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Mr John Hawkins
Committee Secretary
Senate Economics Committee
P O Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins,

Inquiry into Liquidators and Administrators

I have pleasure in enclosing a submission to the Senate Economics Committee's Inquiry into Liquidators and Administrators which has been prepared by the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia.

The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

Thank you for giving us the opportunity to comment.

Yours sincerely,

Margery Nicoll
Acting Secretary-General

3 March 2010

Enc.

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LAW COUNCIL OF AUSTRALIA

BUSINESS LAW SECTION

INSOLVENCY AND RECONSTRUCTION LAW COMMITTEE

SUBMISSION TO SENATE ECONOMICS REFERENCES COMMITTEE

INQUIRY INTO LIQUIDATORS AND ADMINISTRATORS

Preliminary

1. This submission by the Insolvency and Reconstruction Law Committee of the Law Council ('the Committee') accepts as a starting proposition that often the situation faced by insolvency practitioners is a very difficult one. They and their advisers are faced with a circumstance of business or personal financial failure and the inevitable stressors that are associated with it.

2. Accompanying this starting proposition is that inherent in the insolvency regime must be a recognition that the failure of a company or an individual's financial affairs is accompanied by an insufficiency of assets or income to meet debts. This is inherent in the definition of Insolvency as found in the Bankruptcy Act and the Corporations Act.

3. A country's insolvency regime meets important legal, social and economic purposes. Importantly, it regulates the structured and appropriate orderly wind up, trade or sale of insolvent businesses or those of insolvent entities or individuals. Given the significant impact of an insolvency on a range of parties, it is important that the regime provide a high level of confidence to the community in the way it operates.

4. It is also important and, it is submitted, essential that there be consistency across the range of laws dealing with issues of insolvency (both personal and corporate, so far as are possible).

Reviews

5. The area has been the subject of significant reviews and reforms over the last 20 years, and into 2010. A significant legislative review of corporate insolvency was conducted in 2007 when changes to the *Corporations Act* 2001 were made. These changes followed review of all law reform proposals made in the preceding years, back to 1997.

6. In particular, in relation to practitioner conduct and regulation, the law introduced increased disclosure requirements on practitioners, and greater

regulatory controls, and fine-tuned many insolvency processes. Further reform proposals have been made since then and continue to be made.

7. Currently, there are numerous other reviews underway into the area, including:-

    7.1. ASIC's consultation paper on insolvent trading – dated 21 January 2010;

    7.2. Treasury's 'phoenix' proposals – dated 15 January 2010;

    7.3. Bankruptcy remuneration regulations;

    7.4. Security for costs – NSW Law Reform Commission – due February 2010;

    7.5. National co-operatives law;

    7.6. Productivity Commission;

    7.7. Treasury, insolvent trading.

Regulation

8. It is recognised that Australia has one of the most regulated regimes of corporate and personal insolvency. It is this level of regulation and oversight that has substantially contributed to the confidence in the industry and is in fact highly regarded by world standards.

9. A person requires high level accounting qualifications and extensive experience to become a practitioner. The role of assessing and registering practitioners lies with ASIC. There is a two tiered registration, that of registered liquidator and official liquidator, the latter being able to take on court-ordered appointments. The registration regime is important in ensuring the integrity of the industry.

10. Once a practitioner is registered, they may act as a liquidator and administrator. The roles and practices of liquidators and administrators are closely and effectively regulated by the courts and ASIC. Insolvency practitioners are required to uphold the highest standards of integrity and professionalism in the conduct of insolvency administrations. This is stated in the legislation and in the case law.

11. The IPA maintains its Code of Professional Practice (the IPA Code) developed with the assistance of ASIC in 2007-2008. This sets high professional standards for its members, often in excess of the legal requirements. The IPA Code is relied upon by the Courts and regulators in consideration of the conduct of practitioners.

12. The Committee accepts that from time to time, some practitioners (as with any profession) will fail to adhere to appropriate standards of conduct and ethics. They are and should be dealt with appropriately and

13. ASIC has powers to deal with practitioners who are not performing their duties to the required standard. Further, actions against practitioners can be and are taken by directors, creditors and others in relation to alleged breaches of law or practice.

14. Whilst only official liquidators are officers of the Court, the courts nevertheless maintain an overall supervisory role of practitioners. In the event of any breach of duty, the practitioner can and will be held to account before the Courts. The recent decision in Ariff was an example of obviously improper conduct with appropriate sanctions by the Court.

15. When considering the conduct of practitioners, one must look at the number of appointments and the issues that arise. According to the ASIC web-site, in the 2009 calendar year, the number of insolvency appointments recorded with ASIC were 9,437.

