs to business of \$96,333 and costs to government of \$36,413, a total of \$132,746 per annum.

6.3.3 Costs – Qualitative

A number of qualitative costs have been identified as follows:

- Potential conflict of interest between ITSA's registration role and that of Official Trustee performing some 95% of bankruptcy administrations;
- Potential duplication of legislation with the registration provisions of the Corporations Law;
- Raises a barrier to entry to the industry and may therefore inhibit competition.

6.3.4 Benefits

The benefits of the status quo include:

Supports the objectives of:

1. **QUALITY:** Ensure that practitioners have appropriate levels of competence and skills.
2. **QUALITY:** Ensure the integrity and independence of practitioners.
3. **QUALITY:** Provide a procedure for effectively dealing with complaints and discipline.
4. **QUALITY:** Assurance to bankrupts and Creditors that administrations will be handled competently.
5. **TIMELINESS:** After bankruptcy, quickly gather available funds from bankrupts' estates and then distribute funds to creditors.

6.4 Option 2: Repeal all Legislation and Do Nothing Further by Government

6.4.1 Description

Option 2 assumes that no action is taken by Government and the existing legislative régimes are repealed.

It is assumed that ITSA would maintain its trustee role and its bankruptcy regulation role of routine inspections, special investigations, monitoring and liaison.

6.4.2 Costs - Quantitative

There may be a reduction in the quality of estate administration with a consequent increase in complaints to ITSA. This may require ITSA to expend additional resources to handle these complaints and to monitor and inspect trustee administrations.

No information is available that would enable these additional costs to be quantified.

6.4.3 Costs - Qualitative

The qualitative costs of Option 2 are given below:

Option 2 does not support the following objectives:

1. **QUALITY:** Practitioners may have lower and less appropriate levels of competence and skills.

2. **QUALITY:** The integrity and independence of practitioners may be reduced.
3. **QUALITY:** There may be a reduction in the level of assurance to bankrupts and Creditors that administrations will be handled competently.
4. **TIMELINESS:** The response to creditors' petitions to quickly disperse available funds from bankrupts' estates may be less speedy.

6.4.4 Benefits – Quantitative

There will be a reduction in costs associated with registration of \$132,746 per annum.

6.4.5 Benefits – Qualitative

The qualitative benefits of Option 2 are given below:

- Any appearance of conflict of interest between ITSA's registration role and that of Official Trustee performing some 95% of bankruptcy administrations disappears;
- Potential duplication of legislation with the registration provisions of the Corporations Law will be eliminated;
- Removes a barrier to entry to the industry and may therefore promote further competition.

6.5 Option 3: Repeal all Legislation and Government to support Self-Regulation

6.5.1 Description

Option 3 assumes that all provisions relating to the registration of Trustees would be repealed. The Government would then promote and support the industry to self regulate the admittance of personal insolvency practitioners.

It is assumed that ITSA would maintain its trustee role and its bankruptcy regulation role of routine inspections, special investigations, monitoring and liaison.

This approach would be based on the English Model with the government gradually withdrawing and in the meantime strongly support industry's efforts to be an effective registrar. The Government would then be in a position to repeal the registration legislation when industry has its own procedures in place.

6.5.2 Costs - Quantitative

(a) Business

The Costs to business comprise the following categories:

- Costs of Experience and Training

To become registered the applicant must satisfy the professional body they have gained a significant amount of experience and formal training to enable the satisfactory performance of the trusteeship roles and responsibilities.

This experience and training comes from a variety of educational and experiential sources and is not possible to quantify these costs in dollar terms, however, it would be significant for each individual.

For example, to be a competent trustee requires executive and commercial expertise, to be able to administer estates to have a knowledge of the Bankruptcy Act and other legislation and in summary to have all of the personal and professional characteristics expected of an officer of a court.

In addition, they must have had sufficient exposure to potential or actual inducement to enable the regulator to be satisfied as to their standard of ethics.

- Cost of Registration

It is not known at this stage what the registration fees would be were a Professional body to be involved in the registration process. However, we have assumed that it would be the same as the charges applying under the current legislative régime. In addition, these charges are broadly comparable to those of professional bodies such as the Institute of Chartered Accountants and Institution of Engineers.

