



27 April 2012



Companies Auditors
and Liquidators
Disciplinary Board

Dr Richard Grant
Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Grant

Inquiry into the collapse of Trio Capital and other related matters

Thank you for your email of 13 April 2012.

Proof reading of transcript

I attach a copy of the transcript marked in red with my suggested corrections.

Questions on Notice

I note that I was asked to take a number of questions on notice, and I deal with these questions as follows.

1. Question relating to main concerns in matters brought to CALDB regarding auditor conduct or administration over the period 2003-2004

The transcript records the following:

“CHAIR: One of the things that does happen though is that cases do come before you—92 cases, in fact, since 2003-04. What are the main concerns regarding auditor conduct that you have discerned in that period of time? And what are the main concerns regarding auditor administration?”

Mr Insall: I am not sure that the figure of 92 is correct. I might have some difficulty in answering the question. I have been the chairperson since 2010. In that time no matters have actually proceeded to a hearing, except one failure to lodge an annual return. As a matter of historical record, from my own knowledge, I am unable to provide an answer to that.

CHAIR: I might just ask you to take that one on notice and provide more about it.”

In the period from 1 July 2003 to 30 June 2011, 89 applications were made to the Board. However, some explanation of that number is necessary.

In the first place, the Board categorises matters as either "Administrative" or "Conduct" matters:

- (a) "Administrative" matters involve the less serious complaints, such as a failure to lodge an annual return on time, ceasing to be resident in Australia and becoming disqualified from managing operations under Part 2D.6. Many of these matters are withdrawn by ASIC particularly if the auditor lodges the required return or resigns as a registered auditor. Generally, they involve no major issue of auditor conduct;
- (b) "Conduct" matters involve the more serious complaints, including allegations that an auditor has not performed adequately and properly the duties of an auditor, or is not a fit and proper person to remain registered. These matters are often complex and are often contested strongly. They take longer to deal with. These are the matters which throw up issues of auditor conduct.

Of the 89 matters referred to above, 70 were Administrative matters and only 19 were Conduct matters.

Secondly, not all the above matters proceeded to hearing. Of the 19 Conduct matters, only 16 proceeded to hearing. The remaining applications were withdrawn by ASIC.

Thus, the more meaningful number of matters in terms of the issue raised by the Committee's question (ie matters dealt with by the Board which involved concerns about auditor conduct) was 16.

I do not think it is possible to discern any "main" concerns or pattern of concerns regarding auditor conduct from a review of these 16 decisions. Most involved a failure to carry out an audit in accordance with one of the many auditing standards. Beyond this, the cases related to disparate factual circumstances, ranging over matters such as failure to assess risk of going concern problems, failure to obtain or document evidence supporting valuation of goodwill, failure to obtain appropriate evidence in auditing a trust account, acting where there was a possibility of conflict, failure to comply with accounting standards dealing with self-generating and regenerating assets, etc.

2. Question relating to improvement of the operations of the Board

A question was asked concerning whether I had any view about how the Board's operations could be improved. But that question seemed to arise out of a series of other questions about whether the role of the Board should be expanded, so I set out what I believe to be the relevant transcript, including the context for the question:

"Senator SHERRY: You are an independent expert. You are chair of this committee. You might like some more power, so here is a chance for you to tell us. We can make

recommendations to government. Do you think you should have your own initiating power?

Mr Insall : We have always adopted the position that it is not our role to comment on policy. There is an ongoing review by government at the moment, which is on the Treasury website, about the role of the board.

Senator SHERRY: I was not aware of that. I take it as correct. You will surely be putting a view to the government about whether or not your powers or responsibilities should be varied in some way?

Mr Insall : It is our position that policy is a matter for others.

Senator SHERRY: That is not what I asked. Will you be putting a view or have you put a view to government? I am not asking what it is because I know how far I can go. Have you put or has the board put a view to the government about the powers and responsibilities of your board?

Mr Insall : I am not sure that I can answer that question without having—

Senator SHERRY: Why not? I am not asking you for the policy advice. I know how far I can go. I cannot ask you for the policy advice.

Mr Insall : We have had discussions with Treasury about the role of the board.

Senator SHERRY: Thank you.

CHAIR: Did they include discussions about how the board could be improved or are they simply reportage on what has been happening so far?

Mr Insall : We are responding to proposals which have been put forward by government following the Senate inquiry into the role of the board. The inquiry related to liquidators and the government has since issued an options paper and a proposal paper. We have obviously had discussions with the government in relation to those.

CHAIR: You are not willing to put on the record today any view that you have about how the board's operations could be improved?

Mr Insall : No.

Senator SHERRY: You could always take it on notice, Mr Insall.

Mr Insall : No.

Senator SHERRY: Could you take it on notice for us?

Mr Insall : I would prefer not to answer questions in relation to the policy of the board here.

Senator SHERRY: We are not asking you to do that. What we are asking you to do is take the question on notice and give it a considered view perhaps with your board because you are here representing the board. I understand that position. Take it on notice. I do not see any harm in you doing that and discussing it with the board and hopefully we will get a response. Taking it on notice cannot do any harm or prejudice your position at all.

Mr Insall : I will take the question on notice."

I understand the question to be directed at whether I have views as to whether the Board's operations should be expanded so that it should have some initiating or investigative power.

