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Remunerating Corporate Insolvency Practitioners in the United Kingdom, Australia, and Singapore: The Roles of Courts

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Abstract
Insolvency practitioner remuneration is a vexed topic globally and the role of courts in fixing and reviewing remuneration is controversial. This article compares the approaches adopted by the courts in the United Kingdom, Australia and Singapore to the issue of fixing and reviewing corporate insolvency practitioners' remuneration. The analysis considers the factors that the courts in the three jurisdictions consider in deciding remuneration claims including reasonableness, proportionality and the need for insolvency practitioners to justify their claims. Measures taken in each of the jurisdictions to facilitate predictability in time-based remuneration, whether through legislation, professional codes or judicial development, are examined. Various initiatives towards greater participation of external experts in deciding remuneration claims are also considered. The analysis finds that the three jurisdictions share some similarities despite jurisdictional differences but also differ in some important aspects. The article argues that courts have taken the initiative in each jurisdiction to fill a perceived regulatory gap where legislation provides little or ambiguous guidance, or where the judiciary believes that legislation and regulation have not kept up with community expectations. The results also highlight the cross-pollination of ideas in these jurisdictions.

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Insolvency practitioner remuneration is a vexed topic globally, and the role of courts in fixing and reviewing remuneration is controversial. Traditionally, courts have been at the forefront of resolving formal disputes about insolvency practitioner remuneration, but they are no longer perceived, perhaps even by themselves, as being the best place to resolve remuneration disputes.[1] This article analyzes the roles that courts in the United Kingdom (UK), Australia and Singapore have played in developing the law relating to fixing and reviewing remuneration of corporate insolvency practitioners, including preferences for using methods other than time-based charging. Time-based charging refers to the method of calculating remuneration based on hourly (typically) charge-out rates for practitioners who apply those rates to the time spent working on a matter.[2] The legislative structures relating to insolvency practitioner remuneration in the three jurisdictions share some similarities but also differ in some important aspects, including the level of detail and guidance provided by legislation.

The article argues that courts have taken the initiative in each jurisdiction to fill a perceived regulatory gap where legislation provides little or ambiguous guidance, or where the judiciary believes that legislation and regulation have not kept up with community expectations. Judges in these jurisdictions have made significant contributions to the development of the law, but there are limits to judge-made law from a policy-making perspective. The results from this judicial intervention show some interesting similarities despite jurisdictional differences, and highlight the cross-pollination of ideas in these jurisdictions. In the UK and Australia, professional bodies have also promulgated codes of practice on remuneration in varying detail. This article also finds that there has been consideration of greater involvement of external experts in fixing and reviewing remuneration in each jurisdiction, with varying degrees of implementation.

Comparing approaches in the UK, Australia and Singapore is useful given their shared yet divergent insolvency law history. Stakeholders including government reformers, academics and industry bodies in each jurisdiction regularly refer to developments in one or the other jurisdictions as evidence for and against various reforms. A comparison between the UK and Australia is also justified due to the similarity between the profiles of the corporate insolvency markets in those jurisdictions.[3] Including Singapore in the tripartite comparison in this article highlights the common global concern about the level and method of fee charging by insolvency practitioners and seeks to avoid the pitfalls of bilateral comparisons which

1. Brown and Symes describe fixing and reviewing remuneration as a 'quasi-administrative exercise': David Brown and Christopher Symes, 'Submission to Senate Inquiry into Liquidators and Administrators' (Submission No. 40, Parliament of Australia 2009), 6–7 <http://www.aph.gov.au/Parliamentary_Committees/Committees/Senate/Economics/Completed_inquiries/2008-10/liquidators_09/submissions> accessed 31 August 2017.

2. It is common in all three jurisdictions for practitioners to apply a discount to the fees charged either at the hourly-rate level or to the overall remuneration amount. This calculation method is used in industries as diverse as plumbing and legal and accounting services, as well as insolvency practitioners.

3. Dickfos argues, for example, that both Australian and English corporate insolvency markets may be divided into secured and unsecured markets: Jennifer Dickfos, 'The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration' (2016) 25 International Insolvency Review 56, 66.

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may focus too heavily on differences or similarities between two jurisdictions. The article focuses on remuneration of corporate insolvency practitioners in external administrations. Remuneration of insolvency practitioners in personal bankruptcy proceedings and fees paid prior to commencement of a formal external administration are outside the scope of this article, but these topics also deserve further attention.

After this introduction, Part II sets out the UK's sources of court authority to fix and review practitioner remuneration, and the manner in which courts have sought to deal with remuneration, including in light of the Practice Direction – Insolvency Proceedings (which will be referred to as the Practice Statement, in accordance with the usual practice).[4] In Part III, the article examines the Australian position in detail. Some Australian commentators argue that concern about insolvency practitioner remuneration is due, at least to some extent, to a lack of understanding on the part of creditors about the proper role of insolvency practitioners.[5] Australia is moving towards greater participation by external experts in fixing and reviewing remuneration by introducing the use of registered liquidator reviewers. In Part IV, the article shows how Singapore courts have taken notice of experience in other Commonwealth jurisdictions to develop the common law in three seminal cases. Intervention by the Singapore courts involved the introduction of costs scheduling in *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn*,[6] which is a significant step in developing the law as it relates to fixing and reviewing insolvency practitioner remuneration in Singapore. Part V compares these developments and concludes that there are common trends in these three jurisdictions, despite different insolvency law frameworks. A key focus is lowering fees for the benefit of unsecured creditors, but without a clear strategy for providing for the other benefits that an appropriately remunerated and competent insolvency practitioner profession brings to the community.[7]

I. UNITED KINGDOM

A. *Source of Courts' Authority to Fix and Review Remuneration in the UK*

Courts in the UK may fix or review corporate insolvency practitioner remuneration in liquidations, administrations and receiverships. The rules for the fixing of remuneration for administrators and the basis of the remuneration are largely similar to those applicable to liquidators.[8] Accordingly, the discussion in this section focuses on liquidators and gives

4. The Practice Direction – Insolvency Proceedings came into force on 29 July 2014 and replaced all previous Practice Directions, Practice Statements and Practice Notes relating to insolvency proceedings.
5. See eg Dickfos (n 3) 61.
6. [2015] SGHC 260, [2016] 1 SLR 21.
7. Elaine Kempson, 'Review of Insolvency Practitioner Fees: Report to the Insolvency Service' (Insolvency Service July 2013) ('Kempson Report').
8. A key difference between the rules determining the remuneration of liquidators and administrators arises, however, where a liquidation committee or creditors' committee, as applicable, does not exist, or the applicable committee fails to fix remuneration. Unsecured creditors may vote in relation to a liquidator's remuneration in such circumstances, but they do not vote in the same situation in administration where only the secured creditors, or the secured creditors and preferential creditors, fix the remuneration if the unsecured creditors are out of the money. Insolvency Rules 2016, r 18.18(4) (where there would be

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the equivalent provisions relating to administrators in the footnotes. Receiver remuneration is usually determined by agreement between the receiver and the holder of the charge, but Section 36 of the *Insolvency Act 1986* also allows the court to fix the remuneration of receivers on the application of the liquidator.

In a liquidation, where the basis of remuneration is not fixed by a liquidation committee or by the creditors within eighteen months after the date of the liquidator's appointment,[9] it will be determined either by reference to scale fees,[10] or the liquidator may apply to court to fix the remuneration.[11] If the liquidator considers the rate or amount of remuneration fixed to be insufficient or the basis fixed to be inappropriate, the liquidator may apply to the court for an order changing the basis of the remuneration or increasing the amount or rate.[12] Any secured creditor, or any unsecured creditor with either the concurrence of at least 10 per cent in value of the creditors (including that creditor) or the permission of the court, may apply to the court for relief[13] on the ground that the remuneration charged, the basis for the remuneration, or expenses incurred, is or are excessive or inappropriate.[14]

There are three bases that may be used to fix the remuneration of a liquidator (or administrator), and they may be used in combination:[15] a percentage of the value of the assets realized or distributed, the time properly spent in attending to the matters arising from the winding up, or a set amount. This position was reached in two stages of development. Under earlier law and practice, time spent was not stated expressly as a basis for charging, and courts viewed it with suspicion.[16] Time-based charging was first stated expressly as a basis for charging when the *Insolvency Rules 1986*

insufficient funds for distribution to unsecured creditors other than out of the prescribed part under s 176A(2)(a) of the Insolvency Act 1986). The different treatment highlights debates about whether only creditors in the money should have a vote in relation to remuneration given that they have an economic interest.

9. In the UK, where the liquidator is not the Official Receiver, the basis of remuneration is to be determined by the liquidation committee in the first instance. See Insolvency Rules 2016, r 18.1(2) read with r 18.20 (2), r 18.22 (Insolvency Rules 1986, r 4.127(3C)). If there is no liquidation committee or the committee does not make the determination, the basis of remuneration may be fixed by a decision of the creditors: Insolvency Rules 2016, r 18.20(3) (Insolvency Rules 1986, r 4.127(5)). The equivalents for administrator are to be found in Insolvency Rules 2016, r 18.1(2) read with r 18.18(2), (3) (Insolvency Rules 1986, rr 2.106(3C) and 2.106(5)) (note that, as pointed out earlier, where the unsecured creditors are out of the money, the decision would be made by the secured creditors or the secured creditors and preferential creditors).

10. This applies to a winding up by the court and the scales are the realization scale and distribution scale set out in sch 11 of the Insolvency Rules 2016 (sch 6 of the Insolvency Rules 1986, rr 4.127(6) and r 4.127A).

11. This applies to a creditors' voluntary winding up and administration: Insolvency Rules 2016, r 18.23 (Insolvency Rules 1986, r 4.127(7), r 2.106(6)).

12. Insolvency Rules 2016, r 18.24 read with r 18.28(1), (3) (Insolvency Rules 1986, r 4.130(1)). For administrators, see Insolvency Rules 2016, r 18.24 read with r 18.28(1), (2) (Insolvency Rules 1986, r 2.108).

13. Insolvency Rules 2016, r 18.34(2) (Insolvency Rules 1986, r 4.131(1) (liquidator), r 2.109(1) (administrator)).

14. Insolvency Rules 2016, r 18.34(1) (Insolvency Rules 1986, r 4.131(1A) (liquidator), r 2.109(1A) (administrator)).

15. Insolvency Rules 2016, r 18.16(2), (3) (Insolvency Rules 1986, rr 4.127(2), 4.127(3A) (liquidator), rr 2.106, 2.106(3A) (administrator)).

16. *Re Carton Ltd* (1923) 39 TLR 194, 197. See the discussion in *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 BCLC 379 [8].