Registration costs include the following depending on the stage which the applicant proceeds through the registration process:

- The application fee is \$1,500 and assuming that there are 12 applications are made per year then the total annual cost of applications is \$18,000.
- The registration fee is \$1,000 and assuming that 10 applicants are accepted per year, then the total annual cost of registration is \$10,000.
- The renewal fee is \$1,000 payable every three years. There are 205 trustees and thus the annual cost of renewal is \$68,333.

Total costs are thus \$96,333 per annum.

In addition, applicants would, according to their own perceived need, devote some time to preparation for the interview and devote time to submitting for the interview itself. The cost of this time devoted to registration is unable to be quantified.

(b) Commonwealth Government Costs

Under Option 3, Commonwealth Government costs would be nil, after the change had been made.

(c) Professional Body Costs

It is not known at this stage what it would cost a Professional body to manage the registration process. However, we have assumed that it would be the same as the costs incurred by ITSA under the current legislative régime.

These current costs are \$36,413.

(d) Total Quantifiable Costs of Compliance

The quantifiable costs of compliance is made up of the costs to business of \$96,333 and costs to the Professional body of \$36,413, a total of \$132,746 per annum.

6.5.3 Costs – Qualitative

A number of qualitative costs have been identified as follows:

- In the absence of legislative support there may be delays in withdrawing trustees from registration in instances where they fail to perform in accordance with professional standards;
- None of the professional bodies have indicated, at a national policy level, a willingness, together with the required resources and infrastructure, to take over the registration function from ITSA;
- Tying registration to a particular Professional body may place an additional barrier to entry on potential participants, if that body requires membership as a prerequisite to Trustee registration and membership is denied on the basis of a particular vocational qualification;

In addition, the following comments were made by the Working Party which reviewed the Regulation of Corporate Insolvency Practitioners and reported in June 1997:

5.13 It would be possible to relieve the ASIC of its registration functions and place responsibility for that role on one or more professional bodies by statutory conferral.

5.14 Although a number of professional bodies might theoretically be considered for this purpose, such as the Institute of Chartered Accountants in Australia (ICAA), the Australian Society of Certified Practising Accountants (ASCPA), the IPAA and (possibly) the professional law bodies, the Working Party considers it would be premature to spread responsibility for the registration functions by having more than one body with parallel responsibility. In particular, the Working Party considers that if the registration of liquidators were to be opened up to the legal profession, as recommended later in this report, it would be undesirable, at least initially, for there to be a multiplicity of registering bodies, bearing in mind that in respect of the legal profession there is a registering body in each State and Territory. The large number of potential registering bodies would lead to difficulties in maintaining consistency in the application and administration of the requirements.

5.15 Other matters which would need to be carefully considered if the registration functions were delegated to the professional bodies are the need for appeal procedures, funding arrangements and the position of persons who have a conscientious objection to becoming members of a professional organisation.

These comments are relevant also to the acceptance of Option 3.

6.5.4 Benefits – Quantitative

There are no quantitative benefits associated with Option 3.

6.5.5 Benefits - Qualitative

Option 3 supports the following objectives in the longer term:

1. **QUALITY:** Ensure that practitioners have appropriate levels of competence and skills.
2. **QUALITY:** Ensure the integrity and independence of practitioners.
3. **QUALITY:** Provide a procedure for effectively dealing with complaints and discipline.
4. **QUALITY:** Assurance to bankrupts and Creditors that administrations will be handled competently.
5. **TIMELINESS:** After bankruptcy, quickly gather available funds from bankrupts' estates and then distribute funds to creditors.

In addition, Option 3 removes:

- Potential conflict of interest between ITSA's registration role and that of Official Trustee performing some 95% of bankruptcy administrations;
- Potential duplication of legislation with the registration provisions of the Corporations Law;

Of further benefit is the fact that many of the professional bodies associated with the insolvency industry maintain rules and codes of conduct together with formal training courses in insolvency and members are encouraged to undertake these.

7. CONCLUSION AND RECOMMENDED OPTION

7.1 Is the Problem a Large One?

7.1.1 Number of Trustees and Bankruptcies

Only 12 trustees are registered per year (See Table 2 on page 8 above). However, under the registration process all trustees (currently 215) are reviewed every 3 years by ITSA survey.

