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One Ring to Rule them all: has the call for a Single Regulator been Answered?

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Key words: Insolvency; Recognised professional bodies; Regulation

Abstract

This article considers the recent call for evidence by the Insolvency Service to establish whether changes are necessary to the current regulatory framework for insolvency practitioners in the UK. The article will explore whether one regulator would be beneficial against the current five regulators, and how this change could be implemented.

Introduction

In October 2015, the Small Business, Enterprise and Employment Act (SBEEA) introduced significant changes to insolvency law, practice and the regulation of insolvency practitioners (IPs).[2] It is not intended that the entirety of these changes will be discussed in this article, instead it will focus on the issue of regulation and how this may change in the next few years.[3] The SBEEA 2015 set out regulatory objectives for insolvency regulators,[4] which apply to both the Recognised Professional Bodies (RPBs) and the Secretary of State, as oversight regulator.[5] Additional powers have been provided for the Secretary of State to take action against RPBs[6] and, where it is in the public interest, these powers extend to action being

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[2] See SBEEA 2015 <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted> accessed 15 January 2020. Also see P Bailey, 'Small Business, Enterprise and Employment Act 2015: corporate insolvency provisions considered' (2015) Co. L.N. 2015, 372, 1-4.
[3] The SBBEA 2015 brought changes to the way that some IP fees and expenses are communicated and agreed with creditors, see 'deemed consent' procedure, 246ZA of the Insolvency Act 1986, as amended by section 122 of SBBEA 2015.
[4] 391B of the Insolvency Act 1986, as amended by section 138 of SBBEA 2015. This statement represents an importance step forward in the regulation of IPs by imposing obligations upon RPBs when carrying out their allocated task.
[5] 391D of the Insolvency Act 1986, as amended by section 139 of SBBEA 2015. This is a useful policing mechanism for the Secretary of State to ensure that RPBs who conduct themselves in a way that is inconsistent with the regulatory objectives can be given a direction to get the RPB back into line, see L Sealy & D Milman, 'Annotated Guide to the Insolvency Legislation', (22nd edn, Sweet & Maxwell 2019) 534.
[6] This could take the form of a financial penalty under s391F; a reprimand under s391J; or more seriously the Secretary of State could initiate revocation of recognition under 391L of the Insolvency Act 1986, as amended by section 140 of SBBEA 2015.

taken against IPs directly.[7] Of particular interest, the SBEEA 2015 also included a power that would permit the Secretary of State, should it be deemed necessary, to create a single, independent regulatory body to supersede the five RPBs that currently authorise and regulate the IP profession. The window in which this power remains open expires in 2022. To establish whether the single regulator model should be pursued the Insolvency Service in July 2019 published a consultation to call for evidence on the *Regulation of Insolvency Practitioners Review of Current Regulatory Landscape*.[8] As of February 2020, the responses are yet to be disseminated.[9]

In readiness to any possible future regulatory reform this article first considers the rationale of regulation and why it is deemed a necessity to market failure. Second the different forms of regulation will be examined, specifically state- and self-regulation. Third the perceived institutional impediments will be examined, taking note of the issues associated with state- and self-regulation. Fourth, Australia and New Zealand will be briefly examined as a review of other regulatory frameworks and whether the UK could derive any lessons. Finally, the single regulatory framework will be examined to establish whether it is feasible.

Background: recent developments

To provide a rationale for regulation it is first necessary to provide a brief overview of how the insolvency industry has evolved. By understanding how the profession has changed, this helps to appreciate the type of regulation that has emerged in the UK. During the socio-economic fallout when failed companies spiralled out of control in the early 1970s, the UK's respective governments' response has been to apply a private sector solution to problems like insolvency.[10] This approach led to the replacement of the IPs regulatory bodies from the

[7] 391R(1)(b) of the Insolvency Act 1986, as amended by section 141 of SBBEA 2015.
[8] Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf> accessed 15 January 2020.
[9] See also, 'Insolvency Service issues call for evidence on insolvency practitioner regulation', (2019) 40(10) *Company Lawyer* 328-329.
[10] T C Halliday & B G Carruthers, 'The Moral Regulation of Markets: Professions, Privatization and the English Insolvency Act 1986' (1996) 21 *Accounting, Organisations and Society* 371–413.

Official Receiver and the Insolvency Service (who is now the current regulator of the RPBs),[11] to a number of RPBs who are self-regulating and independent of the government.[12] The Insolvency Act 1986 provides qualification criteria that must be met by individuals who wish to be IPs, and part of that qualification process is that the IP must be a member and be authorised by of one of the RPBs or licensed to act by the Secretary of State.[13] The creation of the RPBs was deemed a necessary step to distance government bodies away from dealing directly with market failure and having to engage in commercial decision-making that could be interpreted as creating government policy. In essence, insolvency was considered a matter that should be approached by professionals free from government interference, directly or otherwise.

