Insolvency Practitioners Regulation Act
A level playing field for practitioners and enhanced protection for creditors

The Insolvency Practitioners Regulation Act (the Act) was passed into law in mid-June 2019, bringing with it tighter regulations and standards to help ensure that insolvency practitioners act in the best interests of creditors.

STORY
Tony Maginness, Jared Booth & Nicola Hankinson
Baker Tilly Staples Rodway Auckland

The Act, which is effective from June 2020, will introduce transitional licenses for practitioners who have been accredited through the CA ANZ and RITANZ insolvency practitioner regime. Baker Tilly Staples Rodway has five accredited insolvency practitioners across New Zealand, including two in Auckland, one in the Hawkes Bay and a further two in Taranaki.

While further details, including the regulations themselves, are still being finalised, some of the key changes introduced by the Act include:

Establishment of a public register

This register of licensed insolvency practitioners will be maintained by the Registrar of Companies, much like the Auditors Register.

Licensing and minimum standards

Insolvency practitioners will be required to hold a licence with an accredited body or be a lawyer, accountant or member of a recognised professional body and to meet prescribed minimum standards, including a “fit and proper person” test. Practitioners will need to undertake on-going professional development in order to retain their licences, and to formally apply for their license to be renewed every five years, to ensure they remain fit to carry out liquidations. This is very similar to the current licensed auditor regime.

Solvent liquidations

These must be administered by certain professionals, such as qualified lawyers or accountants.

Penalties

Strict penalties will be introduced, with unlicensed individuals acting as insolvency practitioners being liable to a fine of up to $75,000.

Voidable dispositions and administration of company money

Additional powers for insolvency practitioners in relation to voidable dispositions and additional duties in relation to administration of company money, with practitioners being liable to a fine of $50,000 or up to two years imprisonment if these duties are not complied with.

Disclosure and reporting

Disclosure and reporting requirements will be more rigid to effectively manage liquidation proceedings and practitioner appointments, ensuring all interests are disclosed and managed and “serious problems” are reported. Interest statements, disclosing any actual or perceived conflicts of interest and how these will be managed, are required to be prepared and updated every six months to capture new information.

> “Insolvency practitioners play an essential role in New Zealand’s business environment. One of the main aims of corporate insolvency law is for businesses to be turned around if they are viable but if they are not, they should be wound up, the assets realised and distributed to creditors in accordance with clear rules and with a minimum of harm to both the insolvent party and their creditors.”
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> **HON KRIS FAAFOI,**
> **MINISTER OF COMMERCE AND CONSUMER AFFAIRS**

Creditors' rights

These have been strengthened under the Act. Companies will no longer be able to appoint their own liquidator following service of liquidation proceedings. Creditor’s consent will now be required if shareholders or the board wish to appoint a liquidator. Until now, companies facing liquidation have been able to choose their own liquidator. In some cases, this has led to the appointment of a so-called ‘friendly’ liquidator, who has not always pursued available claims against directors and shareholders.

Related parties

There will be a tightened focus on related party transactions and voting rights. Related party voting at creditor meetings must now be disregarded unless the Court orders otherwise. Related party voting has often enabled director and shareholder interests to keep a friendly liquidator in office, instead of having that liquidator replaced with an appointee of the creditors’ choice at the first creditors’ meeting. In addition, Cabinet has agreed to a number of additional insolvency law reforms, which will be included in the Insolvency Law Reform Bill. These reforms include increasing the clawback period for related party transactions to four years (six months for unrelated parties).

Solvent liquidations: additional requirements

Directors will now need to formally declare that the company will be able to pay its debts in full within twelve months after the appointment of a liquidator in order to confirm that the company in liquidation is solvent. A fine of up to $10,000 will be payable if this declaration is not made or is not based on ‘reasonable grounds’.

A 12-month deadline will be introduced for solvent liquidations to become insolvent liquidations (or be concluded). This is intended to ensure that solvent liquidations are dealt with on a timely basis.

Reporting to regulatory authorities

It is worth highlighting the additional responsibilities placed on directors to formally confirm the solvency of the business. This is a big responsibility, which needs to be taken seriously particularly given the requirement

for insolvency practitioners to report any 'serious problems', including any material breach of directors' duties, to the Registrar of Companies and other appropriate authorities. The definition of a 'serious problem' is wide and includes:

- Any offence committed by the company, or a past or present director, officer or shareholder of the company;
- Any misappropriation of company money or property, or any act of negligence, default, breach of duty or trust committed by any person who has taken part in the formation, administration, management, liquidation, or receivership of the company;
- Any material breach of director's duties; or
- Where the management of the company has materially contributed to it being unable to pay its debts as they fall due.

Overall, we consider the Act will help further protect creditors and result in a more regulated, professional insolvency sector in New Zealand, with greater transparency.

What won't change with the introduction of the Act is the need to ensure businesses are well-managed, well-funded, and have adequate cashflows to meet their debts as they fall due. As they say, prevention is better than the cure, so it is worth working closely with your business advisor (or securing a business advisor if you don't already have one) to keep your business on track during these difficult times.

tony.maginness@bakertillysr.nz
jared.booth@bakertillysr.nz
nicola.hankinson@bakertillysr.nz

If you find yourself in hot water, our accredited insolvency practitioners can work with your business to help oversee a smooth exit process, whether this be administration, receivership, or a solvent or insolvent liquidation. Our licensed insolvency practitioners are Tony Maginness and Jared Booth in Auckland, and Philip Macey and Greg Eden in Taranaki.

"We strongly support the Government's move to raise the bar and create a more robust process for regulating and monitoring insolvency practitioners. We consider the Insolvency Practitioners Regulation Act and related amendments to the Companies Act will help to protect the interests of creditors and safeguard the integrity of the insolvency profession in New Zealand."

TONY MAGINNESS, DIRECTOR,
BAKER TILLY STAPLES RODWAY CORPORATE ADVISORY SERVICES AND ACCREDITED INSOLVENCY PRACTITIONER