

“FIT AND PROPER”: AN INTEGRITY REQUIREMENT FOR LIQUIDATORS IN THE AUSTRALIAN CORPORATE LEGAL FRAMEWORK

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ABSTRACT

A flow-on from the global financial crisis has been an increased focus on insolvency processes in Australia. The conduct of liquidators in particular represents a sometimes overlooked but critical aspect of the corporate legal framework. This paper reviews the current regime for regulation of this important group of professionals, in light of the legislative ‘fit and proper person’ requirement. It also considers the historical and ethical contexts in which this requirement has arisen. This paper postulates that there might be room for improvement in the application of the ‘fit and proper person’ requirement for applicants for registration and registered liquidators.

1. INTRODUCTION

In the 2009 New South Wales Supreme Court case concerning the particularly egregious behaviour of the now disqualified liquidator Stuart Ariff,¹ tends to focus upon the issue of liquidators’ suitability as fit and proper persons. There is now to be a Senate Inquiry into the role of liquidators to be conducted in 2010.²

This paper focuses on the requirements in the *Corporations Act 2001* (Cth) s 1282(2)(c) where the Australian Securities and Investments Commission (ASIC) must grant an application for registration if “ASIC is satisfied that the applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator”. It also focuses on the s 1292(2) requirement that to remain registered a liquidator must be a “fit and proper person”. Our interest is in how ASIC currently interprets the fit and proper person requirement. To do this we rely upon

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¹ *Australian Securities and Investments Commission v Stuart Karim Ariff* [2009] NSWSC 829.

² Letter from John Hawkins, Secretary, The Senate Economics Reference Committee, to Dr Vivienne Brand, 4 December 2009 calling for a submission to the Inquiry into Liquidators and Administrators.

ASIC's publication, *Regulatory Guide 186* ("RG 186").³ In exploring the fit and proper person requirement we give a brief historical overview and consideration of ethical issues arising from liquidators' conduct. We tentatively suggest some ways in which registration and monitoring of liquidators in Australia may move forward in light of the fit and proper person requirement.

A preliminary question, we ask who are "liquidators" for the purpose of this paper? A person must be registered with ASIC in order to be an external administrator of failing companies or in order to undertake most company liquidations.⁴ Legally, a natural person can only be appointed or act as the liquidator of a company registered in Australia if they are registered as the liquidator of that specific company or they are a registered liquidator and, in the case of a court ordered liquidation, they are an official liquidator.⁵ The exception is an unregistered liquidator dealing with a members' voluntary winding up of a proprietary company.⁶ This paper is principally concerned with registered liquidators.⁷

2. THE FIT AND PROPER PERSON REQUIREMENT FOR LIQUIDATORS

The fit and proper person requirement aims to ensure that the general community can have confidence that those seeking registration and those currently holding registration as liquidators possess "sufficient moral integrity and rectitude of character"⁸ as to permit them to be entrusted with significant financial responsibility and personal discretionary power. Public trust in the reliability of liquidators is paramount to maintaining market confidence in company operations in Australia.⁹

Section 1282(2) stipulates that applicants for registration will satisfy minimum standard educational qualifications and experience in liquidations and demonstrate that they are capable of performing adequately and properly the duties and functions of a liquidator. In addition to the competency and capacity requirement, ASIC must be satisfied that, to be registered as a liquidator, the applicant "is otherwise a fit and proper person"¹⁰ – the integrity requirement. Section 1282(2)¹¹ stipulates conditions an applicant must satisfy before ASIC will grant or deny registration. Between these two stark extremities of who ASIC will and will not register lies a grey area

³ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007 [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009.

⁴ *Corporations Act 2001* (Cth) ss 418(1)(d); s 448B(1), (2); 411(7)(d).

⁵ *Corporations Act 2001* (Cth) s 532(1), (8); Butterworths, *Australian Corporation Law*, vol 3 (at 164) 9.2.3005.

⁶ *Corporations Act 2001* (Cth) s 532(4).

⁷ *Corporations Act 2001* (Cth) ss 1279(1)(b); 1282(2); 1284(1); 1286(1), (3).

⁸ *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70 at 76. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

⁹ Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 2009*, p2. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument>.

¹⁰ *Corporations Act 2001* (Cth) ss 1282(2)(c); 1282(3).

¹¹ *Corporations Act 2001* (Cth).

comprising of applicants that ASIC *may* consider not to be fit and proper. Indicators that ASIC may consider in assessing an applicant's fitness and propriety are whether he or she holds professional body membership; opinions stated in applicants' referee reports; whether there are any prior convictions or criminal record (ASIC has latitude here depending on the nature and gravity of the offence and the applicant's rehabilitative conduct); and whether there has been a statutory disqualification from managing corporations. These facets of the integrity requirement are now considered.

3. DEFINING 'FIT AND PROPER PERSON'

The phrase 'fit and proper person' while used in the *Corporations Act 2001* (Cth)¹² is not defined. Considered in isolation, the words 'fit and proper' have been described as "a tiresome legalistic doublet with no claim to being either a term of art or a melodious phrase."¹³ When coupled with 'person' however 'fit and proper' acquires context, a framework of actions with generally accepted outcomes in which that person engages or hopes to engage. A 'fit and proper person' therefore "is suitable, appropriate, and legally eligible to undertake a particular activity."¹⁴

This interpretation has judicial support. In *Hughes and Vale Pty Ltd v State of NSW (No 2)* ("*Hughes*")¹⁵ Dixon CJ, McTiernan and Webb JJ stated that the purpose of the fit and proper person test was "to give the widest scope for judgment and indeed for rejection."¹⁶ Posing the question of whether an applicant was a fit and proper person to hold a licence to sell liquor, their Honours' said the 'fit and proper person' test "ought not to be confined to an inquiry into [the applicant's] character and ... it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances."¹⁷ This approach was cited by the Administrative Appeals Tribunal (AAT) with approval in *Re Percival and ASC*¹⁸ and the AAT noted the "very wide discretion" allowed by the phrase.¹⁹

4. STATUTORY USE OF FIT AND PROPER PERSON FOR APPLICANTS SEEKING REGISTRATION AS LIQUIDATORS

Section 1282(2), dealing with registration of liquidators, states "where an application for registration as liquidator is made ... , ASIC *must* (emphasis added) grant the application if: ... (c) ASIC is satisfied that the applicant is capable of performing the duties of a liquidator and is *otherwise* (emphasis added) a fit and proper person to be

¹² *Corporations Act 2001* (Cth) ss 1282(2)(c).

¹³ B A Garner, *A Dictionary of Modern Legal Usage*, Oxford University Press, New York, 1987, p 244.