The introduction of the RPBs as regulators was therefore aimed to instil public confidence in the insolvency industry by addressing a number of concerns that included: the need for transparency in insolvency appointments (competence and knowledge),[14] to enhance monitoring standards (compliance with law, ethics and regulation), and to ensure that the above standards were not only enforced, but that the public interest was protected through a proper disciplinary and complaints procedure. Much that followed caused concerns that while some of the procedural inadequacies associated with the preceding system were addressed, several high-profile company failures from the 1990s onwards continued to raise questions. For example, in 1998 following the *Mirror Group Newspaper plc v Maxwell*,[15] excessive IP fees were identified as a major concern in the Ferris Report.[16] Over the next 20 years reform was implemented which resulted in greater fee regulation and directly led to SIP 9 (version 2 onwards), the Insolvency (England and Wales) Rules 2016, and the updated Part 6 of the 2018 Practice Direction on Office Holder

[11] Who were housed in the Department for Trade and Industry (DTI).
[12] The DTI now has a regulatory rule.
[13] For authorisation personally from the Secretary of State or from a "competent authority" see s392 IA 1986 and the Insolvency Practitioners Regulations 2005 (SI 2005/524).
[14] Acting as an IP in any designated proceeding when not qualified to do so constitutes a criminal offence, see s389 Insolvency Act 1986.
[15] [1998] BCC 324.
[16] See the report of Mr Justice Ferris' Working Party on 'The Remuneration of Office Holders and Certain Related Matters' (London 1998) ('Ferris Report'). For further comments on the Ferris Report, see K Theobald, 'The Ferris Report' (1998) 14 IL&P 300; G Lightman, 'Office-Holders' Charges' (1998) *Insolvency Intelligence* 1.

Remuneration.[17] Twelve years after the Ferris Report, a major review in 2010 by the Office of Fair Trading (OFT) identified that further regulatory reform was required as it concluded that confidence within the insolvency industry – from both the creditor and IP perspective remained low. The OFT advocated, inter alia, for the establishment of an independent complaints body to increase the efficacy and consistency of after-the-event complaint and review; implement measures to restore creditor trust in the regulatory regime; and enable a cost-effective route of fee assessment, see para 1.24 (a)-(c).[18] The OFT recognised that if an ombudsman scheme or an independent complaints handler was considered to be the most appropriate pathway to take, it would have been worth considering the possibility of extending an existing scheme's purview to cover the insolvency sector.[19] The lack of action that followed the OFT market review subsequently led to the Kempson Report in 2013, which reiterated some of the ongoing issues that concerned the function and regulation of IPs, the method and level of IP remuneration, and the treatment of unsecured creditors.[20] In response, the Kempson Report proposed a simple, low-cost mediation and adjudication service for disputes that involved low-level fees to ease the burden on the courts so that they could be left to deal with the complex cases involving larger sums of money.[21] Such a recommendation was designed to promote accountability and transparency while at the same time reduce the level of self-regulation that occurred within the insolvency industry.

In response to the persistent concerns regarding a lack of accountability within the profession, a Complaints Gateway was set up in 2013 with the objective of increasing

[17] The cases discussed under the earlier 2004 Practice Direction are likely to be still relevant, for example see *Brook v Reed* [2012] 1 WLR 416; *Sallis v Hunt* [2014] 1 WLR 1402; *Jacob v UIC Insurance Company Ltd (in provisional liquidation) (No1)* [2007] BPIR 494.

[18] Office of Fair Trading, *The Market for Corporate Insolvency Practitioners – a Market Study* (June 2010) <https://webarchive.nationalarchives.gov.uk/20140402172033/http://oft.gov.uk/shared_oft/reports/Insolvency/oft1245> accessed 15 January 2020. For a detailed overview of the new complaints structure See V Finch, 'Insolvency Practitioners: The Avenues of Accountability' (2012) 8 *JBL* 645–67, 660.

[19] For a detailed discussion on the history and role of insolvency practitioners, see J Wood 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour' (2019) 19(2) *Journal of Corporate Law Studies* 333-366.

[20] E Kempson, 'Reviewing Insolvency Practitioner Fees' (2013) <https://www.gov.uk/government/publications/insolvency-practitioner-fees-a-review> accessed 20 January 2020.

[21] The OFT made a similar recommendation in their market review report as did a report of research undertaken for the Insolvency Practices Council, see M Seneviratne and A Walters, 'Complaints handling by the regulators of insolvency practitioners: a comparative study' (Report to the Insolvency Practices Council 2009).

transparency in the complaint process.[22] The Gateway was designed to act as the initial point of contact for all complaints concerning the conduct of the IP, irrespective of which RPB they belonged to. The Gateway has ensured that complainants are treated equally since all complaints received are subject to the same evidential threshold, with successful claims being referred to the respective RPB for further action.[23] Shortcomings associated with the treatment of complaints after referral will be discussed below.

The SBEEA 2015[24] has hoped to encourage an independent and competitive insolvency market to emerge with IPs providing high quality services at a cost to the recipient which would be fair and reasonable. Further, the IP services would be transparent and conducted with integrity, it would consider the interests of all creditors, and it would look to protect and promote the public interest.[25] To ensure the insolvency industry remained competitive and provided high quality services, the SBEEA 2015 provided the power to revoke a RPB's recognition if it was deemed contrary to the above aims. The revocation could be exercised by the Secretary of State according to section 391(4) IA 1986, as amended by section 144 of the SBEEA, and this could also be used to establish a single body to regulate all IPs. Such a provision provides for two distinct possibilities: to create a new regulatory body or to redirect all responsibilities to an existing body's purview.[26] Since the timeframe to decide whether such action should occur expires in 2022,[27] it is imperative that the rationale for regulation and its form is critically examined.

