COMPANY LIQUIDATORS AND ADMINISTRATORS

SUBMISSION TO THE SENATE ECONOMICS COMMITTEE

Introduction

1) The matter which has been referred for inquiry and report is defined as:

> *"the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business."*

2) The utility of attempting to deal comprehensively with those matters, appears problematic, in view of the considerable overlap in the area, as defined, in respect to which the Committee is reporting and wider questions of general public importance, including:

   a) the content and administration of the insolvency laws; in particular as to corporate insolvency;

   b) mechanisms and controls in the charging of professional fees for accounting services and for the provision other comparable professional services;

   c) the formulation and application of law enforcement policy and practice, by the Australian Securities and Investments Commission and by other comparable Government regulatory authorities.

Are there systemic problems in the insolvency administration profession?

3) Media reports indicate that the current inquiry may have been provoked by recent regulatory action taken against insolvency practitioners; in particular, the case of Stuart Karim Ariff.

4) While the writer had a professional involvement in some aspects of the Ariff case, the views which are expressed below are purely my personal views.

5) The Ariff case aside, there do not appear to have been many occasions in recent times, involving complaint against insolvency practitioners, with respect to failure to account properly for client funds. On the other hand, the personal recollection of the writer is, that in the 1980s, at least two prominent members of the Sydney profession were the object of criminal trials and imprisonment, for wrongdoing of that type.

6) There is an obvious need for appropriate protective and regulatory measures in the area of insolvency administration. That consideration should not be confused however, with an unwarranted perception of any generally criminal or dishonest propensity, peculiar to members of the accounting profession, practising in the insolvency field.

7) It must be recognised, that insolvency practitioners are uniquely placed, in the position of personal responsibility held by them, as the custodians of the money and assets of others. Typically, the class of persons towards whom they owe that responsibility is widely spread – so that there is no strong interest on the part of any particular stakeholder, in the oversight of the insolvency practitioner's propriety.

Some areas for improvement in the current laws

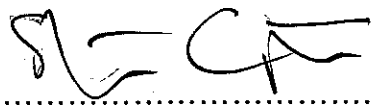
8) Voluntary administration under Part 5.3A of the Corporations Act has become the most significant form of insolvency administration, since the enactment of the legislation for that procedure, in 1993. There have been numerous amendments since then to the legislation, which remains something of a *"work in progress"*.

9) Section 445CA was introduced into the Act, in 2007, to constrain the inappropriate use of creditor power, in the termination of a deed of company arrangement. The balance may now however, have swung too far in the opposite direction – so that the administrator of the deed can become indefinitely entrenched in office. It is suggested that further amendment to the legislation could be considered, perhaps in which a *prima facie* outer limit of

12 months is prescribed as the maximum duration for which a deed administrator may hold office, in the absence of creditors renewing that appointment.

10) Also in 2007, new provisions were introduced (in the form of s438E) requiring administrators to lodge with ASIC verified accounts of their receipts and payments, on a six-monthly basis. An approved form, Form 524, has been prescribed by ASIC. The approved form does not require any specific disclosure of related-party transactions, in the way that is required from company directors of public companies. Consideration could be given to requiring such disclosure, to facilitate scrutiny of company administrators' possible misuse of their fiduciary position.

11) The approved form requires the disclosure of the amount of the administrator's remuneration, both in total and for the relevant period of the account. The procedures under which the administrator's remuneration is fixed, is dealt with in s449E of the Act. However, the concept of *"remuneration"* is not the subject of any relevant definition. It would appear that there may be the opportunity for evasion of the procedures regulating the fixing of remuneration, by administrators paying for services, designated differently as a matter of form – but in substance constituting their remuneration. For this reason, consideration could be given to the introduction of a statutory definition, for the word *"remuneration"*, with respect to insolvency administration.



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