16. The Committee has been unable to find the number of complaints, but it is understood to be minimal during the same time. Of course, each complaint should be investigated properly, but the small number of complaints does show that the industry as a whole operates properly with members conscious of their obligations.

Fees

17. Insolvency practitioners play the key role in our insolvency regime in taking control of insolvent businesses, securing and recovering assets, dealing with creditors and trying to recoup creditors' losses.

18. Appointments as liquidator or administrator are personal to the practitioner. The practitioner assumes control of the insolvent business in place of the existing directors and management.

19. The practitioner may take on personal liability and given the failure of the business, the practitioner faces the very real risk tat their personal expenditure (eg advertising) and remuneration is often uncertain. Further, in the event a practitioner takes on litigation with a view to recovering assets or overturning transactions, they face personal liability for any and all costs and expenses in the litigation and in the event an action is unsuccessful, paying the other party's costs personally.

20. A practitioner is entitled to be fairly remunerated for the work performed from the assets of the company. Creditors have the right to approve all liquidator

and administrator fees. Whether the fees are approved or not by Creditors, the Courts have an overriding supervisor role, having jurisdiction to approve, reduce or disallow costs and expenses incurred by the practitioner. ASIC also has the power to seek review of the practitioner's fees and expenses.

21. The Committee supports in principle the introduction of any alternative process for review of fees that provides a more speedy, transparent and cost-effective process. Unfortunately, as experience with assessment of legal practitioner's fees reveals, any process that involves detailed assessment of any practitioner's accounts is liable to be lengthy and can a times, only add to the costs involved.

22. Practitioners undertake a considerable amount of work that is unfunded and carried out in the public interest. They are legally obliged to perform certain work, including investigations and reporting to ASIC, even if there are no company assets from which to be paid, incurring what can be substantial time and expenses with no assurance of payment.

23. In doing their work, a practitioner has a lien or charge over the assets of the company to recover fees and expenses. It is the position of the Committee that this is appropriate given the personal risk and liability undertaken by practitioners. Any mitigation of that right would, necessarily, result in a reduction in the number of actions or claims brought by practitioners and a lessening of the effective regulation of the conduct of corporate Australia.

24. It is however understandable that dissatisfaction arises from individuals (typically creditors) who have already suffered loss by virtue of a corporate failure, are unfamiliar with the system and see practitioners charge large sums of money, which are paid out in priority to their own claims.

25. The Committee accepts that this dissatisfaction exists, but given the personal exposure of practitioners, there is no other readily apparent system, which would operate fairly or mitigate the risk in fair manner for practitioners or the public.

26. The profession works with and assists ASIC in its public interest and regulatory role by practitioners taking appointments to companies wound up on application or ASIC and creditors, securing assets, and conducting investigations of company officers. On occasion, some of this is undertaken with the assistance of ASIC funding.

27. The profession therefore supports ASIC's involvement and activities prior to and following the collapse of a business. ASIC plays a significant role in insolvency regulation through its insolvent trading program, its assetless administration program, and its involvement in significant insolvency litigation. The assetless administration program is unfortunately limited in its scope and operation.

28. Without some form of statutory or standard remuneration for activity in winding up assetless companies, it is the position of the Committee that the lien in favour of practitioners and the priority of payment of their costs and outlays should be maintained.

Consistency

29. This enquiry is an enquiry into the practices of Liquidators and Administrators. There is no practical difference between the conduct of a liquidation and a bankruptcy, or that of a Voluntary Administration and a Part X in bankruptcy. Accordingly, it is the position of Committee that wherever possible the systems of regulation and procedures should be the same. One example of such a difference is: -

    Account Maintenance: -

    29.1. In Bankruptcy, it is permitted specifically for trustees in bankruptcy to maintain a common bank account for the operation of all bankruptcies (analogous to a solicitors' trust account). When this was implemented, it was so with the express intent of maximising efficiency and returns to creditors.

    29.2. Further, for smaller matters, such as part IX personal insolvency agreements, the operation of a single account is mandatory. There is no or minimal difference between the operation of an Part IX, or Part X agreement and a small company subject to a Deed of Company Arrangement.

    29.3. In a recent matter before the Federal Court (the decision on which is outstanding), it was the position of ASIC that the *Corporations Act* prevents this and for a practitioner to do this would constitute a breach of the Act.

30. If there are to be any amendments arising out of this enquiry, they should be directed to enhancing efficiencies such as this.

Conclusion

31. In addition to the matters set out in this submission, the Committee adopts and supports the submission to this enquiry of the Insolvency and Practitioners Association of Australia.