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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Reference: Australia's insolvency laws

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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Tuesday, 19 August 2003

Members: Senator Chapman *(Chair)*, Senator Wong *(Deputy Chair)*, Senators Brandis, Conroy and Murray and Mr Byrne, Mr Ciobo, Mr Griffin, Mr Hunt and Mr McArthur

Senators and members in attendance: Senators Brandis, Chapman, Conroy, Murray and Wong

Terms of reference for the inquiry:

To inquire into and report on:

The operation of Australia's insolvency and voluntary administration laws, including:

(a) the appointment, removal and functions of administrators and liquidators;

(b) the duties of directors;

(c) the rights of creditors;

(d) the cost of external administrations;

(e) the treatment of employee entitlements;

(f) the reporting and consequences of suspected breaches of the *Corporations Act 2001*;

(g) compliance with, and effectiveness of, deeds of company arrangement; and

(h) whether special provision should be made regarding the use of phoenix companies.

WITNESSES

Committee met at 4.35 p.m.

CHAIRMAN—Today the Parliamentary Joint Committee on Corporations and Financial Services continues its public hearing program into its inquiry into Australia's insolvency laws. Before we commence taking evidence, I reinforce for the record that all witnesses appearing before the committee today are protected by parliamentary privilege with respect to the evidence that they give. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also state that, unless the committee decides otherwise, this is a public hearing and as such all members of the public are welcome to attend.

[4.36 p.m.]

ARNOLD, Mrs Kim Lee-Anne, Technical Director, Insolvency Practitioners Association of Australia

CARTER, Mr Bruce James, President, Insolvency Practitioners Association of Australia

CHAIRMAN—I welcome the representatives of the Insolvency Practitioners Association of Australia to the hearing. As I mentioned earlier, this is a public hearing and therefore the committee prefers that all evidence be given in public. But if at any stage of your evidence or answers to questions you wish to give evidence in private you may request that of the committee and the committee will consider such a request to move in camera. We have before us the written submissions from the Insolvency Practitioners Association of Australia, which we have numbered 22, 22A and 22B. Are there any alterations or additions that you would like to make to the written submissions at this stage?

Mr Carter—We wish to comment on a document that was handed to us as we walked in. Other than that, no.

CHAIRMAN—There are no actual changes to the written submissions which you have lodged?

Mr Carter—No.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

Mr Carter—The Insolvency Practitioners Association of Australia welcomes the opportunity to appear this afternoon and expand upon the submissions we have made. First, I will tell you a little about the IPAA—that is our acronym. The IPAA is an independent, self-governing organisation that represents professionals who specialise in the field of insolvency. We have over 1,100 full and associate members, including accountants, lawyers, bankers, credit managers, university professors and other professionals with an interest in insolvency. In terms of registered liquidators, we estimate that we represent about 85 per cent of practising liquidators.

To become a full member of the IPAA you must be a member of either the Institute of Chartered Accountants, the Society of Certified Practising Accountants or a law society member, as well as having obtained the required amount of experience on insolvency matters, and you must have completed or passed our insolvency education program, which is a year of postgraduate study operated in conjunction with the University of Southern Queensland.

In addition to IPAA, there is a worldwide group called INSOL, which is a group of member organisations from various countries. The IPAA is one of the foundation members. INSOL is a group of like-minded organisations which seeks to develop insolvency law and practices on a worldwide basis—in particular, issues that relate to cross-border insolvencies with some of the major global collapses.

The IPAA provides continuing education forums for members by way of discussion groups, conferences and our quarterly magazine, the *Australian Insolvency Journal*. We also consult with regulatory bodies, such as ASIC, which is the Australian Securities and Investment Commission, and ITSA, which is the Insolvency and Trustee Service Australia—basically the people who handle the bankruptcy work—in the development of standards which our members must follow. The most recent standard that we released was our statement of best practice on independence on the appointment of an administrator. We have also released statements of best practice on issues such as remuneration and administrators' reports and, in conjunction with ITSA, we released the personal insolvency national standards document.

We liaise and work closely with government bodies, such as the Department of Employment and Workplace Relations and the ATO. For example, we are currently working with the ATO to resolve outstanding issues in relation to the operation of GST in insolvency administrations. We are also active contributors to discussions on reforms to Australia's insolvency laws and other insolvency related issues. In the recent past we have made submissions to Treasury on the issue of maximum priority for employee entitlements, to ASIC on financial reporting and AGM obligations for companies in external administration, to the ATO on the GST interaction with insolvency, as well as to this inquiry. We also contributed to the report of the Companies and Securities Advisory Committee on voluntary administrations and we sponsored the 1997 report on voluntary administrations by the Voluntary Administration Law Reform Committee.