¹⁴ P Butt, *Butterworths Concise Australian Legal Dictionary*, LexisNexis Butterworths, Sydney, 3rd Ed, 2004, p 176.

¹⁵ (1955) 93 CLR 127.

¹⁶ *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127 at 156-7.

¹⁷ *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127 at 156-7.

¹⁸ (1993) 30 ALD 280 at [48].

¹⁹ *Re Percival and ASC* (1993) 30 ALD 280 at [48].

registered as a liquidator; but otherwise ASIC must refuse the application”.²⁰ In other words, if an applicant meets the criteria stipulated in s 1282(2), including being a fit and proper person, he or she *must* be registered. In *Davies v ASC*,²¹ a case involving the disqualification of an auditor, Hill J observed that the words “or is otherwise” express a legislative view that a person who fails to perform the duties or functions that would provide the specific grounds for disqualification, would ordinarily not be a fit and proper person to remain registered (in that case, as an auditor). Reference to “otherwise” in s 1282(2)(c) reinforces ASIC’s view that an applicant’s overall capability is part of their fitness and propriety to be registered as a liquidator. By implication, a person who is not capable of performing adequately and properly the duties of a liquidator is not a fit and proper person to be registered.²²

For the purposes of s 1282(2)(c), an applicant is “otherwise” a fit and proper person if ASIC is satisfied that applicant has “honesty, integrity, good reputation and personal solvency”.²³ ASIC considers an applicant in view of:

- the fiduciary nature of a liquidator’s duties and functions when appointed as an external administrator;
- the fact that liquidators as external administrators often have control of very large amounts of money, other property, financial facilities and financial obligations that belong to third parties; and
- the need for liquidators words and actions to be regarded with complete trust by persons who deal with them in their capacity as an external administrator.²⁴

Fiduciary honesty and trust is at the heart of being adjudged a fit and proper person. An applicant who is not capable of performing adequately and properly the duties of a registered liquidator is, by implication, not a fit and proper person to be registered.²⁵

4.1 ASIC’s interpretation of the fit and proper person requirement in s 1282.

ASIC, in *RG 186* states that its interpretation of ‘fit and proper’ under s 1282(2)(c)²⁶ is consistent with, inter alia, *Hughes*.²⁷ ASIC interprets the expression ‘fit and proper’

²⁰ *Corporations Act 2001* (Cth) ss 1282(2)(c).

²¹ (1995) 131 ALR 295 at 307.

²² ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.69.

²³ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.21.

²⁴ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.70(a), (b), (c).

²⁵ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.69.

as referring to the applicant's "overall capability of performing their duties and functions"; and "honesty, integrity, good reputation and personal solvency".²⁸ Applicants, by their professional conduct, must continually demonstrate that they can maintain the standards expected of their profession. Factors such as timeliness, truthfulness and personal integrity when dealing with clients and professional bodies demonstrate whether an individual applicant possesses the relevant attributes to be a liquidator.²⁹

The fit and proper person requirement that is used to assess integrity of an applicant includes ASIC being informed as to whether that applicant has any criminal record; disqualification order; or pending legal or disciplinary action.³⁰ ASIC will also have regard to that applicant's personal solvency, referees' opinions, residency status and, if the applicant is a registered trustee, his or her record and reputation in that role.³¹

4.2 Who does not satisfy ASIC that they are a fit and proper person?

In the negative, and in the spirit of the phrasing of s 1282(2)(c), ASIC will consider an applicant is *not* a fit and proper person to be registered as a liquidator if, in the last ten years, the applicant has been convicted of an offence of which one element was dishonesty, even though that conviction did not disqualify the applicant from managing companies under Part 2D.6 of the *Corporations Act*;³² or the applicant has been found civilly liable for any breach of trust, breach of fiduciary duty, dishonesty, gross negligence or recklessness in the course of his or her professional duties;³³ or

²⁶ *Corporations Act 2001* (Cth) ss 1282(2)(c).

²⁷ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.68. ASIC noted that its interpretation of fit and proper is consistent with judicial opinion in *Hughes and Vale Pty Ltd v The State of NSW (No. 2)* (1955) 93 CLR 127 at 156–7; *Re Su and the Tax Agents' Board of SA* (1982) 82 ATC 4284 at 4286; *Stasos v Tax Agents' Board of NSW* (1990) 90 ATC 4950 at 4959; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 348; and *Davies v Australian Securities Commission* (1995) 131 ALR 295 at 305–7.

²⁸ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.21; RG 186.68.

²⁹ For example, *Re Su and the Tax Agents' Board, South Australia* (1982) 82 ATC 4284.

³⁰ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.71; Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.0005.

³¹ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.68(b); RG 186.73.

³² ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(a); *Corporations Act 2001* (Cth) s 1282(4).

³³ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

the applicant has been convicted of a serious tax offence.³⁴ An applicant who is personally insolvent under the *Bankruptcy Act 1966* (Cth);³⁵ or disqualified from managing a corporation under Part 2D.6;³⁶ or who cannot satisfy ASIC that he or she has full mental capacity,³⁷ will not be registered.

ASIC's latitude regarding registration if the applicant does have a conviction, as described above, stands in marked contrast to the statutory bar on registration if an applicant has been disqualified from managing a corporation under Part 2D.6.³⁸ This is because a registered liquidator must be eligible to be appointed as an external administrator, and undertake the management, of any body corporate.³⁹ Consequently, ASIC must not register as a liquidator an applicant who has been automatically disqualified from managing a corporation because of personal insolvency;⁴⁰ or a conviction for contravention of the *Corporations Act* punishable by imprisonment for a period of greater than 12 months; or conviction for an offence involving dishonesty and punishable by imprisonment for at least 3 months; or a conviction for an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.⁴¹ Other grounds upon which ASIC cannot register an applicant are if he or she has been disqualified for repeated contraventions of the *Corporations Act*, or dishonest or careless acts,⁴² or for mismanagement contributing to two or more corporate failures.⁴³ In summary, an applicant who is disqualified from managing corporations as described above is debarred from being a registered

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(b).

³⁴ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(c).

³⁵ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(d)(i), (ii); *Corporations Act 2001* (Cth) s 206B(4).

³⁶ *Corporations Act 2001* (Cth) s 1282(4); ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(e).

³⁷ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.23(f).

³⁸ *Corporations Act 2001* (Cth) s 1282(4).

³⁹ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.74.

⁴⁰ *Corporations Act 2001* (Cth) s 206B(3); ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.76.

⁴¹ *Corporations Act 2001* (Cth) s 206B(1)(a)-(c) ; ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.76.

⁴² *Corporations Act 2001* (Cth) s 206E(1), (2); Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.5025.