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(IR 1986) came into force,[17] which implemented the recommendations of the Cork Committee,[18] and since then has become the predominant method of charging in the UK.[19] Subsequently, the *Insolvency (Amendment) Rules 2010* provided more flexibility by expressly allowing the use of any one or more of the three bases of computation: time-costs, fixed fees and percentage basis.[20] The IR 1986 have been replaced by the *Insolvency Rules 2016* (IR 2016), which came into force on 6 April 2017. References in this article are provided to both the IR 1986 and the IR 2016. The liquidation committee or creditors should take into account the following matters when determining which basis or bases of remuneration to approve: complexity (or otherwise) of the case; any responsibility of an exceptional kind that fell on the liquidator; the effectiveness with which the liquidator appears to be carrying out or to have carried out his or her duties; and the value and nature of the assets with which the liquidator has to deal.[21]

Pursuant to reforms in 2015, where the liquidator proposes to use time-based charging, the liquidator is required, before the fixing of the basis or bases of remuneration, to give to the creditors of the company a fee estimate and details of the expenses the liquidator considers will be, or are likely to be, incurred.[22] A fee estimate contains details such as the work proposed to be undertaken, the charge-out rates the insolvency practitioner proposes to charge for each part of that work, the anticipated time for the work, whether the insolvency practitioner anticipates it will be necessary to seek approval for charging beyond the fee estimate, and the reasons it will be necessary to seek such approval.[23] Fee estimates are important because the liquidator is not entitled to claim remuneration beyond that set out in the fee estimate without approval by the entity that had previously fixed the basis of the liquidator's remuneration.[24]

Where an application is made to the courts for fixing or approval of an insolvency practitioner's remuneration, the Practice Statement sets out guiding principles to be considered by the courts.[25] The principles state that the remuneration should 'reflect the value of the service rendered' and 'represent fair and reasonable remuneration for the work properly undertaken'.[26] The principles emphasize the

17. Insolvency Rules 1986, r 4.127(2)(b) (liquidator), r 2.47(2)(b) (as they were then).

18. Department of Trade, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982) para 895. The Committee is also known as the 'Cork Committee'.

19. Kempson Report (n 7) 10.

20. Insolvency (Amendment) Rules 2010, Sch 1, para 217 (liquidator), para 90 (administrator).

21. IR 2016, r 18.16(9), which applies to both liquidator and administrator. For IR 1986, see r 4.127(4), r 4.127(5) (liquidator) and r 2.106(4) (administrator).

22. IR 2016, r 18.16 (4), which applies to both liquidator and administrator. For IR 1986, see r 4.127(2A) (liquidator), r 2.106(2A) (administrator).

23. IR 2016, r 1.2 (IR 1986, r 13.13(18A)).

24. IR 2016, r 18.30(1), which applies to both liquidator and administrator (IR 1986, r 4.131AB(1) (liquidator), r 2.109AB(1) (administrator)). This may be the liquidation or creditors committee, creditors or the court; IR 2016, r 18.30 (2), which applies to both liquidator and administrator (IR 1986, r 4.131AB(2) (liquidator), r 2.109AB(2) (administrator)).

25. Practice Statement [21.2.3]. We are grateful to Ms Vivien Chen, Lecturer, Department of Business Law and Taxation, Monash University and former Research Assistant, Melbourne Law School, for the summary of the Practice Statement set out in this paragraph.

26. ibid.

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need for proportionality, stating that remuneration should be proportionate to the nature, complexity and extent of the work; the value and nature of the assets and liabilities dealt with; the nature and extent of responsibility and risk assumed; and the efficiency with which the work has been completed.[27] The courts may also have regard to statements of practice issued by relevant professional bodies. The guiding principles emphasize the need for the insolvency practitioner to justify the claim, stating that any doubt as to the reasonableness of remuneration should be resolved by the court against the insolvency practitioner.[28] Where the matter is sufficiently complex, the Practice Statement provides that the court may direct an assessor or a Costs Judge to prepare a report in respect of the remuneration, or direct that the matter be heard by a Registrar or a Judge sitting with an assessor or Costs Judge.[29]

B. *UK Developments: Mirror Group Newspapers, Practice Statement and 2015 Legislative Reforms*

The rapid development of the profession of insolvency practitioners after the *Insolvency Act 1986* came into force and a spate of high profile bankruptcies and insolvencies in the 1990s involving high levels of fees led to public disquiet about corporate insolvency practitioner remuneration in the UK.[30] The seminal case of *Mirror Group Newspapers plc v Maxwell (No 2)* brought the issue of how to approach time-based charging into sharp focus.[31] The court-appointed receivers sought the court's approval of their time-based remuneration of around £0.78m and a total bill of over £1.628m when the assets realized amounted to £1.672m. Ferris J took judicial notice of the general perception that costs in insolvency cases had reached an unacceptably high level and that there was little by way of controls or effective supervision.[32] But faced with the twin problems of inadequate legislation[33] and the lack of judicial experience on how to fix the remuneration of court-appointed receivers, Ferris J examined the issue of remuneration of insolvency practitioners generally by having recourse to general principles from which 'a much firmer picture emerges'.[34] Since then, this approach of developing general principles across different insolvency proceedings to supplement legislation has been adopted in the UK.

According to Ferris J in *Mirror Group Newspapers*, the essential point is that 'office holders are fiduciaries charged with the duty of protecting, getting in, realising and

27. ibid.

28. ibid [21.2.3(2)].

29. ibid [21.3.2]. A Costs Judge is a judicial officer appointed to assess the costs and expenses incurred in civil litigation in order to decide, for example, how much a successful party in litigation can recover from their opponent.

30. See for example the hard-hitting speech of Lightman J to the Insolvency Lawyer's Association in November 1995, which was subsequently published as Gavin Lightman, 'The Challenges Ahead: Address to the Insolvency Lawyers' Association' [1996] Journal of Business Law 113.

31. *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638.

32. ibid 647.

33. Ferris J thought that the rules on control were 'somewhat sketchy, ill-expressed and consequently liable to be misunderstood': ibid 648.

34. ibid 647.

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ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another'.[35] Based on this line of reasoning, it is for an office holder to justify the expenditure incurred and any claim for remuneration. This fiduciary principle serves two important purposes. First, it places the burden of justifying the remuneration sought on the office holders. This concept was later incorporated as a guiding principle (the 'justification' principle) in the Practice Statement. The fiduciary principle also led to another guiding principle ('the benefit of the doubt' principle), which is that where there is doubt as to the appropriateness or reasonableness of the remuneration sought, such doubt should be resolved against the office holder. Secondly, the fiduciary principle legitimizes the protective stance towards the interests of the unsecured creditors that Ferris J adopted when he laid down the guiding principles on remuneration. The IR 2016 gives the courts jurisdiction to fix the fees of office holders, but the Rules offer little guidance on how judicial discretion should be exercised. The factors that creditors or courts should take into account when fixing remuneration, referred to above, tell us nothing of the approach that should be adopted. Should, for example, the fixing of the remuneration of an office holder be treated no differently from that of any service provider; is it simply a bargain between the relevant creditors and the office holder, and they should be left to protect their own interests? The fiduciary principle enabled Ferris J to propound a set of subsidiary principles that lean towards protecting unsecured creditors by subjecting the remuneration sought by office holders to a closer and more intense scrutiny than what would ordinarily apply in a willing seller, willing buyer arms-length transaction.[36]

The most important subsidiary principle that Ferris J laid down in the *Mirror Group* case is that the aim of the court in fixing or reviewing remuneration is to reward the value of the services rendered by the office holder.[37] He drew a distinction between the time spent on a piece of work, and the value of the services rendered in doing the work. Time spent represents a measure not of the value of the service rendered but of the cost of rendering it. According to Ferris J's approach, 'remuneration should be fixed so as to reward value, not so as to indemnify against cost'.[38]

While Ferris J was hearing applications relating to the Maxwell estate, the de facto head of the Chancery Division of the High Court (on which Ferris J served) Vice Chancellor Scott (later Lord Scott of Foscote) took an important step to develop the law on insolvency practitioner remuneration. He appointed Ferris J to chair a working party to consider that whole subject. The members of the working party consisted of senior officials from the Insolvency Service, senior practitioners, and a senior bankruptcy registrar.[39] Notably, there was no representation of any creditor group on

35. ibid 648.

36. Ferris J's approach is consistent with Equity's traditional role in the supervision of what Finn has termed the fiduciary office holder. This refers to a class comprising of persons who, having assumed positions which require them to act for the benefit of others, draw their powers and duties not from agreements with those others but from some independent source, for example, a statute, a will, or a court order. Finn also discusses Equity's imposition of a general obligation on the fiduciary to act bona fide in what he alone considers to be in the interests of his beneficiaries. See Paul Finn, *Fiduciary Obligations* (Law Book Co 1977), [11].

37. [1998] 1 BCLC 638, 652.

38. ibid.

39. Francis Ferris, 'Insolvency Remuneration – Translating Adjectives into Action' (1999) 2 Insolvency Lawyer 48, 56.

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the working party. This omission is part of a larger problem of limited unsecured creditor engagement in insolvency proceedings.[40] The discussions of the working party would have informed Ferris J when he wrote the judgment in the *Mirror Group* case. Therefore, although the judgment in the *Mirror Group* case was formally the product of a judicial process, the UK Government and the professions had a voice in the process leading to the judgment. Accordingly, the *Mirror Group* judgment and the Ferris Report were fundamental to the development of the English common law on the remuneration of office holders. Some principles from the Report have been approved judicially,[41] and it influenced the development of the Practice Statement. The Practice Statement was drafted by a sub-committee of the Bankruptcy and Companies Court Users' Committee, previously known as the Insolvency Court Users' Committee,[42] which included senior officials from the Insolvency Service and representatives of the relevant professions.[43] Although the Practice Statement 'of itself cannot make law on substantive issues',[44] it 'acquires authority as a statement of guiding principles if it is expressly approved and applied as such in judgments at an appropriate level'.[45] Since the Practice Statement has been so approved and applied,[46] 'the stage has been reached'[47] that it is to be applied unless the party objecting to its application shows that it would be wrong in principle to apply it.[48]

Ferris J also experimented with using cost assessors in 2002 with great acclaim for the efficiencies that he achieved by incorporating external expertise into his judgment on fees.[49] The idea was referred to as 'imaginative' at the time.[50] It is not clear to what extent

40. On the issue of creditor involvement, see Dickfos, 'The Costs and Benefits' (n 3) 66.

41. *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 BCLC 379 [22]–[23].

42. This Committee should not be confused with the Insolvency Rules Committee which was established under Insolvency Act 1976, s 10 and continued under Insolvency Rules 1986, s 413(1). See Stephen Baister, 'Remuneration, the Insolvency Practitioner and the Courts' (2006) 22 Insolvency Law & Practice 50 for further details of the workings of the Practice Statement.

43. On the composition of the Committee which drafted the first version of the Practice Statement, see *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 BCLC 379 [32]. The Committee currently comprises members of the Bar, the Law Society, the Insolvency Service and the Association of Business Recovery Professionals; Insolvency Service, *Technical Manual* (revised July 2015) [19.116] <www.insolvencydirect.bis.gov.uk/tehnicalmanual/Ch13-24/Chapter19/part10/part_10.htm> accessed 13 October 2016.

44. *Brook v Reed* [2011] EWCA Civ 331, [2012] BCLC 379 [44] (David Richards J).

45. ibid [45].

46. Eg, *Simion v Brown* [2007] EWHC 511 (Ch), [2007] BPIR 412; *Hunt v Yearwood-Grazette* [2009] EWHC 2112 (Ch), [2009] BPIR 810; *Korda, Re Clynton Court Pty Ltd* [2005] FCA 543; *Flynn v McCallum, Re Roslea Path Ltd* [2009] NZHC 2318. More recently, it has also been approved in *Kao Chai-Chau Linda* (n 6) [27].

47. *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 BCLC 379 [48].

48. ibid.

49. See the decisions of Ferris J in *Re Independent Insurance Co Ltd* [2002] EWHC 1577 (Ch), [2002] 2 BCLC 709 and *Re Independent Insurance Co Ltd (No 2)* [2003] EWHC 51 (Ch), [2003] 1 BCLC 640. One commentator described the appointment as a 'progressive step forward' which has 'ensured that the true beneficiaries of an insolvent estate, the creditors, will have a reliable independent quantification of the office holder remuneration'. See Michael Mulligan and John Tribe, 'The Remuneration of Office Holders in Corporate Insolvency – Liquidators, Administrators and Administrative Receivers: Part 1' (2003) 3 Insolvency Lawyer 101, 104. Others were more guarded. See for eg, Gabriel Moss, 'Independent Assessor Helps to Set "Independent" Fees' (2003) 16 Insolvency Intelligence 61.