To that end, the Insolvency Service in 2018 published a 'review of the monitoring and regulation of insolvency practitioners',[28] which aimed to add weight to the discussion

[22] An updated agreement between the Gateway and RPBs came into effect in May 2018 which means that complaints relating to cases where the Insolvency work took place in Northern Ireland can be processed through the gateway, assisting with maintaining consistency of approach.
[23] See generally, J Wood, 'Review of the Regulatory System: How Effective has the Complaints Gateway been?' (2017) 30 (7) *Insolvency Intelligence* 106-113.
[24] Part 10 of the SBEEA 2015, is entitled: Regulation of insolvency practitioners: amendments to existing regime between ss137–146 and sets out the new law concerning the regulatory regime.
[25] s391C, subs 3(b)(i)-(iii), and 3(d) of the IA 1986, as amended by s138 of the SBEEA 2015.
[26] See s145 of the SBEEA 2015. For this option to occur the Secretary of State must be convinced that the assigned body is able and willing to exercise the functions conferred by the regulations, and the body has arrangements in place relating to the exercise of those functions which are such to be likely to ensure that the conditions in subsection (2) are met.
[27] See s146 of the SBEEA 2015.
[28] Insolvency Service, 'Review of the monitoring and regulation of insolvency practitioners' (September 2018), available at 9, available at

on Insolvency Service oversight activities and to help them decide whether to introduce a single regulator, as provided for in the SBEEA 2015. The review summarised that all RPBs had appropriate procedures in place when risk assessing and carrying out monitoring visits, and that monitoring visits to IPs were generally carried out effectively and robustly. However, whilst monitoring visits were effective in identifying and reporting concerns, there were examples where regulatory and/or disciplinary outcomes were not being achieved in the way we would have expected. It was apparent that transparency in the publication of disciplinary outcomes could be improved and work was needed with the RPBs in this regard.[29]

Rationale for regulation

Throughout the insolvency process practitioners have retained a central role, being assigned with the duty to make decisions, take actions, and potentially be held culpable for any omissions.[30] The professional discretion afforded to IPs permits a certain level of unfettered decision-making that provides the basis in which the IP can perform their functions without being overly subject to interference from certain creditors, employees and other stakeholders. Adverse effects that stem from insolvency are likely to affect both those that appoint the IP as well as the other stakeholders that were not part of the appointment process. Yet, any possibility that adverse costs can be applied only to those that appointed the IP is not possible; the costs lay where it falls. To establish the extent of the adverse costs the financial problems must be investigated by the IP, which can only be quantified through the information extracted from those involved with the insolvent company, namely the directors and employees. It is this information that provides the basis in which stakeholders can determine whether their rights and interests have been given due consideration. Private contracting between the IP and the various stakeholders would face insuperable differences

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775650/Monitoring_and_Regulation_of_IPs_Report.pdf> accessed 20 January 2020.

[29] Insolvency Service, 'Review of the monitoring and regulation of insolvency practitioners' (Sept 2018) 10-18, the recommendations are noted at 18.

[30] The regulated of IPs has been stated to be the single most important advance in the operation of insolvency law in the UK since the 19th century, but it is subject to proper institutional infrastructure to make it work , see I Fletcher, 'Spreading the gospel: the mission of insolvency law, and the insolvency practitioners, in the 21st century' (2014) 7 *JBL* 523-540, 526.

to establish a system that could dictate how the IP was to operate, how compliance to those terms would be monitored, and what punishment should follow breaches.[31] Regulation is therefore perceived and offered as a broad response to mitigate the issues associated with these failures.

The impact of regulation on the commercial markets depends on the nature of regulation and how efficiently and effectively it is implemented. While regulations impose costs on companies, causing them to shift resources from other activities to achieve compliance, such as regular financial reviews to ensure the company is solvent and the directors have not undertaken wrongful trading, they are often justified as a means of improving efficiency in the marketplace as we all protecting society from market failure.[32] In essence, the benefits of regulations to address concerns associated with corporate failure are intended to outweigh the efficiency cost of imposing the insolvency related regulations. Effective regulations are therefore concerned with increasing competitiveness by improving the quality and standards that dictate how companies operate. While the nature of regulations and the institutions used to create them may vary, it will be seen that the UK has opted for a self-regulated approach.

State- and self-regulation

There are a variety of options open to the government and industry involvement in the regulatory process to determine what type of regulation would be suitable in the circumstances. The spectrum of options ranges from non-state regulation, co-regulation, to state-based regulation. In terms of the UK, its regulation involves private, market-based institutions governing their actions through the use of industry standards and best practices, professional codes of ethics, and a sense of corporate social responsibility. This type of regulation, which is heavily moulded by the insolvency industry, engages in self-policing activities to enforce standards internally through the RPBs.