⁴³ *Corporations Act 2001* (Cth) ss 206D(1), (2), (3); 206F(1), (2); 533(1); 206C(1), (2); 1317E.

liquidator⁴⁴ and is not a fit and proper person to be registered because, according to ASIC, he or she is “inherently incapable of performing the duties of a registered liquidator”.⁴⁵

4.3 The grey area - who may ASIC consider to be fit and proper or not?

Lying between the two extremes of applicants ASIC will and will not register, is a grey area where ASIC *may* consider applicants to be fit and proper or not. Specifically, ASIC may consider that an applicant is not fit and proper to be registered, depending on the particular facts and circumstances, if any legal or disciplinary action is pending or has been taken against him or her in the last 10 years and has resulted in an adverse finding by any of the following - a relevant professional body of which the applicant is or has been a member; ASIC; the Companies Auditors and Liquidators Disciplinary Board (CALDB); the Insolvency and Trustee Service of Australia (ITSA); the Tax Agents' Board; or the Australian Taxation Office (ATO).⁴⁶ For example, action by the ATO would be relevant to ASIC's assessment of the applicant's fitness and propriety where it relates to matters such as the non-payment of personal taxation liabilities or involvement in the non-payment of corporate taxation liabilities.⁴⁷

Alternatively, ASIC may consider an applicant not to be fit and proper if, in the last 10 years, he or she has been bankrupt; or has been a disqualified person under Part 2D.6;⁴⁸ or has been refused membership by a relevant professional body; or has made an application for registration as a liquidator or as an official liquidator that was refused for fitness and propriety reasons. This list is not exhaustive.⁴⁹

Applicants' fitness and propriety are also assessed by ASIC screening for convictions, previous or pending professional disciplinary actions, removal or resignation as a liquidator and checking referees' reports.⁵⁰ Applicants must disclose to ASIC details

⁴⁴ *Corporations Act 2001* (Cth) s 1282(4).

⁴⁵ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.75.

⁴⁶ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.24(a).

⁴⁷ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.71; *Re Su and the Tax Agents' Board*, *South Australia* (1982) 82 ATC 4284.

⁴⁸ *Corporations Act 2001* (Cth) s 1282(4).

⁴⁹ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.24(b).

⁵⁰ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.5015.

of prior convictions and proceedings pending which may lead to a conviction.⁵¹ Applicants must also provide ASIC with a statement from the Australian Federal Police that the applicant has not been adversely recorded.⁵² However, convictions may not debar registration, depending on the nature and gravity of the offence and the evidence available of rehabilitation (such as readmission to a professional accounting body). For example, ASIC will be satisfied if an applicant can demonstrate that for at least five years since their conviction or release from gaol, whichever is the most recent, their conduct substantiates the claim implied by their application that they are a fit and proper person to be registered.⁵³

4.4 Use of professional accounting body membership to satisfy the fit and proper person requirement

The *Corporations Act* no longer recognises an applicant as eligible for registration because he or she is a member of a prescribed professional accounting body; for example, the Institute of Chartered Accountants (ICA), CPA Australia (CPA) and the Insolvency Practitioners Association of Australia (IPA).⁵⁴ However, ASIC regards favourably current membership of a body that monitors the professional performance of its members and has disciplinary functions because such bodies usually require their members to be fit and proper persons. ASIC naturally assumes such bodies will have also considered that applicant's honesty, integrity and reputation. While membership of a professional body will be a positive factor, it will only be persuasive, not determinative, in ASIC's assessment of whether the applicant is a fit and proper person to be a registered liquidator.⁵⁵ This measure seems premised on the fact that "most"⁵⁶, but not necessarily *all*, applicants hold professional body membership.

5. THE WRITTEN APPLICATION REQUIRED BY ASIC TO ASSESS WHETHER REGISTRATION CAN BE GRANTED

⁵¹ ASIC, *Disclosure of convictions and proceedings*, Regulatory Guide 20 (RG 20) issued 18 May 1992 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/pn20.pdf/\\$file/pn20.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/pn20.pdf/$file/pn20.pdf) at 14 January 2010, RG 20.2; RG 20.12.

⁵² *Corporations Act 2001* (Cth) s 1279(2); *Corporations Regulations 2001* (Cth) Sch 2 ASIC Form 903B "Application for Registration as a Liquidator, page 4"; Australian Federal Police National Police Checks http://www.afp.gov.au/business/national_police_checks.html#forms at 14 January 2010.

⁵³ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.5015.

⁵⁴ *Corporations Amendment (Insolvency) Bill 2007*, Explanatory Memorandum [http://scaleplus.law.gov.au/ComLaw/Legislation/Bills1.nsf/0/0713C3A73E9707EDCA2572EC000E1857/\\$file/07099em.rtf](http://scaleplus.law.gov.au/ComLaw/Legislation/Bills1.nsf/0/0713C3A73E9707EDCA2572EC000E1857/$file/07099em.rtf) at 22 January 2010, paras 3.61, 6.6, 6.7, 6.8

⁵⁵ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007 [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.22; RG 186.72.

⁵⁶ Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.0015.

ASIC's exercise of its discretionary power over whether an applicant satisfies the threshold registration requirements - competency, capability and integrity – largely depends on the quality of the written information provided concerning the applicant's on-the-job performance and perceived attributes as a fit and proper person.

Appendix A to this paper shows the relevant material an applicant must submit to satisfy ASIC's registration criteria. For example, for the fit and proper person criterion alone, an applicant must lodge a letter from a professional body (if applicable), a signed statement about legal and/ or disciplinary matters, and two referee reports.⁵⁷ One referee should be a registered liquidator who has directly supervised the applicant's work on external administrations for at least the equivalent of three years full-time over the last five years.⁵⁸ The other referee should be a person who is able to verify the applicant's professional knowledge, skill, experience, diligence and judgment in corporate insolvency work, as well as attest to that applicant's honesty, integrity and reputation.⁵⁹ The referee reports include specific competency-based questions.⁶⁰ Referees must be able to express opinions about the applicant based on the referee's personal knowledge of the applicant and their direct observation of the applicant's conduct.⁶¹ ASIC will give referees' opinions "careful consideration" when assessing the applicant's fitness and propriety, and may seek further information or clarification from the referees.⁶²

6. POST-REGISTRATION SUPERVISION OF REGISTERED LIQUIDATORS

Once an applicant has satisfied ASIC's threshold criteria he or she will become a registered liquidator ("liquidator" in the balance of this paper). To remain registered

⁵⁷ ASIC, "Liquidator registration checklist", September 2005, link from ASIC, *Liquidator registration kit* web page,

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010.

⁵⁸ ASIC, *How to apply for registration as a liquidator*, Kit issued in September 2005

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010, 2.22.