50. Gordon Stewart, 'Provisional Liquidators' Fees: Independent Assessor' *Recovery* (London, The Association of Business Recovery Professionals, Summer 2003), 7. See also Mulligan and Tribe (n 49) 104.

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cost assessors are currently being used to assist English judges to decide remuneration disputes. A commentary from the time suggests that even Ferris J did not consider that a cost assessor would be appropriate in every case due to the cost involved, and the judge did not adopt all of the assessor's report.[51] Ferris J held, in a preliminary hearing, that it was for the court, not any body of creditors, to fix the remuneration of provisional liquidators. However, as the court by itself is ill-equipped to perform this task without assistance, he invoked the power under Section 70 of the *Supreme Court Act 1981* (now *Senior Courts Act 1981*)[52] to appoint an assessor to assist the court, which he believed had never been done before.[53] The assessor submitted a report setting out the general principles then accepted by the insolvency profession as the basis for claiming insolvency remuneration. The report was sent to the provisional liquidator's solicitors with an invitation to submit comments. The assessor also sat with Ferris J at the remuneration hearing. Ferris J concluded that the appointment was 'an unqualified success'[54] and that the report was 'a valuable contribution to the debate concerning the approach which should be adopted to office holders' remuneration'[55] and attached it to his judgment in summary form.

These developments show an English judiciary active in developing common law principles to supplement legislative provisions and introducing external expert participation in fixing and reviewing insolvency practitioner remuneration in the 1990s and 2000s. The UK Government was involved through its participation in drafting the Ferris Report and the Practice Statement, but other than that, during this time it did not take active steps to reform the applicable legislation. The judge-made law provides some guidance on the regulation of time-based charging but difficulties remain. First, while the principles were helpful in focusing attention on the main criteria to apply when fixing remuneration, they lacked precision, and arguably leaned too heavily in favour of unsecured creditors at the expense of insolvency practitioners.[56]

Second, while it is relatively easy to state the guiding principles, the application of the criteria to the facts of any particular case remains difficult. As David Richards J explained in *Simion v Brown*:

> The task for the court was to arrive at a level or remuneration which balanced the various criteria of the value of the service rendered, the proportionality of the remuneration and a fair and reasonable remuneration for the work properly undertaken, as those criteria were explained in the Practice Statement. The result had to resolve the conflict which might in a particular case exist between those criteria.[57]

51. Stewart, ibid.
52. Where the court appoints an assessor under s 70 of the Senior Courts Act 1981, Civil Procedure Rules, r 35.15 sets out the role of the assessor and provisions for remuneration. The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings: Civil Procedure Rules, r 35.15(5).
53. *Re Independent Insurance Co Ltd (No 2)* [2003] EWHC 51 (Ch), [2003] 1 BCLC 640 [8].
54. ibid [9].
55. ibid [11].
56. See eg criticisms by Gabriel Moss QC in the Bernard Phillips Memorial Lecture 2005, which was reported in Insolvency Practitioner (Spring 2005) 1.
57. [2007] EWHC 511 (Ch), [2007] BPIR 412 [27].

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The case of *Re Cabletel Installations Ltd* also highlights the practical difficulties encountered by courts in fixing remuneration.[58] The case concerned the fixing of the remuneration of administrators in a failed administration. The matter took six days, witnesses were cross-examined and voluminous evidence was presented, but the court still faced uncertainty in determining the proper remuneration to award. After going through the work streams where he disallowed or reduced some of the sums claimed, Registrar Baister looked at the larger picture and considered the case in terms of value.[59] He also used this second stage to take into account some of his earlier concerns for which he could not reach clear conclusions. Thus, in the totality of his findings, he imposed a discount of 20 per cent on the overall figure otherwise allowed. No reasons were given for choosing that figure, or indeed the figures by which the sums claimed in the first stage were reduced. In this regard, Registrar Baister acknowledged that '[q]uestions of costs can never be wholly objective'[60] and that consideration of the criteria on fixing costs 'can be objective up to a point, but there is necessarily an element of impression that cannot be wholly disregarded'.[61] Gabriel Moss QC pointed out that these comments 'emphasise the lack of predictability in the fee approval process'.[62]

Third, English judges have sought to regulate fees by developing principles to govern how disputes over fees should be resolved in court. They have not sought to 'address the problem *at source*: ie, to lay down guidelines at the start rather than deal with the problem after the fact'.[63] Recent law reforms, however, have sought to address this issue.

The recent law reforms owe their genesis to the 2010 report of the then Office of Fair Trading (OFT).[64] The report concluded that there was a market failure where the insolvency practitioner's remuneration was fixed in matters involving unsecured creditors. Although the basis for the report was challenged by the insolvency profession, the subsequent Kempson Report commissioned by the UK Government largely supported the conclusions of the OFT report.[65] It devoted greater attention than the OFT report to the problems of time-based remuneration and offered more suggestions for reform. The most important recommendation was based on the Insolvency Practitioners Association of Australia's Code of Professional Practice.[66] The Kempson Report proposed following the approach in the abovementioned Code

58. [2005] BPIR 28.
59. ibid [20], [71] et seq.
60. ibid [89].
61. ibid.
62. Gabriel Moss QC, 'Holding Hands Penalised in Fees' (2005) 18 Insolvency Intelligence 61, 61.
63. *Kao Chai-Chau Linda* (n 6) [5].
64. Office of Fair Trading, 'The Market for Corporate Insolvency Practitioners' (Office of Fair Trading June 2010).
65. Kempson Report (n 7) 33. For challenges to the Kempson Report, see eg, Association of Business Recovery Professionals, 'Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners: Response to a BIS consultation: R3, The Insolvency Trade Body' (Association of Business Recovery Professionals March 2014).
66. Kempson Report (n 7) [6.1.2]. Insolvency Practitioners Association of Australia is now known as the Australian Restructuring Insolvency and Turnaround Association (ARITA) and its development of professional codes is discussed further below.

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by requiring an office holder who proposes charging remuneration on a time-cost basis to agree with the creditors on an estimate of fees which serves as a fee cap at the outset of the case, and that creditor approval is required if the practitioner seeks additional fees.[67] This proposal was eventually adopted in the *Insolvency (Amendment) Rules 2015*, after the insolvency profession objected strongly to the UK Government proposal in the consultation exercise[68] to limit the use of time-based charging to cases where there is tight control over the work being done (ie, generally, by either a creditors' committee or secured creditors).[69]

The 2010 OFT report also led to substantial reforms of the regulation of the insolvency profession with the enactment of the *Deregulation Act 2015* and the *Small Business, Enterprise and Employment Act 2015*.[70] Fragmented professional bodies have caused difficulties for the UK Government as oversight regulator and made it difficult to establish legislative rules in relation to remuneration. In the long run, the 2015 regulatory reforms may have a more significant impact on approaches to remuneration than the fee cap. Regulatory objectives of the insolvency profession were spelled out in legislation for the first time, and they require encouragement of an independent and competitive insolvency practitioner profession whose members provide high quality services at a cost to the recipient which is fair and reasonable, promoting the maximization of the value of returns to creditors and promptness in making those returns.[71] The new regime also gives the Secretary of State, as oversight regulator, a broad range of sanctions to be used against any professional body that fails to adequately fulfil its role as a regulator, the power to apply to court for a direct sanctions order against an insolvency practitioner, and even a reserve power to designate a single regulator of insolvency practitioners.[72]

II. AUSTRALIA

A. *Source of Courts' Authority to Fix and Review Remuneration in Australia*

Courts in Australia may be asked to fix or review remuneration in the context of receivership, administration or liquidation in accordance with the *Corporations Act 2001* (Cth).[73] The court has the power to fix the remuneration of a receiver on the

67. Kempson Report (n 7) [6.1.2], [6.1.4].

68. Insolvency Service, 'Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners' (Insolvency Service February 2014).

69. See eg the responses of ICAEW, ICAS and R3, and the acknowledgment in the explanatory memorandum to the Insolvency (Amendment) Rules 2015 that 'the responses revealed that the consultation proposal was not the preferred way of proceeding'. See also Chris Umfreville and Peter Walton, 'Insolvency Practitioner Fees in the UK – All Alone in the World?' (2014) Insolvency Intelligence 27, 86.

70. The process was lengthy, including two rounds of consultation: *Consultation on Reforms to the Regulation of Insolvency Practitioners* and *Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners*.

71. Insolvency Act 1986, s 391C(3); Small Business, Enterprise and Employment Act 2015, s 138.

72. Small Business, Enterprise and Employment Act 2015, ss 137–144; Insolvency Act 1986, s 391–391T.

73. Other than s 425 of the Corporations Act 2001 (Cth), the content of the provisions is consolidated in the new 'Schedule 2 Insolvency Practice Schedule (Corporations)' inserted into the Corporations Act 2001 (Cth) by the Insolvency Law Reform Act 2016 (ILRA 2016), Schedule 2, s 2 (see Division 60). The amendments did not deal with receiver remuneration. Corporations Act 2001 (Cth), ss 449E, 473 and

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application of the corporation's liquidator or administrator, or an administrator of a deed of company arrangement executed by the corporation, or the Australian Securities and Investments Commission (ASIC).[74] A receiver has the right to apply for a variation or amendment to an order made by the court.[75] In fixing a receiver's remuneration, the court must consider whether the remuneration is reasonable, taking into account: the extent to which the work performed was reasonably necessary; the period of time during which the work was undertaken; the quality or complexity of the work; the time taken; extraordinary issues; the level of risk or responsibility undertaken; the value and nature of the property; the number, behaviour and attributes of creditors; the number of insolvency practitioners dealt with; and any other relevant matters.[76] Further, if the remuneration is ascertained, in whole or in part, on a time basis, then the items that the court must take into account also include: (i) the time properly taken by the practitioner in performing the work; and (ii) whether the total remuneration payable to the practitioner is capped.[77]

In the case of administration, the court has the power to approve the remuneration of an administrator or administrator of a company under a deed of company arrangement, if there is no agreement between the administrator and the committee of creditors, if any, or resolution of the company's creditors.[78] If there is an agreement or resolution on remuneration, the court may review that remuneration and confirm, increase or reduce it on the application of ASIC, the administrator, or an officer, member or creditor of the company.[79] As with receivers, the court is required to have regard to 'whether the remuneration is reasonable', and in doing so may take into account any or all of the matters listed in relation to receivers above.[80]

The court has the power to appoint a liquidator on an application to wind up a company, including provisionally.[81] A provisional liquidator is entitled to receive such remuneration by way of percentage or otherwise as determined by the court.[82] A court may determine a liquidator's remuneration, including by way of percentage or otherwise, if there is no committee of inspection, or if the liquidator and the committee of inspection fail to agree, and the creditors also fail to determine remuneration by resolution.[83] If the liquidator convenes a meeting of the company's creditors, but no

504 are repealed by the ILRA 2016 (see ss 135, 144, and 165). The provisions listed below continue to apply to remuneration of external administrators appointed before ILRA 2016 commencement day (ILRA 2016, s 322 introduces a new Part 10.25 into the Corporations Act 2001 (Cth) dealing with transitional issues). References to the provisions in the new Schedule 2 in this article are preceded by 'ILRA 2016'.

74. Corporations Act 2001 (Cth), s 425(1), s 425(5).
75. ibid s 425(6).
76. ibid s 425(8).
77. ibid s 425(8)(k).
78. ibid s 449E(1), s 449E(1A).Note that a resolution must deal exclusively with remuneration to be effective: Corporations Act 2001 (Cth), s 449E (1B).
79. ibid s 499E(2).
80. ibid s 499E(4).
81. ibid s 472.
82. ibid s 473(2).
83. ibid s 473(3).