The only real function of the Board at present is to act as an impartial Tribunal to hear applications brought by those entities responsible for investigation and prosecution of complaints, ie ASIC or APRA.

There are, no doubt, alternatives to the present structure. In England, there is an entity known as the Accountancy & Actuarial Discipline Board ("AADB") (see <http://www.frc.org.uk/aadb/>). Both the investigative functions and the tribunal functions are carried out within the overall structure of this Board. Nevertheless, as I understand its procedures, there is a clear separation within the Board of the tribunal function. This embodies an important element of natural justice in hearing complaints. In order to avoid any suggestion of partiality or bias, there must be a proper separation between the entity hearing the matter and the entity investigating and prosecuting the complaint.

(I note that the AADB only deals with those cases which it considers to be important and involving the public interest. Other complaints against accountants are dealt with by professional disciplinary bodies).

In the United States of America, there is an entity called the Public Company Accounting Oversight Board ("PCAOB") which, similarly, embraces both the oversight and tribunal aspects. The PCAOB website (<http://pcaobus.org/About/Pages/default.aspx>) states:

"The PCAOB is a nonprofit corporation established by Congress to oversee the audits of public companies in order to protect investors and the public interest by promoting informative, accurate, and independent audit reports. The PCAOB also oversees the audits of broker-dealers, including compliance reports filed pursuant to federal securities laws, to promote investor protection.

The Sarbanes-Oxley Act of 2002, which created the PCAOB, required that auditors of U.S. public companies be subject to external and independent oversight for the first time in history. Previously, the profession was self-regulated."

The PCAOB rules for hearings provides for the independence of the tribunal function from the investigative function.

No doubt it would be possible to create an expanded version of the present CALDB along the English or US lines, but this would involve creating a new body with significantly greater resources than the present Board, with a clear internal separation between the investigative and tribunal functions.

Whether or not this is desirable is a major question. As far as I am aware, there has been no comparative research carried out into the comparative effectiveness of the English or US and Australian approaches. At the end of the day, any complete system must involve a series of functions including supervision, investigation, prosecution and an impartial tribunal. I am not sure if it really matters under which umbrella these functions are located (provided there is some clear separation of the tribunal function). The real question is whether each area is properly constituted, funded and administered.

As to the present operation of the Board, I am satisfied that it carries out its functions effectively and efficiently when matters come before it. The Senate recently considered the role of the CALDB in connection with the discipline of liquidators and recommended that the Board be retained, although it recommended the removal of the statutory requirement that hearings be conducted in private (see Senate Economic Reference Committee Report "The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the case for a new framework – September 2010"). As I have already stated to the Committee, in recent times, very few matters have been referred to the Board. The reason for this is a matter which needs to be addressed to ASIC or APRA, although to some extent, the use of enforceable undertakings would explain the reduction in the number of matters being referred.

3. Question relating to number of auditors and activity in other jurisdictions

The transcript records the following:

"CHAIR: I have one other question on notice. Could you supply the committee with the number of auditors that you are in a supervisory capacity over and, if you can, any comparisons with other jurisdictions about the number of cases that might come before similar boards to you? Just to give us an overview of what else is going on in other jurisdictions."

I should first note that the question, in referring to the number of auditors "that you are in a supervisory capacity over" could be read as suggesting that CALDB has a supervisory role over auditors. As already indicated, this is not the role of the Board. The Board's only function is, in effect, to operate as a tribunal to hear such applications as ASIC or APRA wishes to bring seeking removal or suspension of the registration of auditors or liquidators. The Board's role is not to supervise or monitor auditors. That is the role of other entities, including ASIC (see for example page 10 of ASIC's Annual Report for the year 2010-2011 which suggests that this is a key responsibility of ASIC, and that there is a staff of 33 persons dealing with this function within ASIC).


As to the question about the number of auditors, ASIC maintains the relevant records and a definitive answer can only be provided by ASIC. I note that page 10 of ASIC's Annual Report for the year 2010-2011 made reference to "5,120 registered company auditors".

As to question about other jurisdictions and the number of cases which might come before similar boards, this is not within my knowledge or the knowledge of the Board. There are many different disciplinary structures throughout various professions within Australia and overseas and it would be a major undertaking to assess the nature of these and extract comparative data.

The AADB's website indicates that it is presently investigating only 19 matters, although my understanding is that this Board only investigates important matters involving the public interest and that the vast majority of matters in England are dealt with by the professional disciplinary bodies.

As regards the position affecting other professions within Australia, I can only suggest that inquiries be made of the appropriate professional bodies for information. I note, simply by way of example, that the website for the Office of the Legal Services Commissioner ("OLSC") (which deals with discipline of legal practitioners in New South Wales) refers, in its 2010-2011 Annual Report, to 2561 complaints having been received in the period in relation to lawyers in New South Wales. The statistics concerning the disposition of complaints is complex because the OLSC may deal with lesser matters summarily or it may refer matters to the Bar Council or the Law Society Council, or to the Administrative Decisions Tribunal. The Annual Report suggests that in the year 2010-2011, 13 practitioners were disciplined by the OLSC summarily (see page 44), 32 practitioners were disciplined by the Councils (see page 45) and 44 practitioners were disciplined by the Administrative Decisions Tribunal, (47 applications, with only three being dismissed - see page 47).

Yours sincerely



Howard Insall SC
Chairman

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