⁵⁹ ASIC, *How to apply for registration as a liquidator*, Kit issued in September 2005

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010, 2.24; Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.5015; 9.2.5030.

⁶⁰ ASIC, "Liquidation registration – Pro forma referee report", September 2005 link from ASIC, *Liquidator registration kit* web page,

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010; ASIC, *How to apply for registration as a liquidator*, Kit issued in September 2005

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010, 2.25.

⁶¹ ASIC, "Liquidator registration – Guidance for referees", September 2005, link from ASIC, *Liquidator registration kit* web page,

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010.

⁶² Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.5015.

he or she must continually perform adequately and properly the duties and functions of a liquidator and, inter alia, remain a fit and proper person.⁶³ Under s 1292(2) ASIC may apply to the CALDB to cancel or suspend registration if the liquidator is, inter alia, “otherwise not a fit and proper person to remain registered as a liquidator”.

6.1 Rationale underlying post-registration supervision

The underlying rationale is based on the fact that a liquidator’s registration continues until it is cancelled or the person dies.⁶⁴ Liquidators have express and implied legal and equitable obligations under the *Corporations Act*, other legislation and general law. ASIC must have confidence that applicants who satisfied the criteria to be registered as liquidators maintain their competency to perform the requisite work of a registered liquidator, and remain fit and proper persons to undertake such work.⁶⁵

6.2 The ongoing requirement of fit and proper person for registered liquidators

Essentially, a liquidator is not a fit and proper person to remain registered if ASIC considers that he or she is “no longer capable of performing adequately and properly the duties and functions of a registered liquidator”.⁶⁶ To perform adequately and properly the duties and functions of a registered liquidator means that the liquidator must comply with all the obligations applicable to him or her in their capacity as a liquidator.⁶⁷ These obligations include general law duties to exercise reasonable care, competence and skill, and to perform all liquidator duties with the highest standards of honesty and integrity and the statutory duties of company officers,⁶⁸ including discharging duties with care and diligence and good faith.⁶⁹

⁶³ *Corporations Act 2001* (Cth) s 1292(2).

⁶⁴ *Corporations Act 2001* (Cth) s 1290(1).

⁶⁵ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.97-RG 186.98; Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6005.

⁶⁶ *Corporations Act 2001* (Cth) s 1292(2)(d); ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.85(a).

⁶⁷ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.102.

⁶⁸ *Corporations Act 2001* (Cth) ss 180-184; ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.103.

⁶⁹ *Corporations Act 2001* (Cth) ss 180-181; ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007

[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.103.

The number and seriousness of any complaints ASIC may receive about a liquidator and/ or their staff may indicate that either that liquidator is not performing his or her duties or functions adequately and properly, or that he or she is otherwise not fit and proper to remain registered.⁷⁰ Another indicator is if a liquidator's membership of a professional body is terminated on the ground of no longer being deemed a fit and proper person to be a member of that body. That decision will negatively influence ASIC's view on whether that liquidator remains a fit and proper person to be registered.⁷¹

6.3 Monitoring of the fit and proper person requirement by ASIC

Supervision of liquidators is a function of ASIC.⁷² We postulate that a possible limitation of post-registration supervision might be that it relies on an annual statement from liquidators concerning personal and practice details and the liquidations that they have conducted.⁷³ In this way, ASIC reviews the liquidator's professional activities and personal details that may relate to whether he or she should remain registered. This reporting requirement is a *de facto* process of indirect periodic renewal of registration.⁷⁴ If ASIC deems disciplinary proceedings appropriate it applies to the CALDB for an order against the liquidator.⁷⁵ The annual statements are not open to public inspection and copying due to the confidential nature of their content.⁷⁶

Commentary suggests that ASIC's pro-active surveillance of liquidators was discontinued due to limited resources.⁷⁷ ASIC's scrutiny of liquidators "is now confined to reactive surveillance only".⁷⁸ ASIC responds to complaints received, professional disciplinary reports or media reports, and to relatively serious offences. All complaints and adverse reports are scrutinised and may be formally investigated.⁷⁹ ASIC may require the production of books, files and working papers in connection with an investigation to determine whether disciplinary proceedings should be initiated.⁸⁰ ASIC is empowered to conduct inquiries into liquidators⁸¹ and

⁷⁰ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.110(d).

⁷¹ ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.110(c).

⁷² Butterworths, *Australian Corporation Law*, vol 3(at 163) 9.2.6030.

⁷³ *Corporations Act 2001* (Cth) s 1288. ASIC may at any time require a liquidator of a specified body corporate to lodge a statement containing prescribed information: s 1288(5). Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6015.

⁷⁴ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6010.

⁷⁵ Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.6030.

⁷⁶ *Corporations Act 2001* (Cth) s 1274(2)(a)(ii).

⁷⁷ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6050.

⁷⁸ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6050.

⁷⁹ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6050.

⁸⁰ Australian Securities and Investments Commission Act 2001 s 30; *Coopers & Lybrand v ASC* (1994) 15 ACSR 383; Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6050.

can require liquidators to attend an ASIC examination to answer questions under oath or affirmation.⁸²

ASIC operates a national “Auditors and Liquidators Watchlist” (“Watchlist”). It is an intermediate measure for dealing with conduct, which in ASIC’s opinion is culpable but not sufficiently serious to warrant taking the case to the CALDB. The Watchlist is periodically reviewed and entries removed after three years if no new matters of concern have been detected. Liquidators whose names are entered on the Watchlist are informed of that entry but it is not open for public inspection.⁸³

The apparently reactive nature of ASIC’s supervisory role is graphically illustrated by the case of the now disqualified liquidator, Stuart Ariff. Whether Ariff was ever on ASIC’s Watchlist is of little comfort for creditors of the 200 companies that were administrated by his firm. Speaking after the handing down of the Ariff decision in August 2009, a creditor lamented:

“It’s a shame ASIC didn’t act when we made our first complaint back in 2005. The damage that Mr Ariff and his group caused would have been much less. Now it is nothing more than a hollow victory. Too much damage has already been done. Too many people and livelihoods have been hurt.”⁸⁴

It was only after the creditor, frustrated with ASIC, took their story to *The Australian* newspaper in 2007 that ASIC started action.⁸⁵ Of course, “one swallow does not a summer make”,⁸⁶ but a review of recent statistics on the number of liquidators under investigation by ASIC suggests the current supervision regime may bring to light fewer transgressions than might be expected given the number of active liquidators in Australia and the complexity of many liquidations. The most recent Annual Report of the CALDB indicates only one uncompleted and one new conduct matter for the report year.⁸⁷ ASIC’s *Insolvency Update* of March 2008 identified only nine liquidators subject to disciplinary action, out of a total pool of 1146 registered liquidators.⁸⁸

⁸¹ *Corporations Act 2001* (Cth) s 536.