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resolution is passed because of the lack of a quorum, the creditors are taken to have passed a resolution determining that the liquidator is entitled to remuneration of up to A$5,000, provided that the liquidator has not already availed her/himself of this mechanism.[84] If remuneration has been determined by agreement between the liquidator and the committee of inspection, or by resolution of the creditors, the court may also review the liquidator's remuneration and may confirm, increase or reduce that remuneration on application.[85] When fixing or reviewing a liquidator's remuneration, the court is required to consider the reasonableness of remuneration, taking into account the same matters applicable to the review of receivers' and administrators' remuneration.[86] A similar approach applies in relation to voluntary winding up, where any member or creditor, or the liquidator, may at any time before deregistration of the company apply to the court to review the amount of the remuneration of the liquidator.[87]

B. *Sustained Criticism of Practitioners' Remuneration in Australia and Judicial Initiatives*

The last five years have seen particularly sustained criticism of insolvency practitioner remuneration in Australia including in government-sponsored reform proposals, commencing with a Senate Inquiry Report (2010),[88] which developed into an Options Paper (2011),[89] a Proposals Paper (2011),[90] two previous draft bills (2012, 2014),[91] a Productivity Commission Report (2015),[92] and a further Insolvency Law Reform Bill 2015 ('ILRB 2015') which was passed in 2016 and is expected to take effect in 2017.[93] But as Dickfos points out, 'everything old is new again' and the issue of corporate insolvency practitioner regulation has been on the

84. ibid s 473(4A). ILRA 2016, ss 60–65 provides that where no remuneration determination is made, the insolvency practitioner may receive reasonable remuneration for work properly performed in an amount of up to a maximum default, initially A$5,000 excluding Government and Sales Tax.

85. Where remuneration has been determined by agreement, application for review may be made by a member or members whose shareholdings represent in the aggregate at least 10% of the issued capital of the company; creditors whose debts against the company that have been admitted to proof amount in the aggregate to at least 10% of the total amount of the debts of the company; or ASIC: Corporations Act 2001 (Cth), s 473(5). Where remuneration is fixed by a resolution, the liquidator or a member or members whose shareholding or shareholdings represents or represent in the aggregate at least 10 % of the issued capital of the company may apply to the court for a review: ibid s 473(6).

86. Corporations Act 2001 (Cth), s 473(10).

87. Corporations Act 2001 (Cth), s 504(1), s 504(2).

88. Senate Economics References Committee, 'The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework' (Parliament of Australia September 2010).

89. Australian Government, 'Options Paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia' (The Australian Government Treasury June 2011).

90. Australian Government, 'Proposals Paper: A modernization and harmonization of the regulatory framework applying to insolvency practitioners in Australia' (The Australian Government Treasury December 2011).

91. Insolvency Law Reform Bill 2012 and Insolvency Law Reform Bill 2014.

92. Productivity Commission, 'Productivity Commission Inquiry Report, Business Set-up, Transfer and Closure' (Report No 75, Australian Government Productivity Commission 30 September 2015).

93. For criticism of the profession, see eg Senate Economics References Committee (n 88) ch 5.

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Australian political and legislative agenda for at least three decades, when the profession was still in its infancy and remuneration was a subject of the seminal Harmer Report (1988).[94] The many reports and reform iterations reflect the contentious nature of this area, including normative battles about who should pay for the external administration of failed companies and battles for financial survival for some insolvency practitioners. At the heart of the proposals, however, is the perception that insolvency practitioners charge too much for their services or at least should be held more accountable for the fees which they do charge.

Community perceptions are reflected in the key government regulator's publications. ASIC statistics cited in the ILRB 2015 Explanatory Memorandum suggest that remuneration was a key area of concern in its finalized corporate insolvency practitioner transaction reviews undertaken in 2012–2014, although it ranked behind independence and more or less equally with concerns about adequacy of investigation and 'other' concerns.[95] Insolvency practitioners also performed poorly on ASIC's 2013 stakeholder survey in relation to 'perceived integrity', particularly amongst small business respondents.[96] ASIC's 2014 report indicates that remuneration was the second most significant area of concern after independence.[97] Concerns about remuneration also arise in the context of the small returns to unsecured creditors in Australia which ASIC estimates to be less than 11 cents on the dollar 97 per cent of the time.[98] Black J of the Supreme Court of New South Wales noted community concern in relation to the 'reliance on hourly rates' in a recent conference commentary.[99]

Other recent commentary confirms the inextricable tension surrounding remuneration in an insolvency environment where there is not enough to go around. Anderson and Brown note that the number of complaints about insolvency practitioners received by ASIC as a percentage of overall complaints at a peak of recent external administration numbers in 2008–2009 was still less than 5 per cent of all complaints received.[100] Similarly, ASIC's statistics on insolvency practitioner complaints suggest that complaints in relation to insolvency practitioners comprised 3 per cent of total complaints in 2010–2011.[101] Anderson and Brown argue that

94. Australian Law Reform Commission, *General Insolvency Inquiry* (Australian Law Commission Report No 45, 1988). Dickfos highlights that the Harmer Report proposed a 'scheme of approval to apply to the remuneration of IPs': Jennifer Dickfos, 'The Regulation of Corporate Insolvency Practitioners: 25 Years on from The Harmer Report (or Everything Old is New Again!)' (2014) 2 Nottingham Insolvency and Business Law eJournal 3, 23, 27–29. Colin Anderson and Catherine Brown, 'Mind the insolvency gap: Lessons to be learned from audit expectations gap theory' (2014) 22 Insolvency Law Journal 178 list other significant reviews in 1997 and 2004.

95. Explanatory Memorandum, Insolvency Law Reform Bill 2015, Diagram 9.1.

96. ibid [9.17].

97. Australian Securities and Investments Commission, 'ASIC Regulation of Registered Liquidators: January to December 2014' (April 2015), 17.

98. Australian Securities and Investments Commission, Australian Insolvency Statistics Series 3, October 2015, Table 3.1.9.2. Based on statistics for 1 July 2014 to 30 June 2015.

99. Ashley Black, 'Three recent developments in insolvency law' (Corporations Law Conference, Sydney, August 2016).

100. Anderson and Brown (n 94) 182.

101. Australian Securities and Investments Commission, 'Insolvency Practitioner Complaints Statistics' (March 2011).

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insolvency practitioners were found to have seriously breached standards in only a minority of cases, and in the majority of cases it was the complainant that received education to improve the complainant's understanding of insolvency law and process.[102] Accordingly, Anderson and Brown query the need for reform in relation to regulatory standards at all, and call for reforms which close the gap between community expectations and reality.[103] They call for more data to help assess insolvency practitioner performance and 'community expectations', and thus develop ideas to fill the knowledge 'gap'.[104]

Dickfos also concludes that the ASIC statistics 'on the nature of CIPs [corporate insolvency practitioner] misconduct provide some support for the proposition that the majority of complaints against CIPs (which would include complaints regarding remuneration) arise from a lack of understanding on the part of creditors of the CIP's role in the insolvency process'.[105] Dickfos uses ASIC statistics from its report on regulated insolvency practitioners to examine the causes for dissatisfaction with their remuneration and establish whether there has been a 'market failure', or if the criticisms are 'ill-founded'. She expresses concerns about the lack of competition amongst insolvency practitioners in Australia and calls for more research on the reasons for unsecured creditor disengagement.[106] She acknowledges, however, that if returns continue to be low, there is little incentive for unsecured creditors to become involved.[107]

Compounding the lack of unsecured creditor understanding and engagement is the absence of a quick, cost-effective mechanism to review remuneration. The Productivity Commission argues that 'court challenges to remuneration are a significant source of cost and delay during insolvency processes'.[108] Further, 'tying up resources' in fee approvals and challenges 'appears futile', especially 'when there is so little at stake'.[109] Recent empirical research suggests that courts in Australia deliver an average of 14.2 judgments involving remuneration each year, taking up valuable judicial time.[110] The Supreme Court of New South Wales hears the most applications in relation to remuneration by far, reflecting its geographical location in Sydney, where the most formal insolvencies occur by number, size and complexity.[111] The Federal Court of

102. Anderson and Brown (n 94) 183.

103. ibid 189.

104. ibid 190. They argue that there is no clear data on whether there is any wrongdoing by practitioners when it comes to remuneration.

105. Education for creditors on how to protect themselves in the first instance, including by using the personal property securities registration system as appropriate, would seem to be a priority. Dickfos, 'The Cost and Benefits' (n 3) 67. She also considers the European Bank for Reconstruction and Development (EBRD) benchmarks for assessing the performance of insolvency office holders and finds Australia mostly compliant.

106. ibid 66–67.

107. ibid 71.

108. Productivity Commission (n 92) 407.

109. ibid.

110. On average 14.2 cases are heard each year based on data from 2011 to 2015, mostly in New South Wales. See Stacey Steele, Vivien Chen and Ian Ramsay, 'An Empirical Study of Australian Judicial Decisions Relating to Insolvency Practitioner Remuneration' (2016) 24 Insolvency Law Journal 165.

111. ibid.

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Australia also hears many applications in light of its jurisdiction over corporations. The next busiest jurisdiction is in the next largest State by population, the Supreme Court of Victoria.[112] There are comparatively few cases heard by the superior courts in other State jurisdictions.[113] Further, of the cases reviewed for the research, over half involved claims for less than A$100,000 and less than A$50,000 in 36 per cent of cases.[114] Although the cases did not reveal the parties' costs, the amount of A$50,000 in particular appears to be a low amount in light of the expense of running a superior court process to obtain approval for remuneration. Removing these cases from the courts may also allow courts to focus on more serious cases, for example, those involving allegations of misconduct.

The Productivity Commission recommended that 'the fee structures for small liquidations be determined through the tender process conducted by ASIC'.[115] The head of the Productivity Commission's recent report on the issue, Dr Warren Mundy, is quoted as observing that 'there does seem to us to be some scope for removing some insolvency matters from the jurisdictions and the court, and at least in the first instance placing them in some sort of tribunal arrangement. And we're interested in looking at those areas particularly in relation to small companies'.[116] He also acknowledges the controversy over who should pay: 'these processes have both public and private benefits, and from our perspective, ideally… the taxpayer in the broad should pay for the public benefits and the people within the system should pay for the private benefits'.[117] Murray also notes the expense involved in a practitioner seeking court approval of fees includes the courts' own filing and hearing fees, in addition to 'the cost and time of the hearing, and adjournments, and awaiting judgment' which 'can be significant'.[118]

The profession itself in Australia took steps to standardize approaches to remuneration. The Australian Restructuring Insolvency and Turnaround Association ('ARITA') has over 2000 members, including accountants and lawyers, and covers over three quarters of registered liquidators and registered trustees in

112. ibid.

113. Northern Territory and Tasmania heard none between 2000 and 2015 according to Steele, Chen and Ramsay, ibid. The study on insolvency practitioners' remuneration from 2000 to 2015 also found an increase in judicial decisions over time, with the highest number of cases recorded in 2014 and 2015. The analysis also suggests that economic events may influence the volume of remuneration cases. While there was a reduction of cases from 2007 to 2009, there was a sharp increase in cases from 2010 in the wake of the global financial crisis. The rise in cases involving insolvency practitioner remuneration over time, along with greater public awareness of the issue, arguably places further strain on the courts' increasing case load.

114. ibid.

115. Productivity Commission (n 92) 27.

116. 'Most detailed review of regime in a decade' (2015) 27(2) Australian Insolvency Journal 4, 7. The article is based on a presentation by Dr Warren Mundy of the Productivity Commission at ARITA's National Conference.