There were 24,408 new bankruptcies in 1998.

The 215 registered trustees that are the subject of the legislation reviewed herein administered only 1,217 bankruptcies, that is, an average of fewer than 6 bankruptcies per trustee. However, these registered trustees **realised** a greater quantum of funds (\$31 M) from the 1,217 bankruptcies than ITSA (\$24 M) did from the 23,191 bankruptcies it handled in 1998. This reflects the mix of work undertaken by ITSA, which acts as a Trustee only when a registered Trustee is not appointed by the creditors.

The problem that the current legislation is intended to avoid is, therefore, described as significant both in quantitative and qualitative terms.

7.1.2 Current Costs

The current costs to industry and government were estimated in section 6.3.2 above and are summarised in the Tables below

(a) Costs To Industry

Table 10: Annual Quantitative Costs to Industry

ITEM	COST
Costs of Experience and Training	Unquantifiable
Cost of Registration	
Application Fee – 12 applications per year at \$1,500	\$18,000
Registration fee – 10 registrations per year at \$1,000	\$10,000
Renewal fee – 205 applicants at \$1,000 every 3 years	\$68,333
TOTAL PER ANNUM:	\$96,333

(b) Costs To Government

Table 11: Annual Costs to Government

ITEM	COST
Staff Costs	\$28,000
Application Review	\$3,023
Interview Transcription	\$2,390
Travel	\$3,000
TOTAL PER ANNUM:	\$36,413

7.2 Is Registration of Trustees Required?

The registration of Trustees is required for the following reasons:

- Market failure due to:
 - external costs,
 - the lack of information about quality of performance, and
 - the high costs of achieving agreement on price – quality trade-off

See Section 2.5 above for a discussion of market failure.

- Vulnerability of the 'typical' bankrupt.

See Section 2.3.3 above for a discussion of the 'typical' bankrupt.

- Ethical implications.

See the discussion on ethical pressures on trustees on page 25 above.

- Trustee authority.

As mentioned on page on page 25 above, the role of a trustee is akin to an 'Officer of the Court'.

These factors justify the registration of trustees and the consequent barrier to entry that results.

7.3 Should Registration be by Government or the Industry

In principle, registration should be by industry for the following reasons:

- Rules made by people in the industry may be more likely to be observed than regulation by government fiat.
- Rules made by industry can be updated more frequently.
- Rules made by industry incorporate the expertise of persons being regulated.

7.4 Should Registration be Run by the Industry?

The Bankruptcy Discussion Group – Melbourne states unequivocally that the IPAA in conjunction with ITSA is the most appropriate body to administer the registration of Trustees. A Government regulatory authority must still be involved in this process because of the strong investigative powers granted to Trustees by the Act.

We have not been able to obtain a clear statement of direction from the IPAA as to whether they would be prepared to take on the registration role beyond that which they currently hold. However, the IPAA Executive Director stated at a recent meeting of the Bankruptcy Reform Consultative Forum that that IPAA did not have the resources to do the job.

To be acceptable to other professions such as solicitors then such a process should not require membership necessarily of the registration body.

Our recommendations are to leave the current situation in place but that registration could be devolved to the IPAA or other appropriate industry bodies once:

- 1) The IPAA or other appropriate industry bodies have demonstrated their professional capability to objectively assume the role of registrar. This capability can be characterised by:
 - a) Acceptance of a range of professional backgrounds as potential applicants.
 - b) Avoidance of mandatory membership of the body.
 - c) Appropriate unified organisation structure, administrative infrastructure and other resources of the body or bodies to manage and record the registration process and associated support functions.
 - d) A documented process for evaluation.
 - e) Documented acceptance criteria for the decision making process.
 - f) Acceptable protocol for the discipline of registered trustees.