⁸² Australian Securities and Investments Commission Act 2001 s 19.

⁸³ Butterworths, *Australian Corporation Law*, vol 3(at 140) 9.2.6050.

⁸⁴ Adele Ferguson, ‘Party Over, as Ariff told to pay \$4.9m’, *The Weekend Australian* (Sydney), 22-23 August 2009, Weekend Business 28.

⁸⁵ Adele Ferguson, ‘Party Over, as Ariff told to pay \$4.9m’, *The Weekend Australian* (Sydney), 22-23 August 2009, Weekend Business 28.

⁸⁶ Aristotle, Greek philosopher (384BC – s22BC), <http://www.quotationspage.com/quote/38907.html> at 19 January 2010.

⁸⁷ Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 2009*, p14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument> at 20 January 2010.

⁸⁸ ASIC *Insolvency Update*, June 2009 page 5 link from <http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidators+-+guidance?openDocument> at 16 January 2010.

7. DISCIPLINARY ACTION

7.1 The CALDB

The CALDB is the body responsible for hearing claims brought by ASIC against liquidators, including failing to perform their duties properly or being otherwise unfit to remain registered. Such claims, if proven, may result in disciplinary action including monetary fines and/ or suspension or cancellation of registration. Appeals against decisions made by the CALDB are heard by the AAT.

A liquidator who is found to no longer satisfy the fit and proper person requirement, or manifests deficiencies in performance, should be appropriately disciplined. ASIC may apply to the CALDB to cancel or suspend for a specified period a liquidator's registration if he or she has failed to carry out their duties adequately and properly, or "is otherwise not a fit and proper person to remain registered".⁸⁹ The CALDB may exercise its discretion as to whether the grounds for an order are made out, and if so, whether to order a cancellation or suspension of registration;⁹⁰ or alternatively, give an admonishment or reprimand.⁹¹ The CALDB may also require the liquidator give an undertaking to engage in, or refrain from engaging in, specified conduct.⁹² Failure by the liquidator to either give, or contravene, an undertaking may trigger the CALDB to order a cancellation or suspension of registration.⁹³ If dissatisfied with the CALDB's decision, the liquidator may appeal to the AAT.

The CALDB is independent of professional bodies. However, if the liquidator who is disciplined by the CALDB also belongs to a professional body, for example ICA, CPA Australia or IPA, that body may also institute disciplinary proceedings for breach of conduct, on the same grounds as the CALDB action.⁹⁴

In terms of disciplinary action by the CALDB over the past two years, Board members were involved in 10 man days of hearings in 2008⁹⁵ and 45 man days of hearings in 2009 dedicated to liquidators' matters.⁹⁶ The CALDB *Annual Report for 2008* reveals that there were no new applications before the Board for liquidators

⁸⁹ *Corporations Act 2001* (Cth) s 1292(2)(d); ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007 [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/\\$file/ps186.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf) at 14 November 2009, RG 186.111.

⁹⁰ *Corporations Act 2001* (Cth) ss 1292(2), (3); 1295; 1298; Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.7040, 9.2.7045.

⁹¹ *Corporations Act 2001* (Cth) ss 1292 (9)(a), (10); 1295; 1298; Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.7050.

⁹² *Corporations Act 2001* (Cth) s 1292 (9)(b),(c).

⁹³ *Corporations Act 2001* (Cth) s 1292 (9); *Re Percival and ASC* (1993) 30 ALD 280 at 283 (para 7); Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.7055.

⁹⁴ Butterworths, *Australian Corporation Law*, vol 3(at 164) 9.2.7090.

⁹⁵ Companies Auditors and Liquidators Disciplinary Board, *Annual Report For the year ended 30 June 2008*, p 14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument> at 20 January 2010.

⁹⁶ Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 2009*, p14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument> at 20 January 2010.

conduct, one uncompleted matter at year end, and one matter appealed to the AAT.⁹⁷ In the 2009 Annual Report there was one new application and one uncompleted matter at year end.⁹⁸ While these numbers appear sparse, especially in light of the number of registered liquidators in Australia, further research on these matters is required before any sound conclusions can be drawn.

8. THE HISTORY OF 'FIT AND PROPER' LIQUIDATORS

Some further insight into the significance of the role of liquidators, and the need to monitor fitness carefully, can be gleaned from a review of the development of this area of regulation. In New South Wales (including Port Philip) in 1847 the first *Winding Up Act* was enacted and this Act was almost identical to the 1844 *Winding Up Act* from the UK. It provided for the estate and effects of the insolvent company to be vested in the Chairman of the company as Trustee who would then surrender the administration into the hands of an Official Assignee (a role similar to a present day Official Receiver or Registered Trustee in bankruptcy). This was using the existing structure for individuals and firms and was subject to examination by the Commissioner for Insolvent Estates.⁹⁹

As the colonies developed they followed the English position on appointment of liquidators from 1868 when Malins VC ruled in *Re The General Provident Assurance Co*¹⁰⁰ that “whoever is proposed to be appointed liquidator [can carry on if] he is respectable and fit and proper person.”¹⁰¹

In 1890, in New South Wales there was a challenge to the use of just the official assignees, and Manning J in *In Re The Wentworthville Estate Land and Building Co Ltd*¹⁰² expressed the opinion that “companies would be wound up much more expeditiously and economically by the official assignees than by those outside the Court”,¹⁰³ presumably meaning accountants. Accountancy as an organised profession at the time was in its infancy and during the 1890s a number of accountant institutes were formed.¹⁰⁴

By 1926, in *Re Austral Knitting Mills Ltd*¹⁰⁵ the court still was exercising unfettered discretion in respect to the appointment of liquidators and Long Innes J remarked:

⁹⁷ Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 2008*, p14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument> at 20 January 2010.

⁹⁸ Companies Auditors and Liquidators Disciplinary Board, *Annual Report for the year ended 30 June 2009*, p14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument> at 20 January 2010.

⁹⁹ *McPherson Law of Company Liquidation*, para 1-400.

¹⁰⁰ (1868) 19 LP 45.

¹⁰¹ (1868) 19 LP 45.

¹⁰² (1890) 1BC 50.

¹⁰³ 1890) 1BC 50 at 51.

¹⁰⁴ R Brown, *A History of Accounting and Accountants*, (Frank Cass & Co, 1968) 259-264.

¹⁰⁵ (1926) 23 WN 131.

*“where the person having the carriage of the winding up order nominates a person to be the official liquidator, who is properly qualified and fit and proper person, I do not think that in many cases the court would have to inquire into the comparative qualifications of that person and of some other person who may be nominated by another party; but the court may occasionally be called on to do so.”*¹⁰⁶

The *Companies Act 1929* (UK) was adopted by Queensland in 1931, South Australia in 1934, New South Wales in 1936, Victoria in 1938 and Western Australia in 1943. This Act created a Companies Auditors and Liquidators Board and provided for the licensing of liquidators. For example, s370(1)(b) of the *Companies Act 1934* (SA) provides that no person shall act as “the liquidator of any company unless he holds a liquidators licence and has given security in the prescribed manner and amount to the satisfaction of the Board”. The subsection went on to prohibit any company appointing other than a licence holder.¹⁰⁷ The Attorney General could also appoint a liquidator if it was impracticable or inconvenient to appoint a licensed liquidator.¹⁰⁸ Only individuals and not bodies corporate could be licensed.¹⁰⁹ The Board was empowered to issue a liquidator’s licence “to any person who has attained the age of twenty one years, is of good character and repute, and is competent to act as a liquidator of companies”.¹¹⁰

Under this 1930’s legislation the Companies Auditors and Liquidators Board had the power to inquire into the conduct, character and abilities of the licensed liquidator and “upon being satisfied that such person is not a fit and proper person to hold such a licence, to cancel such licence.”¹¹¹ Appeals to the Board’s findings had to be made within three months to the court that, in turn, could re-issue the licence or refrain from cancelling or make any other order.¹¹²

The *Uniform Companies Acts 1961* continued to give the States the registration function.¹¹³ For example, in Victoria the requirements for registration included “satisfying the Board of general conduct and character and sufficient practical experience in accountancy and ability to act as a company auditor.”¹¹⁴ At this time registration was renewed annually and the Boards in each of the jurisdictions continued to exercise powers to inquire into the conduct, character and ability of registered liquidators.¹¹⁵

The *Companies Code* of 1981 transferred the registration function to the National Companies and Securities Commission (NCSC) and deemed all existing liquidators as registered across all other Australian jurisdictions.¹¹⁶ The Code expressed that the requirements for registration as a liquidator included “satisfying the NCSC that the

¹⁰⁶ (1926) 23 WN 131 at 132.

¹⁰⁷ *Companies Act 1934* (SA) s371(2)(b).

¹⁰⁸ *Companies Act 1934* (SA) s371(5).

¹⁰⁹ *Companies Act 1934* (SA) s371(6).

¹¹⁰ *Companies Act 1934* (SA) s371(8).

¹¹¹ *Companies Act 1934* (SA) s371(11).

¹¹² *Companies Act 1934* (SA) s371(12).

¹¹³ *Uniform Companies Act 1961* s 6.

¹¹⁴ *Companies Act 1961* (Vic) s 9(1).

¹¹⁵ *Uniform Companies Act 1961* s 9(6).

¹¹⁶ *Companies Code 1981* s 29.

applicant is capable of performing the duties of a liquidator and is otherwise a fit and proper person...”¹¹⁷ This is essentially the same as it is today - an unbroken chain of regulatory focus on liquidators’ fitness for office is apparent from the 1860’s onwards.

9. ETHICS CONSIDERATIONS - LIQUIDATORS AS FIT AND PROPER PERSONS

Earlier sections of this paper have considered regulatory controls on liquidators that aim to ensure these insolvency professionals are fit and proper to discharge their duties, and the historical context in which that regulation arises. In addition, ethical considerations are relevant to effective liquidator regulation in Australia. The nexus between being a fit and proper liquidator and an ethical liquidator is clear, but the exact way in which the regulatory regime in Australia has incorporated ethical considerations into its framework has not always been as apparent. Relatively recent developments in case law and professional standards also illustrate the way in which this component of liquidator regulation continues to evolve.

Liquidators owe trustee-like responsibilities to the company in relation to which they act and by extension to the stakeholders in that company, particularly (in insolvency) the creditors.¹¹⁸ Inherent in any fiduciary relationship is an expectation of conduct consistent with the highest ethical standards. However, evidence is available from both within the insolvency profession and the wider community of concern as to the extent to which those standards are being complied with by some liquidators, most recently in the announcement of a Senate Inquiry into liquidators and administrators.¹¹⁹ The terms of reference of the inquiry include a review of the role of liquidators prior to and following the collapse of a business. ASIC’s involvement and activities in this context also form part of the review.¹²⁰ In the earlier Explanatory Memorandum¹²¹ accompanying the *Corporations Amendment (Insolvency) Bill, 2007* an objective was identified of enhancing ‘the independence and competence of insolvency practitioners’ and also of ensuring that those practitioners ‘maintain the capacity to adequately and properly perform the duties and functions of registered

¹¹⁷ *Companies Code* 1981 s 20.

¹¹⁸ RP Austin and IM Ramsay, *Ford’s Principles of Corporations Law*, LexisNexis, Sydney, 13th Ed, 2007, para 25.150

¹¹⁹ The Commonwealth Senate, Economics References Committee, *Inquiry into Liquidators and Administrators*, referred 25 November 2009 and reporting by 31 August 2010. Media commentary on the Senate inquiry announcement can be found at ‘Senate Probes Wind-up Practice’, *West Australian*, 26 November 2009 at p53; ‘Probe on Insolvency Abuse’, *The Age*, 26 November 2009, p6. Contrast the Insolvency Practitioners’ Association’s recent media release arguing that no further inquiry into the insolvency profession in Australia is warranted, since liquidators and other insolvency professionals are already regulated effectively: IPA Media Release, quoting Mark Robinson, IPA Chair, 25 November 2009, via www.ipaa.com.au. See also *The Parliament of the Commonwealth of Australia, Corporations Amendment (Insolvency) Bill, 2007, Explanatory Memorandum*, available at <http://parlinfo.aph.gov.au/parlInfo>, at para 3.64, where concerns in relation to the conduct of liquidators and other insolvency practitioners are expressed.

¹²⁰ Terms of Reference, Inquiry into Liquidators and Administrators, Senate Economics Committee, Parliament of Australia, available at http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/tor.htm.

