(...)

(...)

16 March 2010

Dear (...)

Re: Insolvency Reform

Thank you (...) for calling me back the other day. I apologise for the 'barraging' I gave you over the phone, but I trust you were able to gather how passionate I am about this issue, and how frustrating I have found the response from Government to date.

As discussed, I enclose the CD of correspondence both sent to the various parties, and responses that I have received back. You will be able to get an idea of the breadth of contact by looking at the file names. There are some that would be good to refer to:

1. 20051123 – Which outline my initial concerns to the previous Corporations Committee.
2. 20060307 – Follow up to the initial response from Chris Pearce.
3. 20070305 – Transcript from previous enquiry that refers to my previous submission
4. 20070319 – Summarises the submissions from the first enquiry, and reiterates some points
5. 20071203 – Summarises to Wayne Swan the history of my enquiry.

I cannot underestimate how frustrated, I was with the little effect the 2004 review had on the insolvency profession. All it did was to provide bandaid solutions to what, I believe, is a much greater problem. I trust that this review will achieve much better results.

(...)

(...) I will now summarise in dot point format, my main concerns:

1. The current insolvency rules are not working. The review needs to take a step back and assess whether creditors are receiving dividends, or whether the funds are going towards external administrators and their legal advisors. How much of this money could be going to creditors?

2. External administrators have lost focus on who they are working for. Their primary focus should be to act on behalf of creditors, and not to base jobs on what potential cash flow they can earn.

3. External administrators have a conflict of interest. They cannot act in the best interests of creditors; while at the same time generate their own fees from the same pool of funds. This situation where they can sign their own cheques for professional fees, and then claim the GST cannot continue.

4. External administrators often see phone calls and correspondence from employees and creditors as an interruption to the insolvency assignment, and give a low priority to their concerns. Eventually creditors just give up out of frustration.

5. External administrators when appointed as voluntary administrator to a company, give assurances to directors that they will be able to solve all of the pressing problems of all parties that are chasing them for money. They in essence become a 'friend' to the directors, while maintaining a professional independence. This relationship changes when the company goes into liquidation, when the external administrator becomes the 'enemy' searching records at the Lands Titles Office to establish what properties the directors may have, to service any potential claims. This I believe is an example of gross misrepresentation.

6. In reports to creditors, voluntary administrators quote an arbitrary figure for future fees, to give a desired result to support their opinion. Unless there is a Committee of Creditors appointed, the liquidator will be able to draw any future fee they like, without referring to the quoted figure, just as long as funds are in the bank account. In fact fee decisions are often based on cash available from the various bank accounts they control.

7. The current law prescribes the order in which payments are made in the event that there are funds available for distribution to creditors. Near the top of the list is external administrator remuneration, which will be paid in preference to a creditor who has traded in good faith with the company for a period of time, and now has a bad debt on their hands. This is clearly unfair and an inequitable distribution of funds.

One of my main areas of concern has been the recovery of preference payments by liquidators. A preference recovery is when a creditor receives a payment from the liquidated company (6 months prior to date of liquidation) when it knew the company was insolvent. The intent of the law is to recover the funds, put into a bank account and then redistribute on a more equitable basis.

1. For a company that now has a bad debt with the company 'in liquidation' to then be hit with a preference recovery is ridiculous. Liquidators will look at the traditional avenues of commercial debt recovery (pay now stickers, legal proceedings, change of payment terms) to look for knowledge that the creditor knew the company was in trouble.

2. From this, the liquidator then 'gauges' that the creditor must have known something was up, and then sends a threatening letter to the creditor asking for any payments received to be returned. These letters are often sent in the hope that the creditor will settle for a lessor amount.

3. If a preference is recovered, it often goes towards liquidator fees, as opposed to being held for redistribution to creditors. Liquidators do not see preferences as recoveries, but instead as a revenue stream. This is clearly not the intent of the law, and must be stopped.

4. I do not doubt that there may be legitimate grounds for recovery, particularly with related parties, but creditors should not be penalised for commercially collecting their debts.

5. I refer you to document 20051123, where on page three, I refer to a preference that was recovered from the Australian Taxation Office. In my view, Government Departments should not be allowed to be chased by external administrators for preference recoveries. This results in public funds, being transferred to private enterprise.

I believe that the time has come for this 'blank cheque' mentality to be stopped. The Insolvency Profession has had this regulated monopoly, and associated legislated revenue stream, at the expense of others, for way too long.

I believe that the time has now come to be bold, take a serious look at the funds being lost to creditors and to make some substantial changes, as follows:

1. Abolish the Insolvency Profession. It is clearly not serving the interests of creditors, but in fact has a conflict of interest, when it can in essence work for someone else's money. Stop the abuse that is currently protected by legislation, heavily weighted against creditors.

2. Give the role of recovery of assets (not preferences), and distribution to creditors, as well as substantial cases of insolvent trading to ASIC. It would be a matter of money in, money out. The Insolvency Profession has had their opportunity, and has failed.

3. In the event that the profession cannot be abolished, there needs to be such a substantial licence fee paid to ASIC, coupled with onerous quarterly reporting. If Insolvency Practitioners want to enjoy a legislated monopoly, they must pay for the privilege.

4. Assignments must be completed within an agreed timeframe with Directors, or with ASIC. Special applications would need to be made for extension of time.

5. Preference recoveries for creditors commercially collecting debts should not have the fear of payments being recovered by liquidators, and must stop. In extreme circumstances, liquidators would only be entitled to a commission, with the balance held for distribution.

6. If a company goes into external administration, where this is clearly no likelihood of any return to creditors, then the company should go straight into liquidation. There would be no point such a company going into voluntary administration.

7. Government Bodies should be exempt from preference recoveries, as this is a drain on public funds.

8. The 'General Employee Entitlements and Redundancy Scheme' to protect the interests of employees must be retained.

9. The 'Assetless Administration Fund' to fund liquidators in companies with no assets needs to be abolished. The profession however would still need to accept these assignments, as they gain substantial returns from other assignments.

10. I would even go to the extent of stating that a Voluntary Administrator cannot go on to be appointed a liquidator. This too is a conflict of interest.

And finally, in reference to directors of Insolvent Companies; currently such a person can start a new company without question. I believe the time has come for a 'one strike and you are out' mentality. This may give directors a heightened sense of responsibility to mange the affairs of their company with more diligence, and to seek help when required.

May I even dare to suggest more measures designed to lift the 'corporate veil' which currently gives reckless directors way too much protection.

I wonder how different the world would be if the *Salomon v Salomon* case over 100 years ago, had gone the other way, and made the directors personally liable.

I trust that you will consider seriously the matters raised in this letter. My experience to date has been an extremely frustrating one.

If the terms of reference for the enquiry are too narrow, it could be that they need to be broadened to take a long and critical look at Australia's Insolvency Laws.

I ask that you keep my name out of any discussions, in order that my safety and that of my family are safeguarded by those who would see these comments as derogatory. You have my contact details.

Yours sincerely,
(...)