- g) Evidence of acceptance of mutual obligations of members in the industry.
 - h) A large constituency amongst the various industry stakeholders, eg, IPAA, ITSA, creditors and ICAA.
- 2) A set of registration standards and evaluation procedures be developed by IPAA acceptable to ITSA.
 - 3) There would be no constraints on **receipt** of applications for registration in terms of background or qualifications of the applicant.
 - 4) ITSA would continue to be a member of the registration panels.
 - 5) ITSA would maintain surveillance of registrars and have the power to require re-assessment of individual registered trustees by the registrar in advance the normal 3-year review. As a member of the registration panel, ITSA would have the power of veto if it believed that a trustee should not continue to be registered. If such veto were exercised then the trustee would not be permitted to continue to function (under the Bankruptcy Act Section 155I with penalties under Section 155J).

7.5 Does the Existing Situation Comply with Competition Principles?

7.5.1 Restriction On The Number Of Trustees

The trustee registration legislation places no restriction or quota on the number of trustees that may be registered at any particular time.

7.5.2 Barrier as to Fees

The quantum of fees for the registration process is not seen as problem by those consulted.

7.5.3 Unregulated Right to Market Entry

There was no support from consultation for right of entry to the market place for anyone who chooses to act as a bankruptcy trustee without registration, as it would be contrary to the public interest for that course to be adopted.

7.5.4 ITSA Staff Do Not Have To Be Registered

ITSA trustees do not have to be registered whereas private trustees do. On the surface, this appears to give ITSA an unfair advantage in the market place and thus the Competition Principles Agreement is not complied with.

No one consulted gave evidence that this apparently unfair advantage is a problem in practice.

ITSA staff perform the role of trustee only when a registered trustee has not been appointed. ITSA's policy is not to actively compete for trusteeships. The result is that, to a large extent, ITSA receives the 'high volume, low value' end of the market, with the private trustees receiving the 'low volume, high value' end of the market. Substantially, this division reflects the mix of work between debtors' petitions for bankruptcy (the 'high volume, low value' group) and creditors' petitions for bankruptcy resulting in sequestration orders (the 'low volume, high value' group).

It has been put to us by some trustees that this division of work reflects the market's recognition of the variation in abilities between registered trustees and ITSA staff. However, it has been put to us by ITSA that senior ITSA staff who hold positions akin to those of registered trustees are all qualified accountants, have wide experience in administering bankruptcies and are subject to a merit-based selection process. No one consulted voiced complaint about the selection process for Official Receivers and their deputies.

Furthermore, we were advised by ITSA that registered trustees often consult those senior ITSA staff for information and advice.

The break-up of work between ITSA and registered trustees may reflect primarily ITSA's role as default trustee, rather than, necessarily, market perceptions of relative skill levels. Therefore, while theoretically it could be said that non-registration of ITSA staff gives them an advantage, there was no concrete evidence given from consultation that, in practice, it creates an uneven playing field or disadvantages registered trustees. If a matter starts as being a simple no-asset bankruptcy but soon reveals itself to the creditors as requiring the unravelling of complex corporate structures or the identification of assets that had moved sideways, then the creditor may choose to have the administration transferred from ITSA to a private trustee.

The fact also exists that ITSA is trustee of some high value bankruptcy cases as a result of creditors exercising their discretion and that may have been able to be undertaken profitably by the private sector.

Despite the above, it remains that if one accepts the causes of market failure outlined in Section 2.5 above, one must assume that the market's ability to recognise the mechanisms by which work is partitioned between ITSA and private trustees is imperfect and may not always work as well in practice as the participants believe.

7.6 Conclusion as to Review

Option 1, the status quo, Option has the greater merit of the Options considered.

Option 2 cannot be recommended due to the high risk of damage to the interests of both creditors and debtors in a completely un-regulated registration environment.

Option 3, industry self-regulation, could be considered in the future if the prerequisite registration environment can be developed by the industry and the industry is willing to take on the role.

7.7 Recommendations

The following recommendations are made:

1. No action be taken at present to change the registration provisions of the Bankruptcy Act.
2. In view of the apparent current lack of either capacity or willingness by industry to take on the registration role, ITSA formally consult the professional bodies about such capacity and willingness; in particular, as to when they anticipate having the necessary infrastructure in place and their estimated annual cost of administering the registration system.

ATTACHMENTS

ATTACHMENT A

Attachment A1:

A list of interviewees.