¹²¹ *The Parliament of the Commonwealth of Australia, Corporations Amendment (Insolvency) Bill, 2007, Explanatory Memorandum*, available at <http://parlinfo.aph.gov.au/parlInfo>.

liquidators on an ongoing basis'.¹²² The problem identified by the Explanatory Memorandum centered on the essentially private nature of the practice of liquidation in Australia, the fact that liquidators and other insolvency professionals are granted very substantial powers over debtors and related assets, and the need for liquidators and other insolvency professionals to comply with the 'highest standards of honesty'. The Explanatory Memorandum noted that some insolvency practitioners were not complying with the required 'high standards of honesty, competence, skill and diligence'.¹²³ Curiously, this level of interest is not reflected in academic commentary on liquidator ethics, which appears to have virtually by-passed the issue.¹²⁴

As identified above, the key public body charged with liquidator disciplinary responsibilities, and hence ethical compliance, is the CALDB. The Board decides if a liquidator is, or is not, a fit and proper person to remain registered as a liquidator in Australia.¹²⁵ The Board sees its role as to provide an incentive to good professional conduct and to protect the public by virtue of its powers to cancel or suspend a liquidator's registration.¹²⁶ Reference has been made above to the CALDB's most recent Annual Report which does not suggest that liquidator ethics in Australia are a significant issue. The Report shows that while more hours were devoted to dealing with disciplinary issues in relation to liquidators this year than last, the number of matters before the Board was vanishingly small, that the work undertaken by the Board was predominantly in relation to auditors rather than liquidators, and that issues related more heavily to administrative problems rather than misconduct.¹²⁷

It is through the CALDB's activities that ethical standards of practice for Australian liquidators gain their most significant formal status in relation to liquidator regulation. The CALDB has power, in reaching a decision, to have regard to professional standard and codes, including for instance the codes of conduct promulgated by the ICA and the IPA.¹²⁸ The CALDB does not promulgate its own ethics standards. In *Dean-Willcocks v Companies Auditors & Liquidators' Disciplinary Board*, Tamberlin J rejected the contention that as no legislative imperative exists for liquidators to comply with professional codes of conduct (as it does in relation to auditors) it was inappropriate for the CALDB to have regard to such standards in imposing sanctions on a liquidator for misconduct. Tamberlin J noted that:

¹²² *The Parliament of the Commonwealth of Australia, Corporations Amendment (Insolvency) Bill, 2007, Explanatory Memorandum*, available at <http://parlinfo.aph.gov.au/parlInfo>, at para 3.66.

¹²³ *The Parliament of the Commonwealth of Australia, Corporations Amendment (Insolvency) Bill, 2007, Explanatory Memorandum*, available at <http://parlinfo.aph.gov.au/parlInfo>, at para 3.64.

¹²⁴ A comprehensive search of a wide range of law and social sciences databases in late 2009 using the search terms 'liquidators and ethics' returns variously no results, or results of almost entirely tangential relevance.

¹²⁵ *Corporations Act, 2001* (Cth). s 1292(2).

¹²⁶ Companies Auditors and Liquidators Disciplinary Board, *Annual Report For the year ended 30 June 2009*, p2. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument>.

¹²⁷ Companies Auditors and Liquidators Disciplinary Board, *Annual Report For the year ended 30 June 2009*, pp13-14. The entire report is available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Annual+Reports?opendocument>.

¹²⁸ *Dean-Willcocks v Companies Auditors & Liquidators' Disciplinary Board* [2006] FCA 1438. The relevant codes in that case were the ICAA Code of Professional Conduct and the IPA Code of Professional Conduct.

“[t]here is nothing in the language of s 1292(2)(d)(ii) which excludes regard to professional standards and codes when deciding whether the performance is a proper and adequate exercise of the office. The reference to "proper" and "adequate" invites the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of "adequacy." The standard is that the duty must be performed "properly". The provision is designed to enable a Board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity.”¹²⁹

Until recently, membership of a prescribed professional accounting body satisfied one of the alternative educational qualification criteria for liquidator registration.¹³⁰ The main accounting bodies of relevance for these purposes were the ICA and CPA Australia. Since those bodies require their members to comply with codes of professional conduct, and have complaints procedures in relation to potential breaches of those codes, a system for requiring compliance with explicit ethical standards was provided by default. An unintended consequence of removing the ability to automatically show adequate experience through membership of one of these bodies may be that the complaints procedures and default monitoring effect of professional body membership may apply to fewer liquidators.

The code of ethics applicable to members of the two main professional accounting bodies in Australia has been in force since July 2006. The Code of Ethics for Professional Accountants (replacing the Code of Professional Conduct that had been in place since 1997),¹³¹ is issued by the Accounting Professional and Ethical Standards Board (APESB), and is based on the code of the same name issued by the International Federation of Accountants.¹³² The APESB is a creature of the ICA and CPA Australia. The Code emphasises the ethical concepts of integrity (‘being straightforward and honest’), objectivity and confidentiality, among others.¹³³ In addition to those two accounting bodies, an additional source of ethical standards for insolvency professionals has been available through the IPA. The IPA’s Code of Professional Practice aims to embody the association’s core values of ‘integrity, transparency, accountability and technical proficiency’.¹³⁴ Judicial authority that the CALDB may have regard to professional standards when reviewing the appropriateness of liquidators’ conduct operates to give the conduct codes of the IPA and the APESB *de-facto* application to liquidators who are not members of those bodies, potentially significantly widening their ambit.

¹²⁹ *Dean-Willcocks v Companies Auditors & Liquidators’ Disciplinary Board* [2006] FCA 1438, per Tamberlin J.

¹³⁰ This alternative was removed by the *Corporations Amendment (Insolvency) Act, 2007* (Cth), Schedule 3, with effect from December 2007.

¹³¹ <http://www.charteredaccountants.com.au/A117835921>, 2 December 2009.

¹³² <http://www.charteredaccountants.com.au/A117835921>, 2 December 2009.

¹³³ *The APES 110 Code of Ethics for Professional Accountants*, at para 100.4, ‘Fundamental Principles’. The full code is available in pdf format at:

http://apesb.org.au/Document/Issued_Standards/Compiled%20APES%20110-%20July%202007.pdf.

¹³⁴ <http://www.IPA.com.au/home.asp>, 2 December 2009.

There are clear advantages, in the context of disciplinary review of the kind undertaken by the CALDB and by relevant professional associations, to a clear and widely-promulgated set of standards. The relevance of standards of this kind is shown in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board*.¹³⁵

10. THE WAY FORWARD

Clear legislative stipulation, historical precedent and current professional ethical usage make clear the need for liquidators to operate with the highest level of probity. An egregious recent example,¹³⁶ newspaper commentary,¹³⁷ and parliamentary commentary¹³⁸ suggest those levels of probity are not always met and that serious consequences follow. Yet the system of liquidator regulation in Australia relies on an essentially reactive model that intervenes when a problem comes to light. At present the Australian system relies heavily on reports of misconduct, either to professional accounting bodies of which the liquidators are members, or to ASIC. The potential exists for an ethical regulatory vacuum in which exhortations to good conduct are not matched by adequate monitoring. Legislative and ethical codes provide a guide to behaviour, a standard by which potentially inappropriate behaviour can be measured, and consequences for non-compliance. They do not however operate as self-fulfilling prophecies, and in any group of individuals there will be a number who will not fully comply with them.

We set out below some alternative strategies for potentially improving regulation of liquidator conduct in Australia. Whilst acknowledging that these strategies are neither exhaustive nor comprehensive they are offered to help generate debate in this area.

10.1 Stratification

Consideration could be given to liquidator registration related to size, the complexity of a liquidation, and to the industry in which a liquidation occurs. Relevantly, applications for registration are assessed considering a liquidator's experience of these different matters. Registration means the ability to accept an appointment of any company despite its size, complexity or industry and it is left to the professionalism of the individual liquidator to 'self-govern' his or her suitability, that is, whether he or she is 'fit and proper'. For example Ariff was a Newcastle liquidator and only conducted his practice a short time before taking on large and complex work with international creditors. It may be that the size of many companies under liquidation in Australia does not justify the imposition of the inevitable increase in charges that would flow from any more expensive regulatory system. However, this factor in itself may offer further support for stratifying the monitoring of liquidators according to the size of companies a liquidator is authorized to act for. The division used to distinguish

¹³⁵ *Dean-Willcocks v Companies Auditors & Liquidators' Disciplinary Board*, [2006] FCA 1438.

¹³⁶ The Ariff case, discussed earlier in this paper.

¹³⁷ 'Senate Probes Wind-up Practice, *West Australian*, 26 November 2009 at p53; 'Probe on Insolvency Abuse', *The Age*, 26 November 2009, p6.

¹³⁸ See *The Parliament of the Commonwealth of Australia, Corporations Amendment (Insolvency) Bill, 2007, Explanatory Memorandum*, available at <http://parlinfo.aph.gov.au/parlInfo>, at para 3.64, where concerns in relation to the conduct of liquidators and other insolvency practitioners are expressed.

the reporting and accounting requirements of large and small proprietary companies¹³⁹ offers one analogy.

10.2 Committees of Inspection (Creditors)

The role of committees of inspection (usually made up of representatives of the company's creditors) is traditionally circumscribed; they have duties such as settling remuneration of the liquidation and they have power to give approval for the compromise of certain debts. However, they are generally seen as more of a consultative device than as an administrative or supervisory body. The liquidator will use the committee for advice and seek their guidance. The possibility exists for creditors to shape the behaviour of liquidators. For example, the performance of the liquidator could be assessed by such a committee through an 'end of liquidation' survey/questionnaire. The committee could be asked if they were satisfied with various aspects of the administration including their opinion as to whether the liquidator has maintained his or her 'fit and proper' status.

10.3 Professional body reliance

If the status quo continues (of expressly legislating for 'fit and proper' without providing more detail) then it will be the standards set by the professional bodies that will be applied. To streamline the application of standards the IPA, through its Code of Professional Practice, should be more directly incorporated by judicial authority.¹⁴⁰ In this way 'fit and proper' can take on a meaning that is easily accessible (and applicable) to those in practice, regardless of whether they are members of the IPA or not.

10.4 ASIC

ASIC produces *RG 186* dedicated to applicants and registrants but this is not sufficient to ensure Australia has a band of fit and proper liquidators. Additionally, ASIC has dedicated staff 'policing' liquidator compliance and helping to maintain high standards of competence and integrity. With more funding ASIC could develop a 'flying squad' pro-active surveillance of liquidators.

10.5 Insolvency Ombudsman

Perhaps it is time to develop the Ombudsman concept in insolvency. Many other areas affecting the Australian community such as banking, employment and health are supported by an independent office that receives complaints and investigates behaviour. The decreased reliance on professional body membership as an indicator of fitness for liquidators might suggest there is room for the creation of an independent monitoring body, an Insolvency Ombudsman, to monitor compliance

¹³⁹ *Corporations Act*, 2001 (Cth) s45A.

¹⁴⁰ Cf *Dean-Willcocks v Companies Auditors & Liquidators' Disciplinary Board* [2006] FCA 1438.

more actively through response to public complaint. Whistleblowing has consistently been shown to be more effective in bringing misconduct to light than extensive compliance and monitoring programs, and a dedicated industry ombudsman, whether under the aegis of ASIC or not, may facilitate this regulatory mechanism. An Office of the Insolvency Ombudsman would therefore be perfectly placed to assist ASIC and the CALDB in their quest to have all registered liquidators satisfy the fit and proper requirement.

11. CONCLUSION

We offer in this paper some suggestions for potential improvements in some aspects of the regulation of liquidators. The seemingly low number of liquidators under investigation (given the size of the profession in Australia), and the level of community concern as to the conduct of liquidators, suggest that there is room to improve the monitoring component of the liquidator regulatory structure in Australia.

APPENDIX A

The “Liquidator registration checklist” linked to ASIC’s *Liquidator Registration Kit*¹⁴¹ webpage lists the following relevant material to be included with an application for registration as a liquidator, as proof of the criteria shown:

| Registration Criteria | Relevant material |
|---|---|
| Qualifications | <ul style="list-style-type: none"> • Certificate of membership or letter from professional body or • Copy of academic record or copy of qualification and certification letter or • Statement of qualifications and experience • Copy of academic record and certified copy of qualification • National Office of Overseas Skills Recognition (NOOSR) assessment (if overseas qualification) • Referee report (1) |
| Winding up experience | <ul style="list-style-type: none"> • Information about experience in winding up bodies corporate to be provided under “Capability” |
| Capability – personal capacities | <ul style="list-style-type: none"> • Employment history for 10 years • Details of corporate insolvency experience • Insolvency course certificate (if applicable) • Details of any non-insolvency corporate management (if applicable) |
| Capability – practice capacities | <ul style="list-style-type: none"> • Description of resources available for your practice • Letter of authorisation from your practice (if you are an employee or consultant) • Letter of consent from supporting practice (if relying on another practice’s resources) • Copy of certificate of registration (if trustee in bankruptcy) |
| Fit and proper: not a disqualified person | <ul style="list-style-type: none"> • Letter from professional body (if applicable) • Signed statement about legal/disciplinary matters • Referee reports (2) |
| Resident in Australia | <ul style="list-style-type: none"> • Details of current/past addresses • Additional information (if needed) |
| Security | <ul style="list-style-type: none"> • Proof of performance bond or acceptable insurance arrangements |
| Referee reports | See under “Qualifications” and “Fit and proper: not a disqualified person” |

¹⁴¹ ASIC, “Liquidator registration checklist”, September 2005, link from ASIC, *Liquidator registration kit* web page, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+registration+kit?openDocument> at 14 January 2010.