117. ibid 8.

118. Murray recommends that given 'corporate insolvency requires either creditor or court approval' of fees, 'liquidators should try to have creditors approve their remuneration as the law allows'. He also notes that 'on the other hand, bankruptcy avoids the court being involved in remuneration, with the Inspector-General having that power under s 167'. Michael Murray, 'Insolvency case reports' (2015) 27(4) Australian Insolvency Journal 54, 54.

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Australia.[119] ARITA's Code of Professional Practice is in its third edition, effective from 1 January 2014. The first edition, the Code of Professional Practice for Insolvency Practitioners (2007–8), built on an earlier Code of Conduct (1992) and various Statements of Best Practice.[120] The third edition of the Code provides extensive guidance, including in relation to time-based charging. The Code was cited during recent UK reform debates as best practice by requiring practitioners to provide a fee estimate at the commencement of a matter.[121] ARITA also offers training on best practices around remuneration.[122] ARITA does not have jurisdiction to review the reasonableness of remuneration in the same way as an Australian court, but ARITA may investigate claims of professional misconduct which may include concerns about remuneration claimed by a member.[123]

The courts have picked up on concerns about practitioner fees, particularly where they are calculated based on time-based charging. A line of reasoning in relation to determining remuneration has been developed by Brereton J of the Supreme Court of New South Wales over the last two and a half years.[124] Brereton J's thinking builds on Finkelstein J's judgment in *Re Stockford Ltd; Korda* in 2004 and subsequent cases.[125] Brereton J's approach is most recently articulated in the case of *Sakr Nominees Pty Ltd*.[126] In that case, the Sydney Water Corporation applied to have the company wound up and an official liquidator was appointed on 3 September 2012. The liquidator sought to have his remuneration approved for the period from 3 November 2014 until the finalization of the liquidation, because all of the creditors had been paid in full and thus it was not possible to convene a creditors' meeting to approve further

119. Australian Restructuring Insolvency and Turnaround Association (ARITA), 'About ARITA' <http://www.arita.com.au/imis_prod/ARITA/About_Us/ARITA/About_Us/About-Us.aspx?hkey=ff7b83c4-fc70-4eb8-9001-08420d81582e> accessed 29 August 2017. Membership of ARITA is not compulsory and an insolvency practitioner may still practice even if he or she is not a member.

120. ARITA, 'Code of Professional Practice for Insolvency Practitioners, 3rd edn of 1 January 2014 as amended 18 August 2014' (ARITA, 18 August 2014) <http://www.arita.com.au/imis_prod/ARITA/For_members/Technical__library/code-of-professional-practice.aspx> accessed 6 September 2017.

121. Michael Murray, 'Practitioners Remuneration – UK Report Picks Up Ideas from IPA Code' (ARITA 16 July 2013) <www.arita.com.au/in-practice/insolvency-law-reform/corporate-insolvency-law-reform/2013/07/15/practitioners-remuneration—uk-report-picks-up-ideas-from-ipa-code> accessed 14 October 2016.

122. See ARITA, 'Remuneration: Necessary and Proper' <www.arita.com.au/education/professional-standards/remuneration> accessed 22 October 2015.

123. ARITA, 'Making a complaint about an ARITA member' <www.arita.com.au/insolvency-you/making-a-complaint> accessed 14 October 2016. For a discussion of ARITA as an alternative to courts in cases of fixing and reviewing remuneration, see Steele, Chen and Ramsay (n 110).

124. In chronological order, the following decisions have been released since 2014: *Re AAA Financial Intelligence Ltd (in liquidation) ACN 093 6161 445* [2014] NSWSC 1004; *Re AAA Financial Intelligence Ltd (in liquidation) ACN 093 616 445 (No 2)* [2014] NSWSC 1270; *Re Hellion Protection Pty Ltd (In Liquidation)* [2014] NSWSC 1299; *Re Gramarkerr Pty Limited (No 2)* [2014] NSWSC 1405; *Re On Q Group Limited (In Liquidation) (Subject to Deed of Company Arrangement) ACN 009 104 330* [2014] NSWSC 1428; *Re Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (in liquidation) (No 2)* [2016] NSWSC 106; *Re Sakr Nominees Pty Ltd* [2016] NSWSC 709. These decisions emanate from the Equity Division – Corporations List and were decided by Brereton J. The liquidator lodged an appeal from the decision in *Sakr* which was decided after the submission of this article.

125. *Re Stockford Ltd; Korda* (2004) 140 FCR 424, [2004] FCA 1682. Black J recently helpfully documents the historical development of this line of reasoning, including the amendments to the Corporations Act (Cth) in 2007 which were influenced by Finkelstein J's decision. See Black (n 99) 3–6.

126. *Re Sakr Nominees Pty Ltd* [2016] NSWSC 709.

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remuneration because there were no creditors.[127] Creditors had approved, and the liquidator received, remuneration of A$197,000 and the liquidator sought a further A$63,577.80. Brereton J noted the court's 'very wide discretion' to allow and fix 'the level and basis of remuneration', and found that:

> [L]iquidators will not necessarily be allowed remuneration at their firm's standard hourly rates for time spent – particularly in smaller liquidations where questions of proportionality, value and risk loom large, and liquidators cannot expect to be rewarded for their time at the same hourly rate as would be justifiable when more property is available... While not without its shortcomings, ad valorem remuneration is inherently proportionate, and incentivises the creation of value rather than the disproportionate expenditure of time.[128]

He went on to suggest that 2.5 per cent on realizations and 3 per cent on distributions or 10 per cent of the first A$100,000 of realizations and 5 per cent thereafter for a liquidation of a small family company with one major real estate asset would be appropriate.[129] He also noted that the larger the liquidation by dollar amount, the smaller the commissions should be.[130] Due to the circumstances in this particular case, including because there was no opposition from contributories, Brereton J allowed an additional A$20,000 in remuneration to the liquidator.[131] The liquidator has appealed the decision.

C. *Australian Reforms: Introducing Reviewing Registered Liquidators*

Recent Australian reforms to insolvency law include provisions focused on remuneration. Brereton J and other judges' 'concern' about 'current industry practices around remuneration' was cited as evidence 'that industry efforts to address community concerns in the absence of regulatory reform have failed' in the Australian Government's compulsory Regulatory Impact Statement ('RIS').[132] The *Insolvency Law Reform Act 2016* (Cth) (ILRA 2016) received Royal Assent on 29 February 2016 and is expected to become effective in 2017. An Exposure Draft of the underlying *Insolvency Practice Rules* was released in October 2016 and provides some further details.[133] The ILRA 2016 seeks to empower unsecured creditors by introducing a regime under which a registered liquidator may be appointed to review remuneration.[134] Moreover, if a determination specifying an external administrator's remuneration (other than an external administrator in a members' voluntary winding up) is made by a resolution of the creditors, a committee of inspection or by the court, and it specifies that the remuneration is to be worked out wholly or partly

127. ibid [1], [11].
128. ibid [14].
129. ibid [22].
130. ibid.
131. ibid [25].
132. Explanatory Memorandum, Insolvency Law Reform Bill 2015 [9.324].
133. Rules are to be made in relation to reviews in the Insolvency Practice Rules (see ILRA 2016, s 90-29).
134. Explanatory Memorandum, Insolvency Law Reform Bill 2015 [6.22].

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on a time-cost basis, the determination must include a cap on the amount of remuneration worked out on a time-cost basis that the external administrator is entitled to receive.[135] More than one remuneration determination may be made in relation to a particular external administrator and that external administration.[136]

The ILRA 2016 also provides for a reviewing registered liquidator to be appointed by ASIC, the court or a resolution of creditors.[137] An appointment may also be made by one or more creditors, but only if the insolvency practitioner agrees (ILRA 2016, Section 90-24(4) and (5)). To the extent that the review is driven by creditors, it is limited to the remuneration and the costs or expenses incurred by the insolvency practitioner (ILRA 2016, Section 90-24(1)). Alternatives to court oversight, such as an independent ombudsman, appear to have been rejected in Australia for financial reasons.[138] The ILRA 2016 provides that a review of remuneration *may* include an assessment by the registered liquidator reviewer of 'whether the remuneration is reasonable'.[139] A review of costs and expenses *must* include 'an assessment of whether the cost or expense was properly incurred'.[140] The meaning of 'properly incurred' is not further defined. Although the review is to be paid for by creditors where one or more creditors requested the review and the insolvency practitioner agreed to the appointment of the registered liquidator reviewer,[141] in all other circumstances the cost of the review 'forms part of the expenses' of the company under external administration.[142] The court is to have 'broad powers' in relation to the review according to the RIS which forms Chapter 9 of the ILRB 2015 Explanatory Memorandum.[143] The court will have 'powers to intervene in (for example, prevent or vary the terms of a review, or remove and replace the reviewer) or to assist a review'.[144] The review is aimed at preventing the 'misuse of disbursements' according to the Explanatory

135. Insolvency Law Reform Act 2016, s 60-10(4).

136. ibid s 60-10(4).

137. ibid s 90-23 and s 90-24.

138. The idea of an ombudsman in Australia is well documented. See Christopher Symes and Jeffrey Fitzpatrick 'A Primal Sketch of an Insolvency Ombudsman' (2011) 13 Flinders Law Journal 1. On a professional body's proposal to establish a tribunal, see Narelle Ferrier, 'ARITA's Proposed Independent Insolvency and Bankruptcy Tribunal' (March 2015) Australian Insolvency Journal 14. ARITA acknowledges that the issue of funding remains unanswered. Further, ARITA's Code of Professional Practice already requires members to have a complaints management system. Principle 17 requires members to implement policies, procedures and systems to ensure effective complaints management. See ARITA's Code of Professional Practice (n 120) 98. An independent complaint-handling body was recommended in UK by the OFT: Office of Fair Trading (n 64) 7. The OFT's idea was cited in the Australian Senate Economics References Committee (n 88) [11.20]. The Senate Committee suggested Ombudsmen at no cost to the creditor [10.35]–[10.41]. In the end, the Senate Committee recommended that an ombudsman only be adopted if its recommended new insolvency regulator failed to handle complaints 'promptly and effectively'. Senate Economics References Committee (n 88) [11.22]. The idea of an ombudsman was floated in UK as early as 1994: Symes and Fitzpatrick (n 138).

139. Insolvency Law Reform Act 2016, s 90-26(2).

140. ibid s 90-26(3).

141. ibid s 90-27(1)(a).

142. ibid s 90-27(1)(b).

143. Explanatory Memorandum, Insolvency Law Reform Bill 2015 [9.300].

144. ibid [9.300].

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Memorandum.[145] According to the RIS, the net benefit of giving a creditor the right to appoint a reviewing practitioner in corporate insolvencies represents a cost of A$250,000 to the system.[146]

The reviewing registered liquidator potentially gives creditors a further avenue to challenge practitioner remuneration and brings an external expert perspective to the assessment. The mechanism has already been criticized, however, as open to professional capture and likely to add costs to a dispute which will end up in court anyway because the reviewer's decision does not appear to be final.[147] Further, assessments are not required to be made public.[148] This result means that the reform efforts have lost the potential for greater transparency on fees and calculation methods. A public record would have had value in setting standards and built up data on the costs associated with insolvency in Australia. Notably, Ferris J attached the cost assessor's report to his judgment in summary form in 2002 to provide guidance for future assessors in the UK.