[31] See International Association of Insolvency Regulators, 'The Regulatory Regime for Insolvency Practitioners' (2018) at 7, available at <https://www.insolvencyreg.org/sites/iair/files/uploads/IAIR%20Principles%20-%20version%201.2%20for%20uploading%20to%20web.pdf> accessed 20 January 2020.

While responsibility for shaping insolvency policy in the UK[33] resides with the Secretary of State for Business, Innovation and Skills, it is the Insolvency Service who act as overseer on behalf of the Secretary of State who enforces overall compliance with the law.[34] Since this task of monitoring IPs was more suited to a body that was more in tune with the intricacies of the insolvency profession, the Secretary of State recognises certain independent professional bodies, called RPBs,[35] for the purpose of authorising their members to act as IPs.[36] This is a practical arrangement since the RPBs can exercise control over their own qualified members to ensure they are trained, monitored, and if necessary, sanctioned, while the Insolvency Service supervises the regulator process, conducts regular visits to each of the RPBs to ensure that standards are being maintained. Thus, the responsibility to ensure that insolvency procedures are implemented in the correct manner (while this of course is a duty of the IP generally), rests with the RPBs.

Between the current RPBs and the Secretary of State there is a Memorandum of Understanding in place to ensure that the qualification requirements for IPs are met,[37] and that common professional and ethical standards are followed. To ensure that IP duties are undertaken in a consistent manner, IPs are subject to regular monitoring visits from their respective RPBs,[38] in addition to regular visits from the Insolvency Service to determine full compliance with the Memorandum of understanding.[39] Should breaches be identified the matter may be referred to the Secretary of State, which could result, in the most serious of breaches, the status of the RPB being revoked. Breaches could relate to the professional and

[33] England, Wales and Scotland.
[34] Insolvency policy and legislation in Northern Ireland is the responsibility of the Northern Ireland Assembly, and oversight regulation is carried out by the Department for Economy (DfE), although it is similar in virtually all respects to that in Great Britain.
[35] Since September 2016, the number of RPBs has decreased to five bodies as the Law Society of Scotland and the SRA ceased to authorise IPs by the end of 2015. The current list of RPBs include: Institute of Chartered Accountants in England & Wales (ICAEW); Insolvency Practitioners Association (IPA); Institute of Chartered Accountants of Scotland(ICAS); Association of Chartered Certified Accountants (ACCA); and the Institute of Chartered Accountants in Ireland (ICAI). As of 1st January 2017, the IPA are preforming some regulatory functions on behalf of ACCA including delegated authority for all regulatory and disciplinary processes.
[36] s391 of the IA 1986. In addition, a small number of IPs are authorised by the Secretary of State directly.
[37] All IPs are required to pass the Joint Insolvency Examination.
[38] At least once every six years, and more frequently if evidence suggests it is necessary.
[39] Usually at least once every three years.

ethical considerations as set out by the Insolvency Service, on behalf of the Secretary of State, which have been set by the insolvency industry. These include the Insolvency Code of Ethics,[40] and the Statements of Insolvency Practice (SIPs),[41] all of which must be followed by the IP. The RPBs through this internal regulation can therefore create, and without external constraint, the rules by which its members would be governed; in other words, the current insolvency system in the UK allows the insolvency industry to self-regulate.

In discharging their regulatory functions, an RPB must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives which provide for: the RPB to have a system of regulation that secures fair treatment for persons affected by their acts or omissions, reflects the regulatory principles and ensures consistent outcomes; encourages an independent and competitive profession, which provides high quality services at fair and reasonable cost, acts transparently, with integrity and considers interests of all creditors in a particular case; promotes the maximisation of the value and promptness of returns to creditors; and protects and promotes the public interest.[42] To that end, the role taken by the RPBs to set and enforce rules and standards relating to the conduct of IPs in the industry reflects that of self-regulation.[43] Even though there are currently five separate RPBs they are coordinated and through cooperation they have established industry standards or best practices guidance as contained in SIPs,[44] and the Code of Ethics, which demands compliance with its spirit, not just its letter.[45] Such an approach permits an element of flexibility and has led to concerns that stakeholders interest could be negated at the expense of the narrow self-interest of the industry. Yet, despite these concerns it is imperative to note that there are benefits as well as limitations to self-regulation.

[40] For further information, see <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics> accessed 22 January 2020.
[41] See R3 website for the updated versions <https://www.r3.org.uk/index.cfm?page=1296> accessed 20 January 2020.
[42] s391 Insolvency Act 1986.
[43] A Gupta and L Lad, 'Industry Self-Regulation: An Economic, Organizational, and Political Analysis' (1983) 8(3) *The Academy of Management Review* 417.
[44] The status of SIPs changed in 2004 from "best practice" to "required practice"—see further M Chapman, 'The Insolvency Service's view of regulation' (Winter 2005) *Recovery* 24, 24.
[45] Insolvency Service, Code of Ethics, para 3.