FACE-TO-FACE INTERVIEWS

NAME	REPRESENTING	ADDRESS
Michael Jones	Jones Condon	Level 12 185 Macquarie Street SYDNEY
Roderick Sutherland	Jirsch Sutherland	Level 2 84 Pitt Street SYDNEY
Sandra Fung	Jirsch Sutherland	Level 2 84 Pitt Street SYDNEY
Max Donnelly	Ferrier Hodgson	Level 17, 2 Market Street SYDNEY
Paul Pattison	Bankruptcy Discussion Group	MELBOURNE
Peter Agardy	Cornwall Stoddart	Level 10, 114 William Street MELBOURNE
David Fogarty	Deacons, Graham and James	Level 24, 385 Bourke St MELBOURNE
Robyn Erskine	Brooke, Bird & Co	255 Whitehorse Rd BALWYN
Peter Vince	Ferrier Hodgson	PO Box 781, DANDENONG
Dean McVeigh	Horwath	Level 13, 600 St Kilda Road MELBOURNE
John Schmirer	Knights	Level 5, 345 Queen St BRISBANE
Paul Sweeney	Hall Chadwick	Level 12, cnr Margaret & Edwards Sts BRISBANE
Phil Jefferson	Jefferson Stephenson	Level 20, 288 Edward St BRISBANE
Ivor Warrell	Warrell Whitehill	240 Queen St BRISBANE
David Clout	Clout & Associates	Level 1, 307 Queen St BRISBANE
Bankruptcy Law Reform Consultative Forum		MELBOURNE
Jane Hutchison	AGRICARE	TASMANIA
Steve Edwards	Australian Finance Conference	Level 22, 68 Pitt St SYDNEY
George Girdis	ITSA	Level 10, 255 Elizabeth St, SYDNEY
Betty Weule	Credit Line Financial Counselling Services	53 Regent St CHIPPENDALE

CREDITOR MAIL-OUT LIST

NAME		REPRESENTING	ADDRESS
S	Stanford	Westpac	SYDNEY NSW 2001
P	Macanulty	Westpac	PARRAMATTA NSW 2150
Terry	Bonisch	Building Industry Credit Bureau	SYDNEY NSW 2001
Helen	O'Sullivan	Australian Taxation Office	SYDNEY NSW 2001
Cindy	Hansen	AGC Limited	PARRAMATTA NSW 2150
L	Kaye	American Express Intl Inc	SYDNEY NSW 2001
Maria	Brucker	Commonwealth Bank	PARRAMATTA NSW 2150
Tony	Haynes	Citibank Ltd	SYDNEY NSW 2001
Albert	Yu	Westpac	PARRAMATTA NSW 2150
Thea	McNamara	St George Bank	KOGARAH NSW 2217
Peter	Williams	National Australia Bank	SYDNEY NSW 2001
Robert	Graham	ANZ Bank	SYDNEY NSW 2001
Stephen	Wilson	AVCO	SYDNEY NSW 2001
Linda	Shevchuk	CPS Credit Union	GOROKAN NSW 2263
Peter	Symons	ESANDA Finance	SYDNEY NSW 2001
Shelley	Clark	Telstra Credit Management	PARRAMATTA NSW 2150
Bradley	Wellard	OPTUS	NORTH SYDNEY NSW 2059
G	Faber	Boral Resources	SYDNEY NSW 2001
Steve	Bourke	Integral Energy	BLACKTOWN NSW 2148
Jason	Simes	Westpac	EPPING NSW 2121
Ivy	Wong	OPTUS	NORTH SYDNEY NSW 2059
Irene	O'Sullivan	Housing Loans Insurance Corporation	SYDNEY NSW 2001
Helen	Price	AVCO	SYDNEY NSW 2001
Bill	Penings	AGC Limited	COORPAROO QLD 4151
Peter	Michael	Australian Taxation Office	BRISBANE QLD 4001
Ian	Traill	Australian Taxation Office	CHERMSIDE QLD 4032
Graham	Kendall	Australian Taxation Office	UPPER MT GRAVATT QLD 4122
Jane	Donnelly	AVCO	SPRINGWOOD QLD 4216
Terry	Shepherd	AVCO	SPRINGWOOD QLD 4216
Sean	Kristopher	AVCO	SPRINGWOOD QLD 4216
Paul	Michael	Bank of Queensland	BRISBANE QLD 4001
Andre	Anthony	CBFC limited	SYDNEY
Nigel	Harden	Child Support Agency	BRISBANE QLD 4000
Laurie	Robinson	Child Support Agency	UPPER MT GRAVATT QLD 4122
Steve	Walker	Collection House	BRISBANE QLD 4001
Geoff	Ast	Credit Union Australia	BRISBANE QLD 4001
Allan	Burnett	Commercial Recovery Management	BRISBANE QLD 4001
Herb	Parker	ESANDA Finance	BRISBANE QLD 4001
Darrell	Crighton	Heritage Building Society	BRISBANE QLD 4001
Tony	Wilson	Queensland Housing Commission	BRISBANE QLD 4001
Shane	Gill	Queensland Police Credit Union	BRISBANE QLD 4003
Heath	Vickery	Queensland Teachers Credit Union	FORTITUDE VALLEY QLD 4006
Leanne	Hodge	SEQEB	BRISBANE QLD 4001
Kathy	Lynch	Stanley and Company	BRISBANE QLD 4000
Aub	Redell	The Rock building Society	ROCKHAMPTON QLD 4700

