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Mr John Hawkins
Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins

Inquiry into liquidators and administrators

Thank you for your invitation to make a submission to the present Senate Inquiry into Liquidators and Administrators. My colleagues and I are currently investigating some aspects of liquidator regulation in Australia. Our research addresses issues of relevance to the role of liquidators and their practices and the involvement of the Australian Securities and Investments Commission. We are particularly concerned with the 'fit and proper' component of the current liquidator regulatory regime.

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. 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.

inspiring achievement

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.[1] Currently, registration results in 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, in the recent case of Stuart Ariff,[2] a Newcastle liquidator, he and his small firm had only conducted a practice for 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 a more expansive 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 the reporting and accounting requirements of large and small proprietary companies[3] offers one analogy.

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.

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[1] ASIC, *External administration: Liquidator registration*, Regulatory Guide 186 (RG 186) issued 30 September 2005 and effective from 5 July 2007, RG 186.19 http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps186.pdf/$file/ps186.pdf at 14 November 2009.
[2] *Australian Securities and Investments Commission v Stuart Karim Ariff* [2009] NSWSC 829.
[3] *Corporations Act*, 2001 (Cth) s45A.

Professional body reliance

If the status quo continues of expressly legislating for 'fit and proper' without providing more detail,[4] then it will be the standards set by the professional bodies that will be applied. To streamline the application of standards, the Insolvency Practitioners Association of Australia (IPA), through its Code of Professional Practice,[5] should be more directly incorporated by judicial authority.[6] 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.

ASIC

ASIC produces *Regulatory Guide 186*[7] 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 initiate more comprehensive, pro-active surveillance of liquidators, for example, through a well-resourced 'liquidator flying squad'.

Insolvency Ombudsman

Perhaps it is time to adopt 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 more actively through response to public complaint. Whistle-blowing can 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[8] in their quest to have all registered liquidators satisfy the fit and proper requirement.

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[4] *Corporations Act 2001* (Cth) ss 1282(2)(c), 1292(2).
[5] http://www.IPA.com.au/home.asp, 2 December 2009.
[6] Cf *Dean-Willcocks v Companies Auditors & Liquidators' Disciplinary Board* [2006] FCA 1438.
[7] 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 at 14 November 2009.
[8] Companies Auditors and Liquidators Disciplinary Board.

We attach a copy of a recently prepared research paper on these issues for the consideration of the Senate Inquiry.

Yours sincerely

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