A key benefit of controlled self-regulation is that it can reduce the risk of overregulation within an industry, an issue that could lead to complex, expensive, and uncertain outcomes. Further, self-regulation permits the industry-led regulation to be responsive to the needs of the business market and adopt flexible solutions to address changes that may occur in the economic and political landscape. To introduce unnecessary or inefficient regulation could have the potential to hinder corporate rescue attempts or enhance the costs associated with insolvency. Ineffective regulation could also have the undesired effect of encouraging discrepancies across the industry in terms of how RPBs assess compliance and how they conduct disciplinary matters. While such disciplinary outcomes are published, and this information is available to the public, even if some differences are noted between how RPBs deal with their members on similar issues, the publication of the outcomes helps to increase transparency and in turn help maintain public confidence within the insolvency industry.[46]

Self-regulation may also help RPBs adopt ethical behaviour since the practice-based rules are founded on social norms and the conduct of peers within the industry rather than top-down prescriptive rules. While self-regulation may be perceived to be weaker than state-regulation either because it has less stringent rules or because it may lack the ability to enforce its rule, this is not entirely accurate. The discretion afforded to the RPBs should not be perceived as a barrier to accountability, rather it acknowledges that flexible, elastic rules will often provide that the matter is heard with greater weight placed on the specific circumstances. It would also ensure that the RPBs' resources can be properly allocated to deal with regulatory processes which can lead to the matter being investigated quickly to resolve the issue(s). The benefits to be taken from self-regulation, however, will need to be duly considered with the limitations that may arise.

[46] I Fletcher, 'Spreading the gospel: the mission of insolvency law, and the insolvency practitioners, in the 21st century' (2014) 7 *JBL* 523-540, 528.

Perceived Institutional impediments

The nature of self-regulation is often shaped by legal and economic restrictions. Since the RPBs have been assigned as the regulators for the industry, it is imperative that they monitor and discipline their members in a similar manner. From examining the statistical data from the Complaint Gateway, it is possible to identify some interesting trends.[47] With any system there will be a trade-off between competing interests – between the regulator, the members, and the complainants. However, difficulties associated with meeting the evidence threshold is likely to produce a system that is more partial to the insolvency profession.[48] It is natural to expect that once the complaint has been referred, different outcomes based on similar circumstances may emerge since the RPBs rely on its expertise and technical knowledge in applying the regulatory rules. Such an approach is expected to have an impact on the level of trust association with the regulatory system, on both the regulators and the level of external scrutiny and accountability that the regulators are subject to. While recent statistics show that of the 13 complaints received against RPBs, none have been upheld, this may support the view rather than dissuade those who consider RPBs are unlikely to be subject to wide scrutiny.[49] Further, it is important to note that the RPBs do not all receive an equal number of complaints and the annual review of IP regulation statistics demonstrate that the ICAEW and the IPA disproportionately receive 96% between them; an indicator that these two regulators could perhaps already absorb the other duties of the other three RPBs and dictate the style of regulation that applies.[50]

In the absence of external pressure, RPBs could be more inclined to protect its interests and that of its members rather than the interests of society. While the Insolvency Service on behalf of the Secretary of State provides oversight of RPBs, it would not

[47] See, Insolvency Service, Annual Review of IP Regulation 2018, at 8, which states that whilst monitoring visits were effective in identifying and reporting concerns, there were examples where adverse regulatory and/or disciplinary outcomes were not being effectively handled. The statistics provided in 2018 show that there were 830 complaints against IPs, an increase from the previous year which received 757 complaints. Of the complaints that were rejected, 443 were rejected in 2018 compared to 363 in 2017. Of the complaints that were referred, 2018 saw an increase at 381, compared to 308 in 2017. Overall, 2018 saw more referrals, yet more rejections.

[48] Of the 262 cases that were closed, 186 (70%) were closed because the requested information was not provided. See Annual Review of IP Regulation 2018, at 11.

[49] In 2018, of the 13 complaints that have been received, 8 were rejected and 5 remain ongoing. See, Annual Review of IP Regulation 2018, at 11.

[50] The figure suggests that the complaint procedure is governed by these two regulators to a far greater extent than the other three. See, Annual Review of IP Regulation 2018, at 21.

necessarily sanction a RPB for reaching a certain outcome unless it could be established that there had been a lack of compliance with the relevant rules. Further, self-regulation conducted through the RPBs tend to have rules that promote remediation to a higher degree than sanctions for violations. This approach has much to do with the discretion afforded to IPs and how their commercial decisions are hard to second guess, along with the difficulty to determine whether the actions of the IP was wrong in the circumstances. A lack of evidence in such cases has usually led these complaints to fail since they were never referred to the respective RPB by the Compliant Gateway. To this end, self-regulation does contain some imperfect characteristics, but perhaps none more so than the regulatory uncertainty it sometimes creates through its complicated layer of regulatory oversight by making the RPBs themselves subject to the scrutiny and oversight of the Insolvency Service, who effectively acts on behalf of the Government.[51]

The layered approach to regulation needs to ensure that if self-regulation by the industry is the preferred method, then this continues. To this end, the insolvency industry made its intent to self-regulate clear by its rejection for the need of an independent ombudsman to investigate and sanction disciplinary action or issue fines in relation to complaints that were substantiated against an IP or the respective RPB.[52] This was in spite of the likelihood that it would lead to efficient and consistent after-the-event complaint and review procedures, which would also have gone some way to restore creditor trust in the regulatory regime, and allow for a cost-effective route of fee assessment.[53] Nonetheless, such a move would have unlikely remedied any perceived unsecured creditor dissatisfaction as their frustration is inextricably tied to the statutory order of priority and the fee regime, which a single complaints body would not have changed.[54] This can be seen in the overarching changes that have been accepted to the regulatory framework to deal with the

[51] I Fletcher, 'Spreading the gospel: the mission of insolvency law, and the insolvency practitioners, in the 21st century' (2014) 7 *JBL* 523-540, 527.

[52] See the Insolvency Regulation Working Party, 1997, 1999. While no Insolvency Ombudsman currently exists, if a complainant is dissatisfied with the Insolvency Service's final response from the Chief Executive, the complainant can ask his Member of Parliament (MP) to raise his concerns with the Parliamentary Ombudsman. There is no direct route available.

[53] OFT, *The Market for Corporate Insolvency Practitioners – a Market Study* (June 2010) 7.

[54] R3, Section 3: An independent complaints body, at 9, available at <https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/R3_responds_to_OFT_recommendations.pdf> accessed 23 January 2020.

on-going concerns about the way in which IP fees are calculated and how IPs are regulated.[55]

In regard to sanctions, RPBs should comply with both the common sanctions guidance and the regulatory objectives set out in the 2015 regulatory objectives and oversight powers, which aimed to ensure that a consistent approach to dealing with complaints and regulation was met across the industry.[56] Such an approach would enable the RPBs to have a regulatory system in place that promotes fair treatment for people affected by the acts of IPs, is transparent in its operations, accountable, proportionate, and ensures consistent outcomes.[57] While the sanction guidance is useful and is often referred to, it should be emphasised that it does not bind the RPB's approach to how it may implement its sanctions regime; leaving the respective disciplinary committees with an element of flexibility as to how it may impose its own decisions to set a sanction that it feels is appropriate to the circumstances of the individual case.[58]

In terms of how the RPBs should respond to complaints made against their IPs, it is evident that the existing regulation is only intended to provide guidelines since a breach would not automatically give rise to disciplinary action or any penalty.[59] In essence, as long as the IPs' actions could be broadly justified on commercial grounds then the IP would be afforded the flexibility to perform their functions as they see fit.[60] This would pose problems

[55] This would include other processes such as pre-packaged administrations. For a discussion on the future of pre-packs see J Wood, 'The sun is setting: is it time to legislate pre-packs?' (2016) 67 *Northern Ireland Legal Quarterly* 173–88.

[56] See Insolvency Service, 'Insolvency practitioner regulation – regulatory objectives and oversight powers' (2015).

[57] Further information on the Common Sanction Guidance can be found on the Government website GOV.UK at <https://www.gov.uk/government/publications/disciplinary-sanctions-against-insolvency-practitioners/common-sanctions-guidance> [accessed 24 January 2020].

[58] But note that a RPB will need to demonstrate compliance with this objective and show that it has acted on complaints made in relation to the level of fees and other costs. See further, J Wood, 'Review of the Regulatory System: How Effective has the Complaints Gateway been?' (2017) 30 (7) *Insolvency Intelligence* 106-113, 107.

[59] S Frisby, 'Balancing Interests in Administration: Contributions from the Courts and the Coalface' (2009) 24 *BJIB & FL* 198, 198.

[60] In *BLV Realty Organization Ltd v Batten* [2010] BPIR 277 the court held that when an IP had made a commercial judgment, it was not for the court to interfere with such a decision unless it was based on a wrong appreciation of the law or was conspicuously unfair to a particular creditor or contractor. In *Re CE King Ltd (In Administration)* [2000] 2 BCLC 297 the court made it clear that they would not interfere with commercial decisions made by the administrator.

for the Complaints Gateway or the respective RPB to identify whether the complaint has merit since commercial decisions can contain subjective elements which would be difficult to challenge on the basis that the decision taken had neglected certain interests or it did not consider more appropriate alternatives for the insolvent company.

In some circumstances, the breach committed may have been minor in nature and likely to have had no impact on the outcome of the case. In others, breaches that have involved the misappropriation of funds, failing to file accurate reports or information, or conduct that renders the IP as unfit to act are all examples that are highly likely to lead to severe sanctions being applied. Such sanctions could include the withdrawal of the IPs' insolvency licence (in the most extreme of cases),[61] a reprimand (can be classified as severe if warranted), and or a fine, with or without costs.[62] The type and severity of the sanction applied would often be dependent on the costs that were rendered due to the breach occurring and whether the action taken by the IP can be reasonably justified. Given that IP decisions are often made on commercial grounds, unpopular decisions could be justified and not readily amenable to review.[63] With five RPBs undertaking their own disciplinary duties it is quite possible that the application of sanctions could be applied on varied grounds.

Other jurisdictions

Australia

In regard to regulation, Australian practitioners are directly regulated by the two government regulators, namely the Australian Securities and Investments Commission (ASIC) and Australian Financial Security Authority (AFSA).[64] Hence there is no accreditation

[61] Although this is quite rare, see the Annual Review of IP Regulation 2018 where only two IP licences were revoked by the ICAEW.

[62] In 2018 the RPBs made 8 warning or cautions (not published); 38 undertaking consent, agreement or fine, reprimand and fine; 1 exclusion and fine; and 39 on-going in 2019. See Annual Review of IP Regulation 2018, 14.

[63] J Wood, 'Review of the Regulatory System: How Effective has the Complaints Gateway been?' (2017) 30 (7) *Insolvency Intelligence* 107.

[64] The AFSA adopt a cyclical approach to regulation as they believe this to be the most effective method of regulation, see <https://www.afsa.gov.au/about-us/practices/inspector-general-practice-statements/inspector-general-practice-statement-1-0> accessed 9 February 2020.

of the Australian Restructuring, Insolvency & Turnaround Association (ARITA), Association of Independent Insolvency Practitioners (AIIP), Chartered Accountants Australia & New Zealand (CAANZ) or any other of the relevant bodies in Australia. Their governance and processes are between them and their members.

While it is possible to concede that self-regulatory schemes like those of New Zealand and the UK tend to be more flexible and impose lower compliance costs on industry participants than direct government regulation, the Australian government has taken the pragmatic view that there is no professional body or industry association in Australia that is resourced or structured to undertake the type of a role that is assigned to the RPBs in the UK. The lack of infrastructure in place to deal with regulation is realised when the number of IPs are reviewed. Compared to the 1565 IP members in the UK, the size of the Australian industry is a little under half the size (600-700 practitioners) which would mean that the cost per industry participant of maintaining the infrastructure needed for effective co-regulation might be prohibitive.[65] As such, the Australian approach to regulation has been heavily influenced on its existing structure and the costs that would be required to implement the co-regulatory system. Should the UK consider these two factors, a streamlined regulatory system could reduce the RPBs into a single regulator without incurring adverse costs since the professional body and resources already exists.

New Zealand

The recent insolvency regulation to be found in New Zealand can be found in the Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ).[66] RITANZ continues to act as a stand-alone incorporated society operating as an independent self-regulatory body for IPs. The membership of RITANZ is quite small at around 441 members, yet despite its size the organisation consists of an array of interests from different backgrounds, that include: academics; chartered accountants who are members of NZICA, and other practitioners working in the insolvency and corporate restructuring fields; lawyers working in the insolvency and corporate restructuring fields; and others with an interest in

[65] Explanatory Memorandum to the Insolvency Law Reform Bill 2015 at 9.150-9.151.
[66] Launched on 1 January 2015. The current system was effectively formed out of its predecessor INSOL New Zealand, which had functioned since the 1980s.

insolvency law and practice, workouts and restructuring. While RITANZ is a regulatory body for IPs, there are few restrictions in place on who may accept appointments as receivers, administrators and liquidators and even fewer on who can manage workouts or compromises with creditors.[67] RITANZ has been concerned for some time and have campaigned for a co-regulatory regime for IPs, alongside other amendments aimed at further raising the practice standards of IPs and to ensure they act in accordance with their statutory duties. RITANZ has worked with CAANZ to help create a self-regulation structure aimed to enhance the value of membership and the profession in New Zealand. This self-regulation regime is now in place and it currently has around 100 practitioners who have achieved Accredited Insolvency Practitioners designation.[68] From June 2020, the IP licencing regime will apply and together with RITANZ, it will establish an accreditation regime that aims to improve and enhance the ethical standards and professional competency of IPs in New Zealand.[69] Accredited IPs are acknowledged as having appropriate experience, and are subject to a code of ethics, rules and standards, ongoing competency requirements, reviews and a disciplinary process, which is similar to the UK. CAANZ and RITANZ will both maintain a public register of accredited IPs together with their contact details for the benefit of the public. It would appear the New Zealand's regulatory approach to insolvency can be closely compared to the UK, albeit on a smaller scale.

One recognised professional body: one regulator to rule them all[70]

Considering the above, a prominent argument for reducing the current RPBs to one regulator is that it could bring clarity on regulatory objectives and contribute to a more

[67] However, see Insolvency Practitioner Regulation Act 2019 (NZ), which sets out the requirements for accreditation.

[68] See RITANZ, available at < https://www.charteredaccountantsanz.com/member-services/member-obligations/regulations-and-guidance/new-zealand-regulations/accredited-insolvency-practitioners> accessed 21 February 2020.

[69] It is hoped that the new rules for IPs will 'level the playing field' in the sector and help screen for fee-chasing cowboys, according to the Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ), see RITANZ website available at <https://www.ritanz.org.nz/insolvency-practitioner-licensing-to-kick-off-in-june-2020/> accessed 9 February 2020.