CREDITOR MAIL-OUT LIST

NAME		REPRESENTING	ADDRESS
Ray	Carswell	Glencoe Meats	CANNON HILL QLD 4170
Evelyn	Steiger	Australian Taxation Office	UPPER MT GRAVATT QLD 4122
Luba	Ferguson	Australian Taxation Office	UPPER MT GRAVATT QLD 4122
Alana	Saarlmaeki	Australian Taxation Office	BRISBANE QLD 4000
Harvey	Patterson	AGC Limited	HOBART TAS 7001
Sue	Collier	Australian Taxation Office	HOBART TAS 7001
Vicki	Coleman	Australian Taxation Office	HOBART TAS 7001
Angus	McCulloch	Australian Taxation Office	HOBART TAS 7001
Pamela	Pyke	ANZ Bank	HOBART TAS 7001
Susan	Watson	Davies Bros Ltd	HOBART TAS 7001
Robyn	Riley	Island State Credit Union	HOBART TAS 7001
Rodney	Belbin	Savings & Loan Credit Union	HOBART TAS 7001
Tony	Seymour	Teachers Police & Nurses Credit Union	HOBART TAS 7001
Susan	Challis	W Coogan & Co Pty Ltd	HOBART TAS 7001
Peter	Cretan	Tasmanian Collection Service	HOBART TAS 7001
Victoria	Cook	Tasmanian Collection Service	HOBART TAS 7001
Richard	Blundstone	Tasmanian Collection Service	LAUNCESTON TAS 7250
Rod	Tremayne	Examiner Newspaper	LAUNCESTON TAS 7250
Steve	Hartog	Department of Social Security	HOBART TAS 7001
Royce	Jessup	Trust Bank Credit Management	HOBART TAS 7001
Kim	Travers	Webster Ltd	HOBART TAS 7001
Julie	Phillips	Tassie Home Loans Pty Ltd	DEVONPORT TAS 7310
Steven	O'Rourke	O'Rourke & Kelly	DEVONPORT TAS 7310
P	Schnaeché	Australian and New Zealand Banking Group	MELBOURNE VIC 3001
J	Schnabl	Australian and New Zealand Banking Group	MELBOURNE VIC 8008
P	Wing	Australian Guarantee Corporation	MELBOURNE VIC 3001
	ARFN Manager	Australian Retail Finance Network	MELBOURNE VIC 3001
Susan	Don	Australian Taxation Office	COLLINS ST EAST MELBOURNE VIC 8003
John	Gleeson	Australian Taxation Office	DANDENONG VIC 3175
Paul	Lynch	Australian Taxation Office	CHELTENHAM VIC 3192
Paul	Doherty	Australian Taxation Office	BOX HILL VIC 3128
Aris	Zafiriou	Australian Taxation Office	MOONEE PONDS VIC 3039
John	Morris	AVCO	SOUTH MELBOURNE VIC 3205
N	Evans	Commonwealth Bank	MELBOURNE VIC 3000
Ian	Capp	Commonwealth Bank	MELBOURNE VIC 3000
Ross	Bird	Commonwealth Bank	MELBOURNE VIC 3000
Gavin	Hamilton	Custom Credit	MELBOURNE VIC 3001
Noel	Hayes	David Syme and Company	MELBOURNE VIC 3001
Lindy	Wall	Department of Human Services	MELBOURNE VIC 3000
P	Joseph	Energy 21	MELBOURNE VIC 3000
K	Connelly	Ford Credit	SOUTH MELBOURNE VIC 3205
Mark	Morstead	Ikon Energy	MELBOURNE VIC 3000
Karen	Rogers	Kenetik Energy	SOUTH BANK VIC 3004

CREDITOR MAIL-OUT LIST

NAME		REPRESENTING	ADDRESS
Greg	Gill	National Australia Bank	MELBOURNE VIC 3001
Irene	Hayes	National Australia Bank	MELBOURNE VIC 3001
G	Kaynes	Telstra Credit Management	CARLTON VIC 3153
Steven	Chettle	Australian Retail Finance Network	MELBOURNE VIC 3001
Maria	Pantzikis	AVCO	ST KILDA ROAD PO MELBOURNE VIC 3004

OTHER STAKEHOLDER CONTACT

NAME	REPRESENTING	ADDRESS
Ross Duus	IPAA	Waterfront Place, BRISBANE
Gavin Thomas	IPAA	39 Market St SYDNEY
Mark Robinson	IPAA	25 Bligh St SYDNEY
Robert Cole	IPAA	22 William St MELBOURNE
Peter Day	ASIC	MELBOURNE
Jacki MacDiarmid	ICAA	York St SYDNEY
Brian McCann	ASCPA	WEST PERTH
John Harrison	ATO	Constitution Ave, CANBERRA
Colin Lorigan	AMEX	SYDNEY
Gary Tierney	WESTPAC	60 Martin Place, SYDNEY
Bernadette Bainey	NAB	255 George St, SYDNEY

Attachment A2:

Copy of the advertisement in The Weekend Australian Newspaper.

ITSA

Bankruptcy Act 1966

Review of Trustee Registration Provisions

The *Insolvency and Trustee Service Australia* has commissioned John Hawkless Consultants Pty Ltd to undertake a review of the Trustee Registration provisions of the Bankruptcy Act 1966 and associated legislation.

The review will examine costs to, and benefits for, businesses of the registration of trustees, whether registration of trustees restricts competition or affects the economy, and identify alternatives to registration and their impact, costs and benefits.

Comments on the Review are sought from the Community.

A copy of the Terms of Reference of the Review can be obtained by writing to:

John Hawkless Consultants Pty Ltd
PO Box 360
BEECROFT NSW 2119

Attention: Caroline Hawkless

Attachment A3:

Copy of the Terms of Reference given to respondents to the newspaper advertisement.

Background

John Hawkless Consultants has been commissioned by the Insolvency and Trustee Service Australia (ITSA) to assist in undertaking a review of the **Personal Insolvency** Trustee Registration Provisions of the Commonwealth Bankruptcy Act 1996 and associated legislation.

It is to be noted that the Review is in respect of personal insolvency handled by registered trustees. The Review is **not** in respect of personal insolvency handled by ITSA or corporate insolvency handled by the Australian Securities and Investments Commission.

Trustees and Bankruptcy

The Insolvency and Trustee Service Australia is a national government agency responsible for helping to protect the community from the impact of financial failure and for countering unlawful activities.

Under the Bankruptcy Act administered by ITSA, the affairs of a person who has become bankrupt are handled by a **bankruptcy trustee**.

The trustee may be a private sector person (**a registered trustee**) or the trustee may be the Insolvency and Trustee Service Australia (a Division of the Commonwealth Attorney General's Department).

Once bankrupt, persons cannot sell or deal with most of their property. Only the bankruptcy trustee can dispose of property for the benefit of creditors. In this context, property means anything of monetary value belonging to the bankrupt person at the date of bankruptcy. Interest in the family home, land, money in bank accounts, vehicles exceeding \$5,000 in value, stocks and shares are all included.