Our submissions highlighted a range of issues that the IPAA feels need to be addressed to improve the operation of insolvency laws within Australia. These issues are wide ranging and cover topics such as voluntary administrations, registration of insolvency practitioners, retention of title, GEERS, use of technology, superannuation and assetless administrations. There are six points which I wish to highlight in my opening comments.

The first point is that of the current interest surrounding the possible introduction of a chapter 11 type arrangement here in Australia. As stated in our initial submission and based on feedback from our members, the IPAA is not convinced that wholesale changes are required in the voluntary administration regime or that a new regime is required in order to effectively restructure large enterprises. Our members are at the coalface and it is their opinion that, with the assistance of the court, the voluntary administration process has the flexibility to be used effectively in the restructuring of larger enterprises. The IPAA notes that this issue is also being considered by CAMAC in their review of the restructuring of large enterprises.

Secondly, it is the IPAA's opinion that the continuing problem of phoenix companies will be properly addressed only when funding is made available to liquidators to properly investigate and examine assetless companies and their officers. We also recommend that the Corporations Act be amended to provide statutory penalties for the promoters of phoenix companies, not dissimilar to the part IVA provisions that currently exist in the Income Tax Act. Such amendments, together with the provision of funding, should provide the best mechanism for the control and elimination of phoenix companies. We understand that ASIC is generally supportive of that position.

Thirdly, the IPAA is concerned with the fact that insolvency does not appear to be a prime area of concern for the ATO. There is currently no liaison of any significance between the IPAA and the ATO, nor between ASIC and the ATO, other than in the area of GST. The ATO is generally

accepted as the most common, large, unsecured creditor in corporate failures across Australia and it is our view that the ATO should take a greater interest in this area. In particular, the ATO should more actively seek to recover outstanding revenue debt at an earlier point in time.

Fourthly, we welcome the increased funding for ASIC in the recent budget. The IPAA works closely with ASIC through a series of formal liaison meetings and informal discussion. The effective operation of the insolvency system really does rely upon active participation and enforcement by the regulator.

Fifthly, the IPAA is concerned about the lack of action in regard to previous reports and inquiries into various aspects of insolvency which have been undertaken over the last six years. Some of the examples include the report of the Voluntary Administration Law Reform Committee report on voluntary administrations which was issued in May 1997, the report of the Working Party on the Review of the Regulation of Corporate Insolvency Practitioners issued in June 1997, an ASIC study of voluntary administrations in New South Wales issued in January 1998, the CASAC report on voluntary administrations issued in June 1998, and the CASAC report on corporate groups issued in May 2000. There are a large number of substantive issues still outstanding from these reviews and they are highlighted in our submissions.

Lastly, in our initial submission we commented on the Department of Employment and Workplace Relations, and in particular on the relationship that insolvency practitioners have through them through the operation of what is known as GEERS. These comments were intended to encourage the department to take a more proactive role in insolvency administrations and for the department to be given the legal standing to take that role. As detailed in our submissions, we doubt the standing of GEERS to take a formal legal position in some of these administrations. On 26 June, during the appearance of certain representatives of the department before this committee, Mr Maynard of the department appears to have misinterpreted our comments as a criticism of the department, which they were not intended to be.

In our submissions and at this hearing we are attempting to articulate the views of our members, who represent a wide cross-section of the professional insolvency community, and we look forward to questions from the committee. As I walked into this hearing, I was handed a Law Council of Australia document headed ‘What really is the role of a liquidator?’. I emphasise that the IPAA has a number of lawyers who are members of its organisation and who indeed sit on its committee. We are not against solicitors or lawyers becoming registered liquidators. However, in respect of the document that has been given to you—and in particular the matrix on which the Law Council has gone through and ticked its interpretation of what skills are required for a liquidator to be registered—on the face of what Kim and I have seen we would disagree with virtually all of it. We would like to be given an opportunity to talk about it, if that is appropriate, bearing in mind that we have only just seen it.

CHAIRMAN—Thank you very much, Mr Carter. Are you in a position to comment on that document now or would you like further time to study it?

Senator CONROY—While he is on a roll, why don’t you let him have a go? There is nothing like a demarcation dispute between professional associations to keep us entertained.

CHAIRMAN—Mr Carter?