III. SINGAPORE

A. *Source of Courts' Authority to Fix and Review Remuneration in Singapore*

Singapore's statutory structure on insolvency practitioner remuneration is found in the *Companies Act* (Cap 50, 2006 Rev Ed) ('Companies Act') and the *Companies (Winding Up) Rules* (Cap 50, R1, 2006 Rev Ed). They were adapted from the English *Companies Act 1948* and the *Companies Act 1961* (Vic) from Australia. Thus, Singapore's legislation on insolvency practitioner remuneration is very similar to the English legislation before the 1986 reforms. The Singapore government has not indicated an intention to reform the law in this area, although it is possible that it will take the opportunity to make amendments in the near future when enacting new legislation which will bring together the rules relating to corporate insolvencies and personal bankruptcies for the first time and modernize and improve the legislation.[149]

145. ibid [9.321].

146. ibid Table 13. The Explanatory Memorandum cites its sources as being ASIC, Treasury assumptions and ARITA.

147. On regulatory capture, see Brown and Symes (n 1). Dickfos also points out that creditors may avoid appointing reviewing registered liquidators because the costs will be borne by the external administration: Dickfos, 'The Costs and Benefits' (n 3) 70. For other criticisms, see Steele, Chen and Ramsay (n 110).

148. See Exposure Draft, Insolvency Practice Rules (Corporations) 2016. On reporting by reviewing liquidators, see Insolvency Practice Rules (Corporations) 2016, r 90-24.

149. The Insolvency Law Review Committee proposed new legislation which brings together personal bankruptcy and corporate insolvency laws. The Committee recommended that the legislation should include regulations on the licensing, qualifications and discipline of insolvency practitioners, but the recommendations did not extend to remuneration: Insolvency Law Review Committee, 'Final Report' (Ministry of Law 2013), ch 10. For a recent announcement on the legislative efforts, see Ministry of Law, Singapore, 'Opening Address by Mr Ng How Yue, Permanent Secretary for Law, At the 2nd National Insolvency Conference 2015' (Speeches, Ministry of Law 14 September 2015) <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-mr-ng-how-yue–permanent-secretary-for-law–a.html> accessed 4 November 2016.

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For compulsory winding up, Section 268(3) of the Companies Act provides that a liquidator, other than the Official Receiver, is entitled to receive remuneration by way of percentage or otherwise as is determined in the first instance by agreement between the liquidator and the committee of inspection. Next, failing such agreement, or where there is no committee of inspection, the creditors may by a majority in number representing not less than 75 per cent in value pass a resolution to fix the remuneration.[150] Finally, failing a determination in either way, it will be fixed by the court.[151] The rule for creditors' voluntary winding up is simpler, providing only that the committee of inspection, or if there is no committee of inspection, the creditors may fix the remuneration to be paid to the liquidator.[152] A member, creditor or liquidator in a voluntary winding up may at any time before the dissolution of the company apply to court to review the amount of the remuneration.[153] There is no similar section for compulsory winding up; instead, the *Companies (Winding Up) Rules* give the Official Receiver the right to apply to court to review the remuneration of a liquidator if the Official Receiver considers that the remuneration as fixed by the committee of inspection is unnecessarily large.[154] The position for judicial managers is less certain. As pointed out by then Judicial Commissioner (JC) VK Rajah in *Re Econ Ltd*,[155] 'by dint of legislative caprice, the Companies Act (Cap 50, 1994 Rev Ed) … appears to allow judicial managers to fix their remuneration outside the supervisory jurisdiction of the court'.[156]

As this summary shows, a key issue for the insolvency practitioner remuneration framework in Singapore is a lack of detail and consistency across proceedings. Further, whilst the legislation on the remuneration of a liquidator in a compulsory winding up may suggest a preference for charging by way of a percentage given that this method of calculation is specifically mentioned in the relevant provision, a discussion paper prepared by the Law Reform Committee of the Singapore Academy of Law in 2005 stated that percentage-based charging was irrelevant in modern day insolvency practice and recommended that the reference to percentage 'should be repealed'.[157] The paper also recommended that 'an hourly rate guide, particularly in connection with overheads and disbursements, should be prepared to serve for benchmarking purposes'.[158] These recommendations were not implemented. In

150. Companies Act (Cap 50, 2006 Rev Ed), s 268(3)(b).
151. ibid s 268(3)(c)
152. ibid s 297(3).
153. ibid s 303.
154. Companies (Winding Up) Rules (Cap 50, R1, 2006 Rev Ed), r 142(1). The rule only applies to court-appointed liquidators: ibid r 142(2).
155. [2004] SGHC 49, [2004] 2 SLR(R) 264.
156. ibid [2].
157. Law Reform Committee, Singapore Academy of Law, 'The Remuneration of Corporate Insolvency Practitioners and Certain Related Matters: A Discussion Paper' (Singapore Academy of Law October 2005), 14 <http://www.sal.org.sg/Lists/Law%20Reform%20Committee%20Reports/Attachments/24/Remuneration%20of%20insolvency%20practitioners%20-%20final.pdf> accessed 18 January 2017.
158. ibid.

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practice, the predominant method of charging by practitioners in Singapore is time based.

B. *Judicial Development of Principles and Practice*

Over the last ten or so years, the courts in Singapore have developed the common law on insolvency practitioner remuneration significantly in three cases. There has been no public outcry over the remuneration of corporate insolvency practitioners similar to the concern surrounding practitioner remuneration in the UK and Australia, but the perception that insolvency practitioner fees need to be checked by the courts still permeates the courts' approach.

The foundation for judicial pronouncements in relation to corporate insolvency practitioner fees was laid down in *Re Econ Corp Ltd*,[159] where interim judicial managers disputed the fees claimed by the provisional liquidators. VK Rajah JC (as he then was) surveyed the law on insolvency practitioner remuneration in the UK, Hong Kong, Australia and New Zealand. His Honour commented that the percentage basis of charging has 'quite correctly' been rejected as 'unfashionable'[160] in most jurisdictions, and also approved the approach adopted and the principles laid down by Ferris J in the *Mirror Group* case. He examined some key issues, including charge-out rates, time-costs for work done by administrative and support staff, and whether solicitors' remuneration may be used as a comparison. It is clear from the approach towards those issues and the principles laid down that the court, in the face of a paucity of legislation, is not averse to active and strong judicial intervention in the fixing of the remuneration of insolvency practitioners with a view to ensuring that insolvency practitioners do not overcharge for their services. VK Rajah JC observed that time-based charging:

> [d]oes not automatically entitle the insolvency practitioner as of right to receive a multiplicand of the charge out rate determined to be reasonable. The court will still have to balance various impinging considerations like reasonableness and scope of work. The court will have to satisfy itself that there are no issues of 'overservicing' or 'overmanning' in the matter. The basis ultimately applied must be characterised by fairness and reasonableness.[161]

Another notable feature of the judgment is that VK Rajah JC took into account the realities of the insolvency profession in Singapore, which may be seen most clearly from his observations on charge-out rates. Whilst accepting that evidence may be adduced on market rates, he doubted whether this would be meaningful or useful, and that it may be that a large majority of those rates is by and large excessive. Although the learned judge did not explain further, the insolvency profession is very small in Singapore and the inference is that there is no real competition between insolvency practitioners. Similar concern with a small profession capturing the market for

159. [2004] SGHC 49, [2004] 2 SLR(R) 264.
160. ibid [42].
161. ibid [60].

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insolvency services prompted the Cayman Islands Grand Court to propound rules giving it more control over the remuneration of insolvency practitioners.[162]

In *Re Econ Corp Ltd*, VK Rajah JC had no occasion to apply the principles he enunciated as the provisional liquidators did not present enough evidence. Those principles were accepted and applied by Judith Prakash J (as she then was) in *Liquidators of Dovechem Holdings Pte Ltd v Dovechem Holdings Pte Ltd*.[163] She held that the liquidators were not allowed to include time charges in their bills for the work done by administrative and support staff.[164] The salaries paid to such employees should be considered as part of a liquidator's overheads. She also clarified that the value of an insolvency practitioner's service need not manifest in a monetary benefit to the company, rejecting the argument that the value of a practitioner's contributions should be measured by the proceeds recovered.[165] On the facts, after disallowing some claims, the judge thought that the figure was still too high for the work that was required to be done. Taking into account all the circumstances and using the 'usual broad brush', she arrived at the fair and reasonable remuneration by discounting by approximately 40 per cent the liquidator's bill.[166] The judge accepted that this figure may be arbitrary, but since the law did not provide a mathematical formula for the calculation of a liquidator's fees, any award would be open to the same criticism.

The above two cases highlight the courts' concerns that remuneration be fair and reasonable in the context of the work performed. The cases set the stage for Steven Chong J (as he then was) to help develop Singapore's common law on insolvency remuneration further in *Kao Chai-Chau Linda*.[167] The case was filed by the receivers and managers ('R&M') seeking approval for their bill of costs. The respondents were Airtrust's shareholders and directors. It was the R&M's fourth application for approval of their bills of costs. In this instance, the R&M claimed professional fees and disbursements of S$3.1 million for work done in 2013, offering a discount of 30 per cent on the fees. The respondents objected to the amount and requested further details. Following provision of details, the respondents continued to object to the level of fees charged, citing perceived inefficiencies and possible duplication of work done by lawyers. Chong J found for the respondents and agreed that some expenses were unjustified. These included time spent on e-discovery, which was a matter for lawyers, and charges of over S$47,000 for the R&M's administrative staff, which should have been treated as part of the R&M's overheads. The R&M's claim for remuneration was reduced accordingly, and the claim for their administrative staff was disallowed. In addition, the discount of 30 per cent, which the R&M initially offered, was increased by the court to 40 per cent.

Like VK Rajah JC in *Re Econ Corp Ltd*, Chong J, after examining the law in several jurisdictions, developed a set of very detailed principles by adopting various features

162. *A-G of Cayman Islands v James Cleaver* [2006] UKPC 28, [2006] 1 WLR 2245.
163. [2015] SGHC 167, [2015] 4 SLR 955.
164. ibid [65].
165. ibid [33].
166. ibid [84]. The liquidators claimed the sum of S$1,213,961 and were awarded the sum of S$750,000.
167. [2015] SGHC 260, [2016] 1 SLR 21.

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from those jurisdictions. He noted Finkelstein J's two stage approach on fixing remuneration in *Re Korda*[168] with approval. In summary, at the first stage the court has to arrive at a working figure, which is usually calculated on a time-cost basis. In arriving at this figure, the court is required to ensure that the hourly rates levied are reasonable, the hours claimed for were reasonably spent and subtract claims for billable hours which have not been adequately supported by evidence. At the second stage, the court should adjust this provisional figure. To the extent that any quantifiable adjustments can be made, for example, where specific quantified heads of claim are disallowed, these should first be factored in before a further percentage reduction is applied by applying the usual 'broad brush' as was done in *Dovechem* to reflect the court's assessment of what a fair and reasonable sum ought to be.[169] This two-stage approach is similar to that adopted by Registrar Baister in *Re Cabletel Installations Ltd*.[170]

The most significant part of Chong J's judgment is his proposal on a system of costs scheduling.[171] A costs schedule is a summary of the estimated costs of an appointment. Chong J expressed deep dissatisfaction over the practice of insolvency practitioners offering voluntary discounts, and the practice of adjudicating fee disputes by way of arbitrarily discounting fees. He emphasized the need for Singapore to have a predictable remuneration regime for insolvency practitioners, as the current lack of certainty surrounding remuneration gave rise to disputes and operated as a disincentive to insolvency practitioners accepting appointments. Drawing on experience and law reforms in the UK, Australia and New Zealand, he proposed that all court-appointed insolvency practitioners whose fees are subject to court approval should submit a cost schedule upfront, within a month of appointment.[172] Policy objectives underpinning the proposals centre on cost control, and transparency and fairness in remuneration. Cost schedules should include details of the work, anticipated time, a description of the team, basis of remuneration, rates, a fee estimate and anticipated disbursements. The schedule should have all the information necessary to facilitate an informed decision as to whether the fees are fair, reasonable and proportionate. The proposal envisages that periodic payments may be made provided they fall within the approved amount. If the amount exceeds the court-approved sum by 15 per cent, the insolvency practitioner would be required to submit an updated costs schedule.[173] Accordingly, the schedule acts as a soft cap, because the practitioner must seek further approval if the remuneration exceeds the initial costs schedule by 15 per cent.[174] Reasons for the higher costs and details of the additional work, time and persons performing the work will also be required.

168. (2004) ACSR 279.
169. As cited by Chong J in *Kao Chai-Chau Linda* (n 6) [43].
170. [2005] BPIR 28 [20], which is discussed in the text to n 58 above.
171. *Kao Chai-Chau Linda* (n 6) [66].
172. ibid [72]. Paragraph A.41 of *Kao Chai-Chau Linda* states that 'all classes of insolvency practitioners who owe their offices to curial appointment and whose fees are subject to curial approval should be required to submit a costs schedule if their fees are expected to exceed S$200,000, irrespective of whether they are working on a solvent or insolvent company'. In the UK, IR 2016 applies to administrators and liquidators. ARITA's Code applies to its members.
173. ibid [A.57].
174. ibid.

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Finally, Chong J noted that legislative reform was to be preferred, but thought that the costs schedule may be implemented 'either through incorporation in a new Practice Direction or by way of suitable amendments to the Rules of Court'.[175] He noted that 'the role of a reviewing court is not to scrutinize the minutiae of the bill, but to consider matters of principle'.[176] This conceptualization is 'a concession both to resource constraints as well as limited institutional competence of the courts in this area'.[177] Chong J's judgment is particularly persuasive because he consulted with the profession during its writing.[178] However, the scope of application for Chong J's approach to costs scheduling remains uncertain. It appears to only apply to insolvency practitioners who owe their office to a curial appointment; for example, a voluntary liquidator appointed by the creditors would seem to be an out-of-court appointment, but liquidators were included in the list of curial appointments without distinguishing between voluntary and compulsory liquidators.

IV. COMPARING THE ROLES OF COURTS

A. *Convergence: Factors Taken into Account when Fixing or Reviewing Remuneration and Fee Estimate Requirements*

As the above analysis of recent developments in the UK, Australia and Singapore demonstrates, the judiciary in each jurisdiction has taken active steps to develop the law within the legislative frameworks. The legislative frameworks give different levels of guidance to the judiciary, and the judiciary has sought to deal with any gaps by developing judicial precedent.

In Australia, the influence of professional body requirements such as ARITA's Code can also be seen.[179] Despite the different approaches to formalizing the factors which may be taken into account by the courts of all three jurisdictions in determining insolvency practitioners' remuneration, there are strong similarities in the considerations. Key factors include the reasonableness of remuneration claimed, proportionality and the need for insolvency practitioners to justify their claims. Guiding principles in the UK's Practice Statement emphasize the need for remuneration to be proportionate vis-à-vis the complexity and extent of the work; responsibility and risk assumed; the value and nature of the assets and liabilities; and the efficiency with which the work has been completed.[180] Australian decisions indicate that the courts have often taken such matters into account in fixing insolvency practitioners'

175. ibid [A.61].
176. *Kao Chai-Chau Linda* (n 6) [41].
177. ibid.
178. ibid at [A.61]. Chong J refers to 'considerable input and support I have received from the parties (who comprised a representative cross section of the insolvency practice), and perhaps most significantly, IPAS [Insolvency Practitioners Association of Singapore], which represents the interests of the professionals who work in this area'.
179. Steele, Chen and Ramsay (n 110).
180. Practice Statement [21.2.3]. See also Katharine Theobald, 'The Ferris Report – Insolvency Practitioner Fees and Remuneration' (1998) 14 Insolvency Law & Practice 300.

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remuneration.[181] In line with the UK's Practice Statement which expressly states the need for insolvency practitioners to justify their claims, and to resolve any doubt concerning the reasonableness of remuneration against the insolvency practitioner, Australian courts have reduced remuneration claims where records of time spent were inadequate or the charges appeared to be unjustified.[182] The seminal Singapore decision of *Kao Chai-Chau Linda* reflects that similar considerations, including reasonableness, proportionality and the need for insolvency practitioners to justify their claims, are taken into account by Singapore courts, with judicial decisions being underscored by concerns about the perceived expense of practitioner remuneration in a smaller market such as Singapore which may lack competition on fees.

All three jurisdictions have also recognized the need for upfront fee estimates which may serve as a cap, and disclosure of details relating to fees and expenses.[183] The effect of the fee estimate differs in each jurisdiction, however. In the UK, it functions as a cap on the amount of fees which the insolvency practitioner may claim, and approval is required if fees in excess of the estimated amount are sought. In Australia, insolvency practitioners will need to seek approval in order to draw time-based remuneration in excess of a cap.[184] In Singapore, approval for further fees is not required unless the amount is in excess of 15 per cent of the estimate. Sources of these rules differ, with the UK relying on statutory intervention, Australia on a professional code which covers a majority of practitioners, while Singapore's provisions are judge-made. Demonstrating the cross-pollination of ideas and common trends in thinking, Chong J referred to equivalent measures in the UK and Australia in proposing upfront costs schedules for prospective fees for Singapore.[185] The costs schedule concept for insolvency practitioners is based on the ARITA Code and the fee cap introduced by the English *Insolvency (Amendment) Rules 2015*.[186] His Honour's observation that remuneration should not be disproportionate to the value of the company's estate[187] also resonates in some respects with the Practice Statement's principles and Brereton J's emphasis in *Re Sakr Nominees* on the need for remuneration to be proportionate to the value of property realized by the liquidator. The UK Government tried to restrict the use of

181. *ASIC v Letten* [2014] FCA 985; *Re Lowery Classic Homes Pty Ltd (in liq)* [2013] NSWSC 719; *Re Morago Nominees Pty Ltd (in liquidation)* [2013] FCA 1240.

182. *ACN 104 635 369 Pty Ltd (in liq) (formerly Total Plant Services Pty Ltd) v Hamilton* [2014] FCA 985; *ASIC v Letten* [2014] FCA 985. Nevertheless, where creditors supported the insolvency practitioner's remuneration claim, the courts took the view that they should not interfere with creditors' commercial judgment; *Re On Q Group Ltd (ACN 009 104 330) (in liq)* [2014] NSWSC 1438 [27].

183. In Australia, ARITA's Code of Professional Practice specifies the need to specify a cap when seeking approval for prospective time-based fees, and disclosure of details: Rules 15.2 and 15.3 of ARITA's Code of Professional Practice (n 120).

184. Rule 15.2.2 of the ARITA's Code of Professional Practice (n 120). The rule allows hourly rates to be increased by 'an agreed formula where the escalation factors are objectively and independently determinable', such as an annual increase in accordance with the consumer price index. The formula must be included in the resolution for approval of prospective remuneration. However, any increase approved does not affect the total remuneration cap, and approval is still needed before the cap can be exceeded. Note also the cap specified under the ILRA 2016 discussed above and due to become effective in 2017.

185. *Kao Chai-Chau Linda* (n 6) [A.5]–[A.20].

186. ibid [A.31].

187. ibid [A.20].

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time-based charging during the most recent reform process, but these proposals were not adopted due to strong opposition from insolvency practitioners. This argument is being played out in Australia as part of the insolvency practitioner's appeal in *Re Sakr Nominees*.

B. *Common Judicial Preferences and the Limits of Judge-made Law*

Similarities in the three jurisdictions are reflected in some of the judiciary's concern about the cost of remuneration and a preference for alternative methods of calculating remuneration to time-based charging based on rates set by practitioners themselves.[188] Brereton J's recent controversial decisions on the calculation of remuneration from the Supreme Court of New South Wales have refocused attention on this issue with the court preferring percentage or commission-based remuneration to hourly rates, and proportionality being referenced as a touchstone when deciding what is reasonable. English judges have used the fiduciary status of office holders to justify a court's role in monitoring remuneration. In Singapore, VK Rajah JC in *Re Econ Corp Ltd* criticized calculating remuneration as a fixed percentage of 'the realized assets and distributions' in 2004, even though Section 268 of the Singapore Companies Act specifically provides for that calculation method. Singapore's most recent approach is the result of explicit judicial leadership. Chong J of the Singapore High Court undertook a review of other jurisdictions, including Australia, consulted with the profession, and took the opportunity presented by the case of *Kao Chai-Chau Linda* to rewrite Singapore's approach to fees in a quasi-legislative decision. On one view, Chong J's approach underscores the importance of the courts' overall oversight of remuneration disputes and reveals a high water point for judicial intervention. The case also demonstrates, however, the courts' general discomfort in setting insolvency practitioner remuneration, and Chong J's frustration with remuneration disputes taking up valuable court time and his desire to simplify fee structures with a view to avoiding future disputes.

Disputes about an insolvency practitioner's remuneration destroy creditor value, impede practitioners' ability to operate, and may bring the profession and process into disrepute. Given that disputes are always likely to arise,[189] avoiding costly disputes about remuneration and dealing with disputes effectively and efficiently should be a goal of any resolution framework. To the extent that the judiciary has taken leadership roles in developing the law in this area, there is a question whether they are best positioned to adequately take into account the public interests in the regulation and provision of insolvency services. These considerations require government efforts to address the issues which are likely to arise as a result of recent developments. Where to

188. Australian Securities and Investments Commission (ASIC) 'Creditors – Fees of Insolvency Practitioners' (*ASIC*) <asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/creditors-fees-of-insolvency-practitioners/> accessed 14 October 2016; Law Reform Committee, Singapore Academy of Law (n 157).

189. Anderson and Brown argue that there is a gap in expectations between what the public expects of an insolvency practitioner and what s/he is required, prepared or capable of doing. They argue that any reforms in this area should consider how to close this gap based on 'audit expectations gap theory': Anderson and Brown (n 94).

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draw the line between private and public interests in the orderly formal resolution of insolvency cases is arguably a role for parliaments in the UK, Australia and Singapore. The public interest, and economy-wide and consumer benefits of an effective scheme are important overall goals when considering insolvency practitioner remuneration and dispute resolution. These goals are more difficult to accommodate, however, in an individual case where creditors will receive zero or very little, and the practitioner will receive payment in full of the applicable fees.[190] These issues are often downplayed but they raise the important questions, including: who should pay for resolving disputes about remuneration?

The cost of insolvency proceedings and returns to creditors are inextricably linked to the cost of performing an external administration.[191] Many of the tasks performed by practitioners are required by law, which most creditors do not realize, and the lack of unsecured creditor engagement is a perennial problem in all three jurisdictions. Lubben, a United States-based legal empiricist in this area, argues that working out insolvency 'means that creditors' recovery on their claims moves from zero to some higher amount'.[192] He points out that, 'the professional fees are the cost of moving to that higher recovery', and that 'the notion that money paid to professionals belongs to creditors is true only if the creditors could realize that value without the professionals'.[193] He cites the 'old truism': 'sometimes you have to spend money to make money'.[194] Emotions and a sense of crisis also come with the insolvency territory, however, and enormous fees and cases of creditors receiving no distribution after practitioner fees are paid have heightened tensions surrounding the issue of remuneration. In many cases, however, courts in Australia approve the remuneration claims of insolvency practitioners.[195] Moreover, despite the shock expressed in the *Mirror Group* case over the amount of the fees, in the end the receiver's remuneration was approved,[196] and the assessor also supported the claimed remuneration in the UK case of *Independent Insurance*.[197]

Debates about remuneration also typically ignore the institutional, regulatory and system-wide importance of the roles that practitioners can play. In the context of

190. On the case for regulating insolvency practitioners, see David Brown and Christopher Symes, 'The Regulation of Insolvency Practitioners: Getting to "Trust and Confidence"' (2013) 19 New Zealand Business Law Quarterly 226. Brown and Symes acknowledge the 'public purpose' behind insolvency appointments which leads to high expectations of insolvency practitioners (page 6). For a summary of regulation of Australian insolvency practitioners and the Insolvency Law Reform Bill 2014, see Dickfos, 'The Costs and Benefits' (n 3) and Anderson and Brown (n 94) 180–82. As noted above, the UK substantially reformed the law on the regulation of insolvency practitioners through the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015.