If a bankrupt person earns above a set amount then regular compulsory payments must be made to the bankruptcy trustee for the benefit of creditors.

The Bankruptcy Act 1966

The Bankruptcy Act makes provision for matters associated with bankruptcy trustees.

These matters include:

- Appointment of Trustees.
- Qualifications, Experience, Knowledge and Abilities of Trustees.
- Registration of Trustees.
- Termination of Registration of Trustees.

Terms of Reference

- Consent of Trustee to act.
- Remuneration of Trustees.
- Committee procedures when considering application for registration, and termination of registration, of a Trustee.

Provisions of the Legislation being Reviewed

The Provisions of the legislation being reviewed are:

- The Bankruptcy Act 1966: Division 1 of Part VIII.
- The Bankruptcy Regulations: Divisions 1, 1A and 2 of Part 8,
- The Bankruptcy Regulations: Part 15, and
- The Bankruptcy (Registration Charges) Act 1997.

Need for Review

ITSA must review this legislation as part of the Government's systematic review of all regulatory legislation.

The aim of the Review is to identify the impact of the Trustee registration provisions on the community.

The Review is to include:

- The objectives of the legislation and related regulations.
- Identification of any restrictions on competition, and any costs to and benefits for business.
- Analysis of the likely effects of the restrictions on competition and the economy generally.
- Assessment of the impact and costs and benefits of the restrictions, including impacts on small business and whether such costs can be reduced.
- Assessment whether the objectives of the legislation/regulation can only be achieved by restricting competition.
- Consideration of the costs and benefits of alternative means for achieving the same result, including non-legislative approaches.
- Determination of the preferred option for regulation, if any.
- Examination of the mechanisms to increase the efficiency of any preferred regulation including minimising the costs of compliance and paper burden on small business.

Terms of Reference

Your Comments are sought in respect of matters covered by the review, as noted above, and including:

1. Whether registration of trustees by law is necessary.
2. Whether alternatives to registration of trustees by law is acceptable (such as trustee industry self-regulation, etc.).
3. The costs and benefits of registration of trustees by law.
4. The impact on competition of registration of trustees.

If you wish to respond please complete the attached questionnaire.

Terms of Reference

Please tick appropriate boxes below or provide additional information as appropriate. If space for your full response is insufficient, please attach as many additional sheets as necessary.

1. Have you ever been declared bankrupt?

- Yes No

2. Have you ever been the creditor of a bankrupt person?

- Yes No

3. Did you use a **private sector** registered trustee?

- Yes No. **If NO then you need proceed no, further with this Questionnaire.**

4. If your answer to Q3 was YES, were you **satisfied** with the services provided by the trustee?

- Yes No

5. If your answer to Q4 was NO, please provide reasons why you were **not satisfied** with the services provided by the trustee?

- Too slow
- Not experienced/competent
- Unsympathetic to your needs
- Fees too high
- Other. Please specify:

.....

.....

.....

Terms of Reference

6. If you were a creditor, were you satisfied in all of the circumstances with the quantum of funds that you received from the bankrupt.

Yes No

If NO, please specify why:

.....
.....

7. Have you ever had reason to apply to the court for the removal of a trustee?

Yes No

If YES, please specify why:

.....
.....
.....

8. Do you think that the registration of trustees by law is necessary.

Yes No

If YES, please specify why:

.....
.....
.....

If YES, what are the costs and benefits of registration of trustees by law.

.....
.....
.....

Terms of Reference

9. Do you believe that there are acceptable alternatives to registration of trustees by law (such as trustee industry self-regulation, etc.).

Yes No

If YES, please specify what alternatives you think are acceptable:

.....
.....
.....

10. Do you believe that there is a detrimental impact on competition as a result of the requirement that trustees must be registered?

Yes No Don't Know

If YES, please specify the nature of that detrimental impact:

.....
.....
.....

11. If you have any other comments to make please attach these on separate sheets of paper.

THANK YOU for taking the time to complete this questionnaire.

Please return the completed questionnaire to:

<p>John Hawkless Consultants Pty Ltd PO Box 360 BEECROFT NSW 2119</p> <p>Attention: Caroline Hawkless</p>