Mr Carter—As I said, solicitors and lawyers form a very important part of our organisation. If they are to be registered as liquidators, we have no opposition to that whatsoever. A number of lawyers already are. However, what the Law Council seem to be doing here is evidencing their view on what are specific legal skills and specific accounting skills in insolvency administrations. On the face of it, we generally disagree. We believe there should be a fourth column in this matrix called 'General Management Ability'. A lot of what the matrix goes into with insolvencies, particularly insolvencies that involve trade-on businesses, requires significant commercial skills. You cannot split them into accounting skills. You cannot split them into legal skills. On the face of it, quite frankly the only tick that we would agree on as being specifically legal skills would be those in applying to the court for directions, because the practitioner does not have the standing. Although the practitioner can do that if they see fit, it is generally done through lawyers. I do not think we are in a position here to go through it item by item, but I am happy to do that if you wish.

Senator CONROY—I was going to ask you to comment on the lawyers saying that only they can sell an asset in whole or in part as it 'may involve discovering and seizing assets'. They have a tick in the 'Specifically Legal Skills' column. What do you think is specifically legal about something like that?

Mr Carter—We would disagree with that. We think it is combined: legal, accounting and management. The only issue where 'legally' comes in is when you are seeking to recover an asset that has not been voluntarily offered up and you have to take recourse through the courts.

Senator CONROY—I should declare a non-vested interest. I am not a lawyer so I can ask lots of anti-lawyer questions, and you can feel free to join in. But there are some lawyers at the table, I should warn you before you give them the kicking they truly deserve—but feel free to keep going.

Mr Carter—I emphasise that we are not actually here to kick lawyers.

Senator CONROY—Are you a lawyer?

Mr Carter—No, I am not, but I have a strong base of lawyers in my membership. Another role that a lawyer would take is assisting in determining ownership of an asset in terms of title. In a lot of insolvency practices of size these days, you find a variety of skills, not necessarily all accounting skills. There is a variety.

Senator MURRAY—Just to summarise your position, you do not support a closed shop. You believe that there are certain criteria that have to be satisfied to meet the ability to practise as an insolvency practitioner.

Mr Carter—Correct. The position of an insolvency practitioner in our society is a position of a high level of trust and responsibility. Given the nature of the appointments that we take, it is so fundamental that the individuals who take those appointments have a wide degree of experience and a wide degree of skill.

Senator MURRAY—If you do not support a closed shop, are the barriers to entry too high and do they have the effect of producing a closed shop?

Mr Carter—The IPAA's position would be that that is not the case. We have gone out of our way in the last five or six years to embrace a wider membership—in particular, from the legal fraternity.

Senator MURRAY—So could an expert manager, for instance, who is neither an accountant nor a lawyer professionally but who would have skills in that area, become an insolvency practitioner?

Mr Carter—They would not be able to join the IPAA as a full member. ASIC determines who becomes a registered liquidator so the decision as to whether a party as you so describe could become a registered liquidator would be ASIC's decision. In other words, it is not a requirement to be registered to be a member of the IPAA. As I understand ASIC's current guidelines, you would need membership of certain organisations—obviously ASIC would have to talk to you about that—but that would be accounting. There would be a level of financial skills that would be required.

Mrs Arnold—I believe that if you can show alternative experience to a degree or membership it is possible to become a registered liquidator. Again, ASIC would have to comment on exactly what they would require. But the act does prescribe alternatives to having a degree and membership in a professional body.

Senator BRANDIS—Mr Carter, I am sorry I arrived late; I just came in at the end of an answer to a question from Senator Conroy. I agree with what I understood you to be saying about this document the Law Council put before us last week. I do not adopt that allocation. It seems to me that of all the skills that a liquidator needs—and I think this was your point—the most important skill is a management skill, which is neither a specifically legal nor specifically accounting related skill set. Coming back to Senator Murray's point, regardless of what ASIC might say, do you think that in theory it would be a good idea to broaden the class of persons entitled to become liquidators on the basis that their principal function in a workaday sense is a managerial function?

Mr Carter—The position of insolvency practitioners is that they can be appointed to anything: from a big liquidation, such as Ansett, OneTel or Harris Scarfe, down to a small liquidation. As it stands at the moment, the system does not separate out a practitioner from taking a particular job. For instance, if you are a suburban liquidator, you could have technically taken Ansett. You would have been foolish to have done so because you would not have had the resources, but you could do that. It is the IPAA's view—and, indeed, it was evidenced by our education program—that it is absolutely fundamental that skills and experience relative to this field are required, and that is why we have our education programs. But if the people satisfy that, then we believe it is appropriate that they should be brought within our field.