191. On the creditors' conflict, see Dickfos, 'The Costs and Benefits' (n 3) 57.

192. Stephen J Lubben, 'What We "Know" About Chapter 11 Cost is Wrong' (2012) 17 Fordham Journal of Corporate and Financial Law 141, 145.

193. ibid.

194. ibid.

195. Steele, Chen and Ramsay (n 110). The study found that insolvency practitioners' remuneration claims were approved in the amounts sought by insolvency practitioners in 40 % of cases. The analysis was based on 71 judicial decisions involving the fixing or reviewing of insolvency practitioners' remuneration from 2011 to 2015.

196. Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 186–87.

197. *Re Independent Insurance Co Ltd (No 2)* [2003] EWHC 51 (Ch), [2003] 1 BCLC 640.

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phoenix activity, research by Anderson et al,[198] suggests that insolvency practitioners have strong incentives to act with integrity and honesty. Insolvency practitioners have duties to report to ASIC in relation to uncommercial transactions and other voidable transactions,[199] report offences in relation to corporations,[200] make declarations of independence, and as officers of the company, they have fiduciary duties and statutory duties requiring them to act honestly – a breach of which may result in civil and criminal penalties. Anderson et al conclude that, 'these duties and the reporting obligation would appear to give the few insolvency practitioners that may be inclined to engage in impropriety a strong incentive not to do so'.[201] In the current funding environment, it is unlikely that ASIC will have capacity or even the expertise to pick up this work and perform these quasi-regulatory roles in the event that practitioners stopped taking on unprofitable cases. Successful insolvency practitioners already pick and choose which matters they would prefer to work on, and this process is likely to become even more clinical if the profession perceives that they might not get paid. As the research by Anderson et al suggests, a lack of competent insolvency practitioners willing to take on a variety of matters will have consequences for the larger economy and community. More companies are likely to be wound up using informal proceedings without public and formal scrutiny, leading to the possibility of more phoenix activity, for example. While the details differ, insolvency practitioners in the UK and Singapore are similarly subject to statutory duties that are imposed on them not so much for the benefit of the creditors of the insolvent companies, but rather to ensure the proper functioning of companies, for example, to deter abuse of limited liability and breach of fiduciary duties by directors.[202] The institutional importance of the roles that practitioners play was acknowledged by the UK government during recent reforms; the government recognized that the proper functioning of the market for insolvency practitioners was vital not only for those directly affected by insolvency proceedings but also for the economy as a whole.[203]

Brereton J's reasoning in *Re Sakr Nominees* also suggests that large liquidations should and do subsidize smaller liquidations. This approach is essentially accepted in relation to official liquidations in Australia according to Phillips' research. Phillips' interview-based analysis demonstrated that official liquidations typically involve small-sized companies with turnover of less than A$100,000 and assets of A$0 to

198. Helen Anderson et al 'Defining and Profiling Phoenix Activity' (2014), Australian Research Council Discovery Projects Research Reports <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536248> accessed 29 August 2017.

199. ARITA's Code of Professional Practice [25.6.3]; Corporations Act 2001 (Cth) s 439A.

200. Corporations Act 2001 (Cth) s 422, s 438D, s 533.

201. Anderson et al (n 198) 31.

202. For example, under s 7A of the Company Directors Disqualification Act 1986 (UK), the office-holder in respect of a company which is insolvent must prepare and send to the Secretary of State a report about the conduct of each director of the company (a 'conduct report'). The conduct report must describe any conduct which may assist the Secretary of State to decide whether to begin disqualification proceedings or to accept a disqualification undertaking. Under s 149 of the Companies Act (Cap 50, 2006 Rev Ed), if it appears to a liquidator that the conditions for disqualifying a director of the company on the ground of unfitness are satisfied, he shall immediately report the matter to the Minister.

203. Insolvency Service, 'Consultation on Reforms to the Regulation of Insolvency Practitioners' (Insolvency Service February 2011), 5.

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A$10,000.[204] The average cost of administering an official liquidation was A$18,066 over an average period of seven to twelve months. However, liquidators only received 29 per cent of the amount they spent on disbursements and 15 per cent of their remuneration.[205] A similar approach is understood and accepted in Japan where fixed fees apply to most small-scale and asset-less cases, and trustees seek to leverage their experience on those matters to attract profitable appointments in large cases such as corporate reorganizations.[206] In Australia, Dickfos argues that the Senate Committee 'considered any attempt to control IPs fees by setting scale rates of fees would further distort the already distorted market for IPs' services'.[207] Such proposals were not part of the recent Australian reforms. The mechanism discussed above which entitles an insolvency practitioner to remuneration of up to A$5,000 if a meeting of the company's creditors fails to pass a resolution on remuneration because of the lack of a quorum may inadvertently set the upper limit for fees in such asset-less cases in Australia at A$5,000. A review of New Zealand's insolvency laws in 2001 suggested a greater role for government in the sector in relation to asset-less insolvencies, including because the costs incurred by the private sector in this industry are ultimately passed on to consumers of the goods and services: that is, insolvency services.[208]

C. *Roles for External Expert Participants in Assisting Courts in Fixing and Reviewing Remuneration*

Both Australian and the UK's courts draw on expertise within the judiciary to assist with determining remuneration matters. The Practice Statement in the UK allows for preparation of reports by Costs Judges on the remuneration claimed or for Costs Judges to be involved in hearing the matter. Likewise, Australian decisions reflect the relatively common practice of referring remuneration claims to a Registrar who is accustomed to hearing such matters.[209] There are arguably also some similarities in the shift towards participation of external experts. Australian reforms encourage the use of reviewing registered liquidators to review remuneration. The reforms allow creditors or the regulator, ASIC, to appoint reviewing registered liquidators.

The concept of a non-judicial review mechanism was also canvassed during the most recent reform process in the UK. After the publication of the Kempson Report in 2013, the UK Government issued a consultation paper in February 2014,[210] which received

204. Amanda Phillips, 'An Analysis of Official Liquidations in Australia' (IPA Terry Taylor Scholarship Report, 2013) 2.

205. ibid.

206. Stacey Steele, 'Appointing and Remunerating Insolvency Practitioners in Japan: The Roles of Japanese Courts' (2017) 26 International Insolvency Review 82.

207. Dickfos, 'The Regulation of Corporate Insolvency Practitioners' (n 94) 39.

208. Law Commission (New Zealand), 'Insolvency Law Reform: Promoting Trust and Confidence, An advisory report to the Ministry of Economic Development' (Study Paper 11, May 2001), [147]–[148].

209. Steele, Chen and Ramsay (n 110).

210. Insolvency Service, 'Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners' (Insolvency Service 17 February 2014). So far as the proposals on insolvency practitioners' fees are

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seventy-nine responses over six weeks from a variety of sources, including lawyers, accountants, professional associations, individual practitioners and HM Revenue & Customs.[211] The consultation specifically asked for feedback on the question: 'do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?' The UK Government did not proceed with this aspect of its reform proposals in light of negative responses from practitioners, regulatory bodies and creditors.

The possibility of appointing retired insolvency practitioners as assessors to advise the Registrar in fixing or reviewing remuneration where the claims exceed S$250,000 was mooted in a law reform discussion paper from the Singapore Academy of Law in 2005.[212] Chong J also noted that courts elsewhere have used assessors, especially 'where the bill is very large and the issues very complex'.[213] Whilst Singapore courts have the power to appoint an assessor[214] and Chong J thought that an assessor could be used 'in an appropriate case', he also cautioned that 'the court should always be mindful that the appointment of an assessor would necessarily entail a further layer of costs'.[215] Similar concerns have been expressed by some Australian judges and are reflected in Ferris J's early commentary on such appointments in the UK.[216] Importantly, Chong J concluded that any report from an assessor 'should be made available to the parties for comment and critique', but that 'the ultimate decision still lies with the court'.[217] He did not suggest that those reports should be made public. The lack of a public disclosure requirement is a criticism of the new registered liquidator review mechanism in Australia.[218]

V. CONCLUSION

The courts in the UK, Australia and Singapore have demonstrated a willingness to develop the law as it relates to insolvency practitioner remuneration. Despite different legislative frameworks, the factors taken into account by the courts suggest a convergence around concerns about excessive fees and prioritization of the interests of unsecured creditors. Convergence between the jurisdictions can be seen in requirements for fee estimates, cost schedules and caps, although the effect of these measures and judicial perceptions of percentage-based methodology differ to some

concerned, the most important was the proposal to 'remove the option for an insolvency practitioner to propose time and rate as a basis for remuneration except in cases in which there is tight control over the work being done (generally, by either a creditors' committee or secured creditors)'. This radical suggestion was not found in the Kempson Report.

211. Explanatory memorandum to the Insolvency (Amendment) Rules 2015, [8.4]. UK Government, 'Consultation Outcome: Insolvency Practitioner Regulation and Fee Structure' (Gov.UK) <www.gov.uk/government/consultations/insolvency-practitioner-regulation-and-fee-structure> accessed 14 October 2016.

212. Law Reform Committee, Singapore Academy of Law (n 157) [59]–[62].

213. *Kao Chai-Chau Linda* (n 6) [45].

214. See Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 10A(1).

215. *Kao Chai-Chau Linda* (n 6) [46].

216. Steele, Chen and Ramsay (n 110). On Ferris J's early commentary, see the text to n 51 above.

217. *Kao Chai-Chau Linda* (n 6) [46].

218. For a critique of the Australian reforms, see Steele, Chen and Ramsay (n 110).

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extent depending on the jurisdiction. Each jurisdiction also allows for external participation in the fixing and reviewing of practitioner remuneration, although the use of external experts is viewed with caution by courts for cost reasons. Australia recently legislated to bolster such involvement at the request of creditors and ASIC, with the UK and Singapore relying on court procedural rules. These similarities and differences reflect an ongoing global debate about how best to fix and review practitioner remuneration and the interaction and cross-pollination of ideas across jurisdictions, particularly in these three well-established Commonwealth jurisdictions.

Postscript

The New South Wales Court of Appeal handed down its decision in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr*[219] on 9 March 2017 after submission of this article. In a unanimous decision of five justices based on the judgement by Chief Justice Bathurst, the court allowed the appeal and ordered that the application for remuneration be remitted to a judge of the Equity Division of the court for rehearing. The court found that the liquidator established a clear error by Brereton J in reaching his conclusion. Importantly for the findings in this article, the Chief Justice noted that it would be inappropriate 'to fix remuneration on an *ad valorem* basis by simply applying a percentage considered appropriate to all liquidations or to a particular class of liquidations without regard to the particular work done or required to be done in the liquidation in question'.[220] He also found that, whilst a time-based charging may not always be appropriate, it is a legitimate method of calculating remuneration,[221] and the *Corporations Act 2001* does not 'mandate a separate approach for smaller liquidations'.[222]

219. [2017] NSWCA 28.
220. ibid [52].
221. ibid [60].
222. ibid [66].

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