[70] A single regulator was considered in a previous article, see J Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour' (2019) 19(2) *Journal of Corporate Law Studies* 333-366, part 6.

consistent approach to IP performance when undertaking a particular function. To adjust the current five RPB co-ordination approach to a single regulator could reduce disparities related to monitoring and disciplinary practices. There is however a risk that a reduction in RPBs could impact market competition on price and quality and diminish the overall confidence in the professionalism and competence of IPs. It would therefore be imperative that a single regulator encourages a self-review process that actively reviews its place within the insolvency industry and remains committed to offering value for money as well as upholding public confidence.

A single RPB would represent change, but perhaps not a drastic change to the current regulatory environment. The new framework could embrace one of the existing RPB's name, such as the Insolvency Practitioner Association (which is the only RPB solely concerned with insolvency related work), but it may wish to distant itself from the old regime and adopt a name that illustrates and reflects the significance of the change. More apt names could reflect the union and function of the RPBs, such as the Association of Insolvency Professionals (AIP), or the Institute of Insolvency Practitioners (IIP), but it would have to consider the work undertaken by the RPBs which is not related to insolvency.[71] To that end, a practical decision could be taken to allow the some of the RPBs, such as the Institute of Chartered Accountants in England and Wales which has some 154,000 members in 148 to continue being involved with accountancy work, but not be concerned with insolvency related work or authorise IPs.[72]

Barriers to regulatory change are likely to concern institutional and administrative matters. Currently, there are approximately 1565 IPs in the UK,[73] which when compared to Australia which has 600-700, and New Zealand which has no more than 250,[74] it may

[71] In a previous article it was suggested that the RPBs should be merged to form one regulatory body, namely the Association of Responsible Insolvency Practitioners (ARIP), see J Wood, 'The sun is setting: is it time to legislate pre-packs?' 67 *Northern Ireland Legal Quarterly* (2016) 173–88.

[72] The profession has already seen this occur when the Solicitors Regulation Authority (SRA) ceased to authorise their members at the end of 2015.

[73] See Insolvency Service, *Regulation of Insolvency Practitioners Review of Current Regulatory Landscape,* 7, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816560/Call_for_Evidence_Final_Proofed_Versionrev.pdf> accessed 26 January 2020.

[74] See International Association of Insolvency Regulators, 'The Regulatory Regime for Insolvency Practitioners' (2018) at 20, available at <https://www.insolvencyreg.org/sites/iair/files/uploads/IAIR%20Principles%20-%20version%201.2%20for%20uploading%20to%20web.pdf> accessed 7 February 2020.

provide some justification as to why there are more RPBs in the UK. Yet, Australia prefers state regulation as opposed to self-regulation, and New Zealand while it shares similarities with the self-regulation regime in the UK, it has placed an emphasis on accreditation to bring standards to the industry and increase public confidence in the system.

In comparison to other organisations the SRA , for example, acts as the single regulator to solicitors despite having some 199,181 members.[75] On the other hand, the Bar Council, which is similar in stature to the Insolvency Service, permits the professional Inns of Court[76] to administer disciplinary tribunals to deal with more serious complaints against barristers.[77] While there are four Inns they each have separate identities that are defined by important historical, social and academic characteristics, making a convergence of the Inns much tricky than that of the RPBs. Should IPs continue to be represented by more than one RPB, the insolvency industry should look to replicate the Inns' disciplinary functions which is conducted by a joint Council that consists of members from across the Inns of Court. At a bare minimal, reform that led to a consistent approach to disciplinary action would help harmonise the monitoring and disciplinary procedures of the RPBs.

To that end, the case for a single regulator could be made if the annual review into IP regulation demonstrates that a RPB has failed to address concerns about how a case has progressed, for example the time taken, or the procedures followed by the RPB to conclude a case. Likewise, a rise in complaints received by the Complaint Gateway against IPs as seen in 2018 could be evidence to suggest a more streamlined regulatory approach by a regulator is required. While complaints have risen, evidence of persistent failure is needed, and it is questionable whether the available data could substantiate such a claim. Further, if there was one regulator there would be no longer the option to compare best practice to another RPB, nor would there be any competition in the market to drive standards.

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[75] The statistics are taken as of Oct 2019 from the SRA, available at <https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/population_solicitors/> accessed 26 January 2020. The number reflects all solicitors on the roll. Practising solicitors account for 150,349 for the same period.

[76] There are four Inns of Court, namely: Gray's Inn, Lincoln's Inn, Inner Temple and Middle Temple.

[77] The statistics from the Bar Council indicate that in 2020 there were 16,500 practicing barristers, see <https://www.barcouncil.org.uk/about-the-bar/> accessed 26 January 2020. Also, it is worth noting that the Bar Standards Board regulates barristers and can be referred complaints from the legal ombudsmen should any evidence of misconduct be identified.

Conclusion

There remains a few more years before a decision is needed as to whether a single regulator should be pursued. Should a single regulator be preferred, the industry will have to demonstrate that a serious attempt has been made at ensuring that, in substance, the regulatory mechanism is a robust and dynamic one, and that there is a transparent and coherent layer of oversight of the remaining regulator. The driver for change is to create a more efficient and effective form of regulation that will instil confidence in the system. Should the proposed change not provide any real net benefits, while also risk diminishing the market's ability to provide for a competitive regulatory system, then the case for a single regulator has not been answered.