Senator BRANDIS—Are there gradations of qualification? Before somebody can take on the winding up of a large public company do they need a higher qualification from your organisation than other members of your organisation? Is there a graduation of qualification?

Mr Carter—As it stands at the moment, there are two types of liquidator. There are registered liquidators, which are generally licensed by ASIC, and there is a higher level of official liquidators which are more experienced practitioners who are officers of the court. Ten years

ago, before voluntary administrations came along, generally the official liquidators took the bigger jobs, because a lot of them were run through the courts. As it stands at the moment, there is no differential and no grading.

Senator BRANDIS—Don't you think there should be?

Mr Carter—It is our view that—and it is in our submission—there is no longer a need to have a separation between registered and official liquidators and that the class difference has become almost redundant.

Senator BRANDIS—I am very familiar with the distinction. But allowing for the fact that that distinction might now be archaic, do you not think nevertheless that it is a good idea to have graduated qualifications for eligibility to do the bigger jobs?

Mr Carter—I think that, from a commercial basis, you could certainly raise that, but I do not know how you would possibly work it.

Senator BRANDIS—Do you think the market sorts it out anyway—

Mr Carter—Yes.

Senator BRANDIS—so that only the big players are going to get the big jobs?

Mr Carter—That is right. The greyness in trying to sort that out would be so difficult. I think the issue really is maintaining the high level of requirement to become a registered liquidator and making sure that that bar is at an appropriate level.

CHAIRMAN—Mr Carter, would you excuse us for a few minutes while we attend a division.

Proceedings suspended from 4.55 p.m. to 5.01 p.m.

CHAIRMAN—Have we finished with this item?

Mr Carter—Can I just add to my answer?

CHAIRMAN—Yes.

Mr Carter—One thing you might not be aware of is that to be a registered liquidator you do not have to necessarily be a member of IPAA. We run an education program—CPE—and put out standards. We estimate that we represent about 85 per cent of the active liquidators in the area.

Senator BRANDIS—So you are the professional body but you are not the qualifying body?

Mr Carter—That is correct. We have put to ASIC from time to time that to become a registered liquidator you ought to be a member of the IPAA but, for a whole series of policy reasons, that has not been accepted. We would like that because that then brings them under our umbrella. Part of the problem with a registered liquidator—and this is an issue that we have

discussed with ASIC—is that you get your registration and then it is a matter of monitoring and maintaining your standards thereafter and there is no process in place for that unless something goes wrong. In other words, it is a bit like getting into the English cricket team: once you are in it, it is very difficult to get out of it. With registered liquidators there is no monitoring of what happens going forward.

Senator BRANDIS—It is a bit like you do not have to be a member of the AMA to be a doctor or you do not have to be a member of a bar association to be a barrister. This is similar, isn't it?

Mr Carter—Correct.

CHAIRMAN—One of the issues that has been raised both in submissions and in the public evidence so far is a lack of confidence, particularly in the voluntary administration process, because of perceived absence of impartiality on the part of administrators. The Taxation Office raised this issue as a concern. The tax office has suggested a roster system, whereby administrators would be appointed on a random basis, might be an appropriate way of getting rid of that perception. Would you like to comment on the ATO's view that there is a perception of lack of impartiality with regard to administrators?

Mr Carter—One of the fundamental planks of insolvency work is independence. Earlier this year we issued a statement of best practice on independence. As an organisation we are aware that it is an area in which there has been some criticism, particularly in the last three years, when you have had high levels of insolvency activity. The nature of an insolvency job is that you are surrounded by people who are under a lot of emotive stress and a lot of legal stress. It affects a lot of people's lives. So, ultimately, there are people who come out of this situation being unhappy with the outcome. In terms of independence, we have tightened our guidelines, and they are quite explicit. They are attached to the submission.

Apart from that, in dealing with issues of lack of independence it comes down to ASIC looking at some of the issues that arise from time to time. Given the nature of our organisation, the highest that we can do is issue statements of best practice and expect our members to honour them. I have no idea how the ATO's suggestion of a roster could possibly work practically. There used to be a roster system in the supreme courts—when the next court job came up, the next person on the roster took the job. That worked, unless you had a really big job where it was inappropriate for the next person to take the appointment. Voluntary appointments are generally initiated by directors and can come from any source. For them to then have to be channelled back into some form of central register and handed out to the next person on the list would seem to be a totally inappropriate way of dealing with this, and I think it would be totally impractical.

Senator WONG—Could I just follow up on that? When you talk about guidelines, I presume you are referring to the statement of best practice that you appended to your submission?

Mrs Arnold—Yes.

Mr Carter—Yes.

Senator WONG—That has no legal standing, does it?

Mr Carter—Correct.

Mrs Arnold—No, it is not a legal standing, but our members are required to comply with our statements of best practice.

Senator WONG—But, if they did not, you would not be able to do anything, would you?

Mr Carter—If they did not, then we have a complaint procedure whereby complaints are made to us and they go back to the foundation organisations.

Senator BRANDIS—Is it a legal standing in the sense that, if one of your members were to be sued for negligence, that would be regarded as representing a reasonable standard of care?

Mr Carter—Yes.

Mrs Arnold—You have to understand that ASIC also uses our standards. If complaints are made to ASIC by a practitioner, they will consider that as part of their review of that practitioner as well.

Senator CONROY—Could I take up the issue of the word 'independence'. I just had a quick flick through your submission, and I see that you talk about professional judgement, but I do not actually find any definition of the word 'independent'.

Mrs Arnold—I suppose 'independence' is one of those terms that is difficult to define. We encourage members to give full disclosure. So, if any relationships may be seen to impinge upon their independence, we encourage them to disclose them to creditors before the first meeting in an administration sense, because that is where independence issues arise most of the time. We encourage full disclosure so that creditors are in an informed position, so that before the first meeting they are able to make a decision as to whether an administrator should be replaced. Our statement works on full disclosure.

Senator CONROY—So when the director phones you and says, 'Congratulations, Mr Carter, I want you to be the administrator,' you say, 'By the way, Mr Conroy, I work for you at the moment. I am your lawyer, I am your accountant, I am your whatever. I have been engaged in business with your company for the last few years,' and then I say, 'Yes, I know that. That is why I rang,' is there any conflict of interest?

Mr Carter—Our guidelines would prevent you taking that appointment if you have a continuing professional relationship.

Mrs Arnold—We also have a code of professional conduct, which reflects our foundation bodies'—the CPA and the Institute of Chartered Accountants—independence guidelines as well. That basically says that if you have a continuing professional relationship, which is defined as being longer than two months in the last two years, then you are not to take the appointment, because that is a conflict of interest. We have a matrix in our code of professional conduct which sets out certain things: 'If you have this sort of appointment first, could you take this sort of appointment subsequently?'—it talks about those sorts of things. It says to our members, 'You shouldn't take that appointment in that situation because that is a conflict of interest.'

Senator CONROY—If someone does, how do you deal with conflicts of interest? That seems to be separated out from your disciplinary process on best practice.

Mrs Arnold—They are all interrelated. Our code of professional conduct and our statement of best practice are not separate things; they are interrelated. Our code of professional conduct covers a range of issues, not just conflicts of interest. If a member breached the code of professional conduct and they were reported to us, we would refer them to their foundation body. And, because our code of professional conduct reflects our foundation bodies' views on conflicts and independence, action would be taken by the foundation bodies.

Mr Carter—Could I add that the independence statement was established with input from ASIC and the ATO. It is difficult—you are correct, Senator—in that no definition of independence is in there, but we consulted with our stakeholders to deal with it.

Senator CONROY—I appreciate that. I would like to take you to a high-profile case—that of Ansett—where someone was appointed and then removed by the creditors. Are you familiar with that case?

Mr Carter—I am not sure they were actually removed by the creditors. I think they were on notice that they were going to be removed and they sought to resign.

Senator CONROY—Do you know what the grounds for conflict of interest were?

Mr Carter—Yes, the grounds were as disclosed in the press as being that PricewaterhouseCoopers in New Zealand had been advising Air New Zealand, so there was a continuing professional relationship.

Senator CONROY—Yes, given that Air New Zealand owned all of Ansett by that stage.

Mr Carter—Yes, that is right.

Senator CONROY—So have you suspended PwC yet for taking on a job in which they had a clear conflict of interest? It breaches the two months rule.

Mr Carter—Firstly, I can say to you that the IPAA has not investigated that issue. Secondly, as I recall, it was PricewaterhouseCoopers' position that they did not have a conflict because they are a separate firm from PricewaterhouseCoopers in New Zealand.

Senator CONROY—I probably should stop there just so that I do not get Dr Dermody thrashing me to within an inch of my life.

CHAIRMAN—Please excuse us while we attend a division.

Proceedings suspended from 5.11 p.m. to 5.20 p.m.

CHAIR—We shall now resume.

Senator CONROY—For the benefit of Senator Murray and Senator Chapman—hopefully, Senators Brandis and Wong will come back—I will just recap that we were chatting about Ansett and PwC and the fact that there was some controversy. I think Mr Carter indicated that they stepped down, withdrew—is that the official term?

Mr Carter—As I understand. I was not involved in the matter; I am just going from what was in the press.

Senator CONROY—I appreciate that.

Senator MURRAY—Was that to do with a conflict of interest?

Senator CONROY—That was the issue that we were discussing as you were leaving. I was talking about the alleged conflict—if we can us that phrase—that PwC New Zealand audited Air New Zealand/Ansett, because Air New Zealand owned at least 50 per cent, if not 100 per cent, of Ansett. Therefore, for the Australian branch or division—what would be the phrase—

Mr Carter—Australian firm.

Senator CONROY—Is PwC a partnership world wide?

Mr Carter—I do not know. Also, I do not think they were the auditors of Air New Zealand. I think they were a consultant for Air New Zealand.

Senator CONROY—Sorry—a consultant. They were clearly a related party.

Mr Carter—They had a relationship in New Zealand, and that was what was raised by the unions over that weekend. We would put that that is an example that the system works—in that an administrator was appointed, an issue of independence was raised by the creditors and the administrator stood down.

Senator CONROY—But the issue here is not that they stood down; the issue is that they took it—which, arguably, is in breach of your guidelines.

Mr Carter—I think the answer to that is that you should ask PricewaterhouseCoopers about that. I do not think it is appropriate for me to comment about it.

Senator CONROY—I am trying to get to the nub of the issue of independence and the code of conduct. You made the point earlier that it is the acceptance that is the key test here, not whether someone complains later. So I am going to disagree with you that it is proof that the system is working when the trigger, if you like, for your code of conduct is the acceptance.

Mr Carter—My comments on that would be as follows: firstly, this code of conduct only came in two or three months ago—

Senator CONROY—Okay.

Mr Carter—Sorry, I mean the statement of best practice. Secondly, the issues that you described just then led to the development of that statement of best practice.

Senator CONROY—I am not trying to draw you in. I appreciate that you have responded by the production of this. But what the Australian Taxation Office is raising—and I think Senator Chapman started on this; and I will defer to my colleagues in a minute—is this issue of conflict of interest that is out there and whether or not there is a concern of impartiality. I could quote National Textiles—though I do not want to get into a fight about Stan Howard et cetera. I will just quickly say that there was an argument that there was a relationship—and this went further than just an allegation; there was an investigation, which I think was found to be correct.

Mr Carter—And I understand that that consultant—

Senator CONROY—And there were some disciplinary issues. But that all happened at the end. The actual liquidation and voluntary administration had been completed and moved on before some creditors took the issues up, and nothing was able to be done to resolve their problems—another example where there was clearly a conflict of interest. Do you know whether that individual who was the administrator or voluntary liquidator—whatever the official phrase was—has been disciplined?

Mr Carter—As I understand it, they have been—

Senator CONROY—Are they still your members? Have they been kicked out?

Mr Carter—I cannot recall if they are members or not, but I understand that they have had their registration suspended by CALDB, which is the disciplinary board of ASIC. The issues that you raise about independence are very valid. I commented earlier about the position of trust that we have in our appointments; independence is fundamental. If it does not work then the community loses faith in the system. We have developed what we can through our statements of best practice. It is an issue that no doubt you will raise with ASIC tomorrow. Apart from that, there are the implications of being disciplined by the CALDB or having the embarrassment of being tossed out of a job because a conflict has been appropriately identified that you did not identify. It is a small market and you need only two or three of those before there is an impact on your practice. I guess all we can do, together with ASIC, is to put together the checks and balances that we can and rely on the conduct of our members. No doubt, as in any profession, there will be some problems.

Senator CONROY—Some of this is compounded by the smallness of the industry. Plenty of people were prepared to say—although not as publicly—that Arthur Andersen had a significant conflict with being appointed, because it had a business relationship with Solomon Lew and Lindsay Fox. I am dredging this up from memory. I am not trying to pick on Stan Howard; I am trying to get to the nub of this issue. The accounting profession has not covered itself in glory in dealing with the conflict of interest issues and the audit debacles that have happened. Arthur Andersen does not exist any more. Those sorts of things show. The market eventually lost complete confidence in Arthur Andersen over its inability to manage conflict of interest. I am trying to get a sense of whether you think a voluntary code in these circumstances is sufficient or whether there should be a roster.

Mr Carter—I have a couple of comments to make on that. The nature of independence has two parts: there is independence and there is the appearance of independence. Both are important. They will change from case to case. All that you can put in place are the highest levels of standards possible that professionals should take into account when they move forward. For example, there is a leading case on this called Commonwealth of Australia v. Irving, where a fellow took a job in South Australia and the ATO objected to it on the basis that he was friends with one of the directors, not that he had had a past relationship with that company. In fact, their friendship extended to going on Variety Club bashes and things like that. He was thrown out as the administrator. I think he ultimately resigned. There are a number of such cases around.

There was also the situation with National Textiles. That builds a body of precedents such that if a practitioner takes a job that he or she should not have taken then potentially there is significant exposure for either discipline or costs. I suggest to you that the courts should very much embrace this independence and see that it is a fundamental building block. If you start to look at the case law that is coming out and the disciplinary action, you see that the persuasion to not get yourself into that position is becoming a lot stronger.

Senator BRANDIS—I did a lot of these cases for a while. From my own experience at the bar, the standards that the courts impose to enforce independence have, in their application by the courts, always struck me as being particularly high. It is not a difficult thing for an applicant—say, an aggrieved creditor—to get up a removal application against a liquidator on a ground of real or apprehended bias. I would be interested to hear whether Senator Conroy has any empirical evidence, but certainly my experience suggests to me that the standards are enforced very ruthlessly by the courts.

Mr Carter—Certainly that was evidenced by the decision of Justice Branson in Commonwealth of Australia v. Irving.

Senator MURRAY—That is the issue. It is when it gets to the courts that that certainly applies. Our concern is with the run of the mill. High-profile companies might have the proper level of protection, but a smaller, medium-level operation which really hurts the local plumbing supply company or whatever is different. What the Joint Committee of Public Accounts and Audit and one or two Senate committees have been focusing on is enshrining the requirement for independence in legislation but leaving the development of the criteria and the characteristics to the appropriate regulator—ASIC, APRA or whoever it turns out to be. So that is why we pursue this issue. From my understanding of the law, Senator Brandis is absolutely right, but that does not cover the daily, average case.

Mrs Arnold—I think the development of independence guidelines in law though is quite different to the development or implementation of a roster system. I do not think the roster system takes into account commercial reality, where certain practitioners of certain experience and certain resources are a lot more appropriate to undertake certain engagements than other practitioners. A roster system does not take that into account. That has been recognised by the courts with the disbanding of the roster systems through the state supreme courts. So the development of independence within law is quite different from the establishment of a roster system.

Senator MURRAY—I refer you to the Joint Committee of Public Accounts and Audit report No. 391, because you will find that an interesting discussion in this area of equivalence. It is talking about the independence of auditors.

Senator BRANDIS—Can I just say that I think the observation you just made is absolutely correct.

CHAIRMAN—I was going to explore that issue in relation to the roster system. The contrary view, and you have said it is unworkable, is that, to deal with particular administrations, you need people with particular expertise. I guess that is the point you are making. Can you give us some examples of where the particular expertise of a practitioner has provided advantages to the administration, in terms of both costs and return to creditors?

Mr Carter—Yes, there are numerous examples of major operating businesses. For instance, I was the receiver of Harris Scarfe Australia, and our firm has significant experience in retail operations. Together with my Victorian partner, we employed 2,800 people across 36 stores. We knew what we were doing, and we hit the ground running. In situations like that, where you are given the keys, so to speak, and you are going into a business that you have never been to before, it is absolutely fundamental to everyone that you have some basic experience.

Senator BRANDIS—This goes to your point earlier, I suppose—it dovetails with your earlier point—that, of all the skills that an insolvency practitioner needs, the most obvious skill is management skill. Experience in managing a particular sort of company is not at least immediately transmissible to managing an entirely different sort of business.

Mr Carter—That is correct. In fact, the greater users of insolvency practitioners are the banks, and the banks primarily will look to appoint practitioners who have expertise in that particular area. That is the market at work.

Senator WONG—I appreciate your views about a roster system—that is, it is one way in which one could address some of the issues of independence. I take up Senator Murray's point: whilst we may say the courts themselves have been quite stringent in their discussions of what independence ought to encompass, the reality is that, for certain groups of creditors, litigation would be extremely difficult. Many cases obviously would not get to that point, and there would be a general concern to ensure that you had independence even if you did not get to the point of having to challenge an administrator through a court process. You have drawn up these best practice guidelines. They are not enforceable in law. Is that correct?

Mr Carter—Correct.

Senator WONG—Do you have any other suggestions, given the concerns which obviously have been raised, about how one could actually have an enforceable mechanism to ensure independence?

Mr Carter—One possible answer is that if it was a requirement to be a member of the IPAA to be a registered liquidator and you therefore struck disciplinary problems if you contravened our statements of best practice and you could get suspended from the IPAA then that would have the flow-on effect of suspending the licence. That is a big jump, and that has a whole bunch of

disciplinary structural issues that would flow from it. The CALDB is primarily the one at the moment, other than the courts, that drives these issues through. But as it stands right now, the extent to which the IPAA has gone has really been the development of the statement. The only other issue would be if our statements were in some way legislated, enshrined in law. Our statements were developed in conjunction with ASIC, with the ATO and with other stakeholders.

Senator WONG—But what about what Senator Murray alluded to—that is, some sort of statutory reference to the need for independence and having what actually is included in that subject to discussion between ASIC and the industry? I appreciate your push for a closed shop, but not everybody who might be a liquidator would necessarily want to be a member of your organisation.

Mr Carter—The problem with independence is that it can, on many occasions, be a grey area. There may well be situations where the person is not independent but is actually the right person to do the job and creditors want them to do the job. That happens from time to time.

Senator WONG—But which creditors want them? There is an issue there, isn't there?

Mr Carter—I know of examples where the administrator has not complied with the IPAA guidelines but, with the full knowledge of the creditors, took the job; the creditors wanted that person to take the job because they believed that he would provide the right outcome.

Senator BRANDIS—I do not mean any disrespect to Senator Wong, but what I think is being missed here, Mr Carter, is that liquidators and insolvency practitioners are fiduciary. It is all very well to say that the independence guidelines do not have the force of law, but in fact every administrator or liquidator, as a fiduciary, has enforceable equitable obligations, which include dealing even-handedly between different classes, avoiding conflicts of interest and so on. The legal obligations in the form of the fiduciary obligations are already there; whether or not they are written down in a code of practice is not going to alter the fact that there are very burdensome fiduciary obligations on every liquidator.

Senator WONG—I am quite aware of the nature of the relationship between creditors and liquidators and administrators but, with respect to Senator Brandis, we do not operate in a world where everybody has access to legal remedies for breach of fiduciary duties, and particularly in the context of an administration. Often, even if you had the wherewithal to take legal action, why would you, because you do not know what you are going to get at the end of the day? You are operating in a context anyway where there may not be enough dough to go around. I agree with you: yes, there are fiduciary duties. But the question is: are they theoretical only in the sense that an aggrieved party would still have to enforce them? We should probably be ahead of the game.

Senator BRANDIS—I am sorry to be bouncing off the witnesses but, Senator Wong, why would they be any more or less theoretical than enforceable written guidelines? Somebody has to actually come to the point of bringing an enforcement application. Whether you are enforcing equitable obligations that are pre-existing or whether you are enforcing new guidelines, isn't there still the same consideration?

Senator MURRAY—But the answer is because you do not have to spend a lot of money to get ASIC involved, or whoever the regulator is that is appropriate. That is the answer.

Senator CONROY—If you are a creditor, you are chasing as much money as you can from the dollar. If someone gets appointed and you are not sure they are actually operating on your behalf or if they are a mate of the directors—whatever reason it is—and they are offering you 40c in the dollar, you are not exactly in a position to go chasing a lengthy, expensive court battle.

Senator BRANDIS—It all depends on the size of the winding up, but ordinarily it is the creditors who pick the liquidator.

Senator CONROY—No, they accept the recommendation. That is not right.

CHAIRMAN—Senator Brandis and Senator Conroy, this is a very interesting discussion between members of the committee, but we really are here to question the witnesses.

Senator CONROY—That is true. Thank you for drawing our attention to that. You are completely right.

CHAIRMAN—Mr Carter might like to respond to this—

Mr Carter—I would, actually, very quickly. I understand the audit issues but, in an insolvency situation, the appointment is taken by an individual. He is a fiduciary; I said at the opening that he or she is in a position of very high trust. It is different from an audit concept. Even if there were guidelines or requirements enshrined in the law, it is still a matter of the interpretation of that law, and someone has got to enforce it. With no disrespect to Senator Brandis, if you have got three lