APPOINTMENT

9.1. In the majority of corporate external administrations, including voluntary administrations, receiverships, and voluntary members' and creditors' liquidations, the insolvency practitioner is selected by the creditors, members or directors making the appointment in accordance with rules set down in the Corporations Law and the Corporations Regulations in relation to the administration concerned.

9.2. In the case of a winding up ordered by the court, the Corporations Law provides that the court may appoint an official liquidator. The Corporations Law does not regulate the procedure for selecting the practitioner and the courts of each relevant jurisdiction have developed their own rules and conventions to deal with the selection process.

9.3. The rules differ between jurisdictions, but there are essentially two types of systems: the nomination system and the rotation system. In a nomination system, the applicant, who is usually a creditor petitioning the court for a winding up order, nominates a preferred practitioner and the court will, in the ordinary course, appoint the nominated practitioner. In a rotation system, the petitioning creditor has no say in the appointment and the court selects a practitioner from a list of official liquidators by rotation. The rotation system has been criticised because of possible anti-competitive effects.[1]

9.4. This chapter focuses on the system for selecting official liquidators for court appointments. Some issues concerning the appointment of receivers and voluntary administrators are also discussed at the conclusion of the chapter.

APPOINTMENT OF OFFICIAL LIQUIDATORS BY THE COURT

9.5. The role and duties of official liquidators and their status as officers of the court is discussed in Chapter 2.

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1 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 83–87.

Features of the Current System

9.6. Under the current system:

- where an order is made for the winding up of a company by the court, the court may appoint an official liquidator to be the liquidator of the company;[2]

- the procedures by which courts select official liquidators for appointment are set out in the rules of court and by convention and vary between jurisdictions; and

- some jurisdictions employ a rotation method, others a nomination method, and some use a combination of the two.

9.7. The following table summarises the position in each of the relevant jurisdictions.

Table 9.1: Appointment Systems for Official Liquidators

Court	System of appointment	Mechanics of rotation system (if any)	Rules
Federal	Nomination system and default rotation system	List of official liquidators	Order 71, Rule 39 of the Federal Court Rules
NSW Supreme	Rotation (nomination system for provisional liquidators)	Firm is on the register, rather than individual practitioners There is a regional list[3]	Part 80, Div 4 of the Supreme Court Rules 1970 (NSW)
TAS Supreme	Nomination system and default rotation system	Court appoints liquidator nominated by creditors in same area company trades	Part X, Div 8 of the Supreme Court Rules 1965 (TAS)
SA Supreme	Nomination system	Not applicable	Part XI of the Supreme Court (Corporations) Rules 1993
QLD Supreme	Nomination system	Not applicable	Rule 63 of the Corporations (Queensland) Rules 1993

2 Subsection 472(1), Corporations Law.

3 The regional list in New South Wales was discussed in detail in Chapter 6.

Table 9.1: Appoiontment Systems for Official Liquidators continued

Court	System of appointment	Mechanics of rotation system (if any)	Rules
WA Supreme	Nomination system and default rotation system	List of official liquidators	Order 81G, Rule 75 of the Rules of the Supreme Court 1971
VIC Supreme	Rotation system	Rigidly applied selection from list of official liquidators	Rule 8.09 of the Supreme Court (Companies and Securities) Rules 1985
NT Supreme	Nomination system	Not applicable	Rule 30 and Part XI of the Supreme Court (Companies) Rules 19896 (NT)
ACT Supreme	Nomination system	Not applicable	Part 5.4, Div 8 of the Rules of the Supreme Court ACT

9.8. The two main areas of concern regarding the current system for selection of official liquidators by the court are the:

- use of a rotation system in some jurisdictions which could have anti-competitive effects;[4] and
- lack of uniformity between jurisdictions which may result in 'forum shopping'.

Why Have Court Appointments?

9.9. A threshold issue regarding appointment of liquidators by the court is whether there is a need for the court to be involved in the selection of practitioners at all. As mentioned above, the court is not involved in the appointment of practitioners in other types of administrations, although in some circumstances it can hear challenges to appointments. It would be possible to amend the Corporations Law so that, when the court orders a winding up, the practitioner to conduct the administration is appointed by, for example, the person(s) making the application, a resolution of a meeting of creditors, or by the ASC. The court would not become involved in the appointment

4 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 83–87.

unless there was a challenge to the appointment. Alternatively, the court could confirm an appointment made by the applicant.

A Matter of Principle

9.10. If the legislature were to include rules for selecting and appointing practitioners as part of the Corporations Law by persons other than the courts, there would, from one perspective, be a significant change in the fundamental principles on which court-ordered liquidations are based. A winding up which is ordered by the court has traditionally been viewed as a winding up **by the court** and the official liquidator acts as a representative of the court in conducting the administration. The Corporations Law provides for some powers of the court to be delegated to the practitioner, subject to the control of the court.[5] The official liquidator is entrusted with the reputation of the court for impartial and proper dispatch of duties.[6] Viewed in that light, it may be considered appropriate that the law provides for the court to make the appointment and it is also proper that the court should have a discretion to appoint a practitioner of its own choosing.[7] Amending the law so the appointment is made by another party would blur the distinction between court-ordered liquidations and other administrations and would require significant consequential changes to the insolvency framework set out in the Corporations Law.

9.11. On the other hand, it is arguable that having someone other than the court make the appointments would not be a significant change, either in principle or practice. Even though a court-ordered winding up is viewed as being conducted by the court, it is, like the company itself, a creature of statute. In this regard, it is arguable that the legislature has already placed a significant fetter on the court's discretion by providing that the court must select the practitioner from a list of official liquidators kept by the ASC.[8] Furthermore, the courts do not, in practice, take a pro-active role in

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5 Section 488, Corporations Law.

6 per Street J in *Duffy v Super Centre Development Corporation Ltd* (1967) 1 NSWR 382 at 383.

7 In the case of in *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) & Anor v Attalex Pty Ltd (No 2)* (1984) 2 ACLC 752, McHugh JA (at 773), when commenting on the discretion of the court to appoint a liquidator under the former Companies Code, stated that: 'It is hardly to be supposed, however, that the Legislature intended that the Court's choice was simply to approve or disapprove that official liquidator, willing to act, who is nominated by the applicant for winding up of a company. Virtually the whole history of the appointment of liquidators is against such a notion. Whatever the form of the legislation, the Court has always asserted a right to reject one nominee and appoint another.'

8 The provision concerned, section 472, Corporations Law, actually provides that 'the Court *may* appoint an official liquidator...' However, it is generally accepted that the Court must not select a person other than an official liquidator—see, for example, *Pipkin v Corporate Affairs Commission (SA)* (1987) 11 ACLR 433.

selecting a practitioner. Neither the nomination nor the rotation systems require the court to become involved in the selection process unless a party asks it to depart from the usual practice, in which case it makes a ruling based on the evidence put before it. In particular, under the nomination system, which seems to be the most common, the court appointment is effectively a 'rubber stamp' for a selection made by the petitioning party. Accordingly, enacting the 'usual practice' as law would not make a practical difference to this framework.

9.12. The Working Party tends to favour the latter view. However, it acknowledges that any proposal to replace the court's discretionary power of appointment with a power to be exercised by another party should be considered in consultation with the courts and with due regard to constitutional issues which may arise regarding the separation between judicial, executive and legislative powers. The issue of how to deal with assetless administrations also comes to the fore if there is no system of court appointment.[9] The issue also interacts substantially with the question of whether to retain the category of official liquidator.[10]

Uniformity

9.13. A key concern with the current system for appointment of insolvency practitioners is the lack of uniformity between jurisdictions. Since the courts in each jurisdiction differ in the way they select practitioners, persons making an application to have a company wound up may be influenced to make the application in one jurisdiction rather than another in order to be assured of a particular selection process. For example, a petitioning party (or their legal adviser) with an asset-rich administration who wants to have a particular practitioner appointed may choose to make the application in a jurisdiction which uses a nomination system. On the other hand, a person seeking to wind up an assetless company may be attracted to a jurisdiction which uses a rotation system if they have difficulty finding a practitioner to consent to conducting an administration without an indemnity for costs.

9.14. One of the major objectives in establishing a national corporate regulation scheme and the Corporations Law was to provide a seamless legal and administrative regime for corporate regulation across Australia. In this regard, it is generally agreed that the establishment of the national scheme, compared to the former cooperative scheme, has been successful in reducing the complexities and costs involved in doing business in Australia, particularly in relation to companies which trade across state borders, and increasing confidence in the marketplace.

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9 For further discussion on dealing with assetless administrations, see Chapter 10.

10 The abolition of the official liquidator class was recommended in Chapter 6.

9.15. In the light of those considerations, the Working Party considers that the potential for forum shopping between jurisdictions is not a desirable outcome of the lack of uniformity in the selection processes for official liquidators. On the other hand, it has not been identified as a problem which has created significant difficulties in practice.

Conclusion

9.16. Having regard to the above matters, the Working Party recommends that, in the long term, consideration be given to substantive changes to the Corporations Law framework which minimise the distinction between court-ordered and voluntary liquidations in terms of the qualifications and appointment of liquidators. The Working Party envisages that these changes would see the abolition of the category of official liquidator altogether.[11]

9.17. The Working Party also recommends that the rules relating to the selection of liquidators by the court be made part of the Corporations Law in order to establish uniformity across jurisdictions.

Selection System

9.18. In the event that the Working Party's recommendation that the category of official liquidator should be abolished is not proceeded with in the near future, consideration should be given to the question of whether official liquidators should be appointed through a nomination system or a rotation system.

9.19. The main arguments advanced in favour of using a nomination system for selection of official liquidators are that:

- selection of official liquidators by the market encourages competition for insolvency services;
- the most skilled and efficient official liquidators will be rewarded;
- the number of official liquidators required by the courts will be set by market forces; and

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11 See note 10 above.

- creditors are encouraged to seek appointment of the most able and competitive liquidators based on skill, experience, efficiency and/or costs.

9.20 The main arguments in favour of a rotation system for selecting practitioners are that it:

- prevents inappropriate relationships developing between insolvency practitioners and creditors;
- avoids entrenching liquidation work in a small number of large firms;
- ensures all official liquidators receive a reasonable amount of work thereby maintaining their experience levels;
- enables less experienced practitioners to gain more experience than they may otherwise obtain; and
- spreads the burden of assetless administrations.

Anti-Competitive Effects

9.21. The Working Party received submissions to the effect that the rotation system impedes competition and may not be in the best interests of creditors, particularly where an administration requires particular skills.

9.22. It is difficult to argue that a rotation system does not produce anti-competitive effects in relation to those administrations to which it applies, since practitioners or firms appearing on the rotation list will be appointed when their turn comes around, rather than being appointed on the basis of their own expertise, efficiency or suitability for the particular administration involved. The rotation system operates on the assumption that all practitioners who attain official liquidator status are equally capable of performing every court-ordered liquidation. However, notwithstanding the rigid entry requirements for that class, it is likely that some official liquidators are more suitable than others for particular administrations, either in terms of experience or available resources.

9.23. While the existence of anti-competitive elements connected with a rotation system may be accepted, the nature and impact of those elements is a matter of debate. One submission to the Working Party argued that the business environment for insolvency practitioners has changed markedly since the time of the Harmer and former Trade Practices Commission reports. Court-ordered liquidations are now such a small part of the work done by insolvency practitioners that the rotation system can have only a negligible impact, if any, on competition between them.

Inappropriate Relationships

9.24. One of the virtues of a rotation system for the selection of official liquidators is that it assists to ensure the independence of the practitioner. There are two concerns about inappropriate relations which may arise if a nomination system is used rather than a rotation system:

- the formation of 'clubs' comprising lawyers and liquidators who refer work to each other; and

- the independence of the insolvency practitioner from any particular party involved in the liquidation, such as a creditor.

Clubs

9.25. If a nomination system is used rather than a rotation system, relationships may develop between groups of legal practitioners, who act for creditors or other persons applying to the court, and official liquidators, whereby the legal practitioners and insolvency practitioners refer each other work. A result of these informal arrangements could be that solicitors would tend to recommend the appointment of their favoured liquidators, with little regard to the merits of the appointment. Unless an official liquidator can become a member of one of these 'clubs', they are unlikely to be nominated for appointment by those persons irrespective of their suitability. In practice, the nomination system may not necessarily result in the market rewarding those practitioners who are the most competent and efficient, but rather those who are most successful in 'cultivating' relationships with solicitors acting for petitioning parties using the prospect of cross-referrals as an incentive.

9.26. In its submission to the Working Party, the ASC noted the argument that an inappropriate relationship may develop between liquidators and solicitors who refer work to one another. However, the ASC considered that creditors seek efficient conduct of administrations and this disciplines the market for insolvency practitioners and induces persons such as solicitors, to seek competent practitioners.

9.27. The Working Party notes that the nomination system which currently operates in relation to other forms of external administration also has the potential to give rise to 'clubs' between legal practitioners and insolvency practitioners. While there may be instances of this occurring, it has not been suggested that a rotation system should be introduced for those administrations in order to prevent its occurrence. There are, in the Working Party's view, no factors peculiar to a court-ordered liquidation which justify use of a rotation system in order to prevent the formation of 'clubs'. Furthermore, this possibility has not been identified as a significant problem in those jurisdictions which use a nomination system for selection of official liquidators for court ordered liquidations.

9.28. Accordingly, the Working Party agrees with the view expressed in the report of the former Trade Practices Commission[12] that the possibility of the establishment of 'clubs' of legal practitioners and insolvency practitioners is not a sufficient reason for rejecting the nomination system for selecting official liquidators.

Independence

9.29. The second element to the issue of inappropriate relationships is a concern that, if official liquidators are nominated for appointment by a particular party, there may be a tendency for the liquidator to give undue weight to the interests and wishes of that party. Pre-appointment discussions could take place regarding the possible conduct of the administration and appointments could be made on the understanding that the liquidator will take, or refrain from taking, a particular course of action. Liquidators may tend to have a bias against acting contrary to the wishes of the appointing party, particularly if that person could be a direct or indirect source of further work.

9.30. This would be a most undesirable consequence of a nomination system because it is very important that officers of the court exercise independent judgement and do not act in the interests of any particular party but rather in the interests of creditors and shareholders as a whole. They must also have regard to their status as officers of the court.

9.31 The importance of the independence of practitioners appointed by the court has been considered by the courts on a number of occasions. Some relevant passages from judgements are as follows:

> 'The principle to be applied is clear and was indeed quoted by the learned judge from McPherson, *The Law of Company Liquidation*, 3rd ed, p 209 where it is said "The guiding principle in the appointment by the court of a liquidator is that he must be independent and must be seen to be independent". The authorities to which we were referred amply support that statement of principle and it is unnecessary to refer to them.'—Full Court of Victoria in *Re National Safety Council of Australia Victorian Division* (1989) 15 ACLR 355 at 360.
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> ...The winding up is by the Court which for the purposes the liquidator is. As such he is entrusted with the reputation of the Court for impartial and proper dispatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge.

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12 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 86.

> When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the Court.'—Marks J of the Victorian Supreme Court in *Commissioner of Corporate Affairs v Harvey* (1979) 4 ACLR 259 at 286.'

9.32. Concerns about the lack of independence of practitioners cannot be dismissed lightly. Complaints regarding improper relationships between external administrators and advisers, creditors, directors or debtors are commonly received by the ASC and the Minister responsible for Corporations Law.

9.33. However, there are mechanisms currently available for concerned parties to apply to a court to remove a nominated practitioner after appointment. In the case of official liquidators, the removal must be 'on cause shown'.[13] The courts have indicated that it will not necessarily be enough to demonstrate to the court that the majority of creditors are in favour of removal, although this would be a relevant consideration.[14] The court must be satisfied, on the evidence presented to it, that it is desirable in the interests of all those interested in the corporation's assets that a particular person should not manage them, although there is no need to show any personal misconduct on the part of the liquidator concerned.[15]

9.34. Although there are instances where liquidators have been removed by the court due to a lack of independence or perceived conflict of interest,[16] this remedy is not often practicable. Aside from the obvious difficulties involved for an interested party in preparing a case to satisfy the court that the removal is justified as well as the legal and other expenses involved in bringing an action of this nature, there are other costs which will be incurred. The incumbent practitioner has usually done a certain amount of work which would need to be reviewed by any replacement. The replacement practitioner should be remunerated for reviewing the work previously done, which adds to the overall costs to the creditors.

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13 Subsection 473(1), Corporations Law.

14 per Ryan J in *Re Giant Resources Ltd* (1991) 9 ACLC 1,418 at 1,424–1,425.

15 *Re Adam Eyton Ltd & Co* (1887) 57 LJ Ch 127; 36 Ch D 299, quoted with approval by Marks J. in *Commissioner for Corporate Affairs v Harvey* 4 ACLR 259 at 287.

16 See for example, *Re Queensland Stations Pty Ltd (in liq); Re Coutts Finance Pty Ltd; Re Coutts Townsville Pty Ltd* (1991) 9 ACLC 1,341; *In the matter of Keith Morris Pty Ltd, K.D. Morris & Sons (NSW) Pty Ltd, Kirr Investments Pty Ltd* (1975–1976), Corporations Law ¶40-206.

9.35. The rotation system goes a long way towards preventing improper relationships arising between insolvency practitioners and particular parties in relation to court-ordered liquidations. The question is whether there are any factors peculiar to these liquidations which make the independence of the practitioner more important than it is in other external administrations, so that a rotation system is justified in that context but not in the others.

9.36. Arguably there are such factors. Court-ordered liquidations occur, by definition, in a litigious environment. There will almost always be parties involved who have interests which clash with the interests of other parties and it is important that the liquidator is not aligned, or seen to be aligned, with a particular individual or interest group. There is also the status of the official liquidator as a representative of the court to consider—see the passages quoted from judgements above.[17]

9.37. On the other hand, it is arguable that there are sufficient safeguards to ensure independence apart from the rotation system. The rigorous entry standards require that persons who attain the status of official liquidator to meet the highest professional and ethical standards. If practitioners fall short of these standards in the course of any particular administration, there are mechanisms by which their conduct can be supervised including the possibility of removal by the court. There is also the prospect of disciplinary proceedings and, ultimately, the loss of official liquidator status. In those circumstances, it is arguable that there is no need for a rotation system as a further preventative measure.

Spreading of Work

9.38. A further reason advanced in support of a rotation system is that it equitably distributes the available work among practitioners. It is argued that this is in the public interest because:

- it ensures that the work does not become entrenched in a small number of large firms;
- all official liquidators will maintain their experience levels; and
- it gives less experienced practitioners an opportunity to gain experience they may not otherwise get.

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17 This argument might be considered 'begging the question'—the status of official liquidators as officers of the court also needs to be justified—see above discussion in paragraphs commencing at 9.9.

9.39. The Working Party agrees that the entrenchment of work in a small number of firms would not be a desirable outcome. However, there is no evidence that the work has actually been entrenched in a small number of firms in the jurisdictions which do not use the rotation system.

9.40. The Working Party considers that it is important that official liquidators maintain a minimum level of experience in court-ordered liquidations. However, it queries whether a rotation system is an appropriate means of achieving this. The Working Party has sympathy with the view of the former Trade Practices Commission that, in light of the already stringent experience requirements for entry, it is difficult to justify use of a rotation system to obtain additional experience.[18]

Assetless Administrations

9.41 Where an assetless company is ordered into liquidation by a court, the liquidator conducting the administration has no source of remuneration unless creditors are prepared to indemnify the practitioner for expenses incurred. It was noted in the Harmer Report[19] that creditors are unlikely to do this where there is little prospect of any recovery. Consequently, in many instances of court-ordered liquidations, the conduct of the administration actually imposes a cost, rather than a benefit, on the liquidator concerned.[20]

9.42. The final major argument in support of a rotation system is that it has the effect of spreading the burden of administrations where little or no remuneration will be received. When commenting on the rotation system operating in New South Wales, one judge noted the following:

> 'Unless a system exists for inducing official liquidators to take the unremunerative liquidations, it seems likely that, in many cases, either liquidators will not be found at all or the work will be done less thoroughly than it should...
>
> Ever since the *Companies Act, 1936*, the Court, when appointing liquidators, has had available at least two liquidators, each of whom was required to take any case allocated to him. The general public interest in the winding up of companies and the Court's duty always to appoint a liquidator point to the importance of a pool of liquidators being available

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18 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 84.

19 Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry*, (Mr R.W. Harmer, Commissioner-in-charge), AGPS, Canberra, 1988, paragraph 337.

20 Evidence given to the former Trade Practices Commission suggested that the figure was in the order of 70 per cent—see Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 68.

> to the Court beyond the nominee of the applicant for a winding up. The Report of Mr Justice Helsham's Committee demonstrates that, without such a group or the provision of external funds, there may be difficulties in obtaining liquidators for many windings up.'[21]

9.43. This argument was considered at some length in the report of the former Trade Practices Commission.[22] The Commission took the view that minimal resources needed to be dedicated to assetless administrations, so the burden on practitioners is not great in any event. Provisions in the Corporations Law limit the extent to which a liquidator is required to incur expenses in the case of assetless companies.[23] However, experienced insolvency practitioners have stressed that the cost component associated with compliance with the Corporations Law is significant in the case of an assetless company. In particular, the accounting and reporting obligations imposed on liquidators are quite extensive and must be complied with regardless of the size of the corporation's assets.

9.44. The former Trade Practices Commission also considered that there is no evidence to suggest that there are difficulties in finding a practitioner to take on assetless administrations in those jurisdictions which do not have a rotation system. The Commission thought this was because liquidators in those jurisdictions are driven by market forces to accept appointments notwithstanding that there is no prospect of remuneration. Unless they are willing to take the 'bad with the good' from persons referring work, they are unlikely to get a good flow of referrals.[24]

9.45. A further argument raised by the Commission against the use of a rotation system in order to spread the burden of assetless administrations is that it operates so that all creditors effectively pay for the administration of assetless companies in the sense that the remuneration rates of liquidators will be generally adjusted upwards to compensate for the administrations they perform without remuneration. The Commission noted that, by contrast, in Queensland, where a nomination system operates, the Australian Taxation Office directly subsidises those practitioners who undertake all of the assetless work for that office.[25] The Commission stated in its report that direct subsidies of that nature are preferable to a cross-subsidy system

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21 per McHugh J.A. in *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) & Anor v Attalex Pty Ltd (No 2)* (1984) 2 ACLC 752 at 774.

22 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 84–86.

23 Section 545, Corporations Law.

24 The Working Party does not necessarily agree with the Commission's explanation. Creditors may tend to use the Federal Court system for assetless companies to get the benefit of the rotation system. See the discussion earlier in this chapter on 'Uniformity' at paragraphs commencing at 9.13.

25 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, p. 84.

which effectively requires all creditors to share the burden, even those who never become involved with assetless companies.

9.46. Finally, the Commission stated that the rotation system does not, in practice, result in the burden of assetless administrations being shared equitably because:

- some jurisdictions allow exceptions to the rotation system on the application of the petitioning party which removes some of the better remunerated administrations from those available to practitioners on the rotation list;

- where major administrations are on offer, there is a tendency for the larger firms to attempt to persuade solicitors or creditors to appoint them as provisional liquidators pending a formal liquidation, since if they are already in place as a provisional liquidator the court may be reluctant to replace them with a liquidator from the rotation list;

- if individuals, rather than firms, are included on the list, a single firm may be appointed to a number of liquidations for which it will receive no remuneration; and

- the system takes no account of the complexity and size of the administrations involved, so equity will not necessarily be achieved.[26]

9.47. Notwithstanding differing views regarding some of the arguments advanced in the report of the former Trade Practices Commission, the Working Party agrees with the general conclusion reached that the benefits of spreading the burden of assetless administrations do not provide a great deal of support for the imposition of a rotation system. Although the burden of assetless administrations is undoubtedly a problem, the rotation system is an imperfect method of addressing it.[27]

Preferred Option

9.48. The Working Party received a number of submissions which commented on the issue of the preferred system for selecting official liquidators for court-ordered liquidations. With one exception in support of the rotation system, submissions favoured a system which included elements of the nomination system and the rotation system. Under the option which received most support, practitioners would be selected in the first instance by nomination of the petitioning party with the consent of the practitioner concerned. However, if, in any particular case:

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26 Trade Practices Commission, *Study of the Professions, Final report—July 1992, Accountancy*, pp. 84–87.

27 See further discussion regarding the treatment of assetless administrations in Chapter 10.

- no nomination is received due to lack of assets or otherwise; or
- the independence of the liquidator is questioned,

a practitioner would be selected from a rotation list which operates as a 'default' system.

9.49. The Working Party supports this suggestion in principle because it eliminates the anti-competitive elements in a strict rotation system but still allows the rotation system to operate in the situations where it is most needed. There are, however, some issues in relation to the mechanics of such a combination system which deserve some attention.

Consent

9.50. In one submission to the Working Party, the view was put that a consent should always be obtained from a liquidator before a nomination is made. It was reported that, in some jurisdictions, nominations are being made in reliance on the general consent which official liquidators give to the ASC as part of their application without the knowledge of the liquidator concerned.[28]

9.51. The Working Party agrees that when a petitioning creditor wishes to nominate a particular practitioner to perform an administration, they should be required to approach and obtain the consent of the practitioner in advance of making the nomination.

9.52. However, in relation to selecting practitioners off the rotation list, the system would be undermined if practitioners were entitled to reject administrations they did not wish to accept. The Working Party considers that the general consent should be adequate to select practitioners from the backup rotation list—no further consent should be required for that purpose.

Challenges to Independence

9.53. The system envisaged would operate to protect the independence of practitioners because where the independence of a nominated practitioner was in doubt, a practitioner would be appointed from the rotation list instead.

9.54. Although this idea sounds straight-forward in theory, in practice there could be some questions in relation to its application. As mentioned above, the mechanisms

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28 In 1938 in New South Wales a practice note was released by Long Innes CJ (in Equity) to the effect that it was unnecessary to obtain the consent of an official liquidator prior to appointment—(1938) 55 WN 112.

currently in place for replacement of practitioners in relation to other types of administrations have been criticised. They are not always feasible due to the costs involved in making an application to the court and the difficulties in obtaining evidence that would be sufficient to persuade a court to make the relevant orders. Ideally, the system for safeguarding the independence of official liquidators under a combination of the nomination/rotation method would not suffer from those drawbacks.

9.55 The Working Party considers that, as a starting point, the mechanism for challenging the independence of a practitioner and securing a replacement from the rotation list should be framed around the following ideals:

- it should take place as early as possible in the proceedings so that the duplication of practitioners' work is minimised, however, a later replacement should not be precluded altogether;

- the need for safeguards to prevent parties making unjustified allegations of bias or improper relationships, which can cause delay and increase the costs of the administration, must be balanced against the need to ensure that the procedure for challenging independence does not place demands on persons making a challenge, in terms of costs and procedural burden, so great as to make the procedure impractical; and

- it should recognise the court's position in relation to official liquidators.

The Power of the Court

9.56. A further issue is the power of the court if a nomination system is introduced, particularly if such a system is enshrined in legislation. Although, in practice, the court rarely takes any active involvement in the selection process, on at least one occasion, the court has expressed the view that it has, and always had, a right to do so, and that this is appropriate given the status of an official liquidator as an officer of the court.[29]

9.57. Whether it is necessary for the court to retain the discretion to select its own nominee was previously discussed in this chapter.[30] However, a secondary issue is whether the court should have a power of veto which it could use to 'strike out' a nominee of which it did not approve and ask the relevant party to make a substitute nomination.

9.58. The Working Party considers that a veto power is appropriate, but the right to select a substitute practitioner of its own motion is not necessary and selection should

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29 See further note 7.

30 See paragraph 9.10.

be the responsibility of the nominating party. As indicated above, the power of the court is in the nature of a motion of confirmation of a nomination. In circumstances where a further nomination is not forthcoming for some reason, the court could select a practitioner using the backup rotation list.

Should Entry on the Rotation List be Compulsory?

9.59. At present, the ASC requires all applicants for official liquidator status to give an undertaking that that they will accept any appointment made by a specified court and/or district of a Federal Court. The status of official liquidator, therefore, comes with a price. The practitioner must agree to take on any court appointment, even if it is unremunerative.

9.60. In the past, practitioners have been willing to take on the role of an official liquidator and have their names placed on a rotation list, notwithstanding the burden it places on them in terms of conducting assetless administrations. The status of the office gave them access not only to court-ordered liquidations, but also administrations that, although they could legally be conducted by a registered liquidator, tended to be given to official liquidators because creditors perceived official liquidators as providing a higher quality service than registered liquidators.

9.61. If official liquidators could choose not to be entered on the backup rotation list, they would not share in the burden of conducting assetless administrations, but would still get most of the benefits of being an official liquidator. A likely outcome of such an arrangement would be that many official liquidators would choose not to be on the backup rotation list, leaving only a handful of practitioners to share the burden of assetless administrations. This would, in turn, make being on the rotation list even less attractive, since the assetless administrations accessed through the list are likely to outnumber the remunerative ones by a considerable margin.

9.62. The Working Party considers that if a backup rotation list system is to be workable, all official liquidators should be required to participate in the system. In the event that a system of funding assetless administrations is developed, such as by way of a centralised fund, this issue could be reconsidered since there would then be a positive incentive to be on the list.[31]

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31 The Working Party discusses this proposal in detail in Chapter 10.

Conclusion

9.63. The Working Party recommends that:

I. the system of appointment of corporate insolvency practitioners by the court should be based on nomination by the petitioning creditor with a 'back up' rotation system if the nomination is not, or cannot, be made successfully;

II. the court should be given power to reject a nomination on its own motion or on the application of an interested party; and

III. entry on the backup rotation system should be compulsory for all official liquidators pending abolition of that class and/or establishment of a funding mechanism for assetless administrations.

OTHER APPOINTMENT ISSUES

9.64. Complaints that insolvency practitioners are not suitably independent from other parties such as directors and creditors are not limited to liquidations. Concerns of this nature also arise in relation to voluntary administrations and sometimes in connection with receiverships. Challenges to appointments in those circumstances are currently possible, but rarely used because of the expense involved with taking the matter to court.

9.65. The issue of appointment of administrators in voluntary administrations is currently being considered by the Legal Committee of the Companies and Securities Advisory Committee in its review of the voluntary administration scheme.[32] The Working Party notes that it would be desirable to make procedures for replacement of practitioners who are not seen to have the required level of independence as accessible as possible.

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32 See further Legal Committee, Companies and Securities Advisory Committee, *Voluntary Insolvency Administration—Discussion Paper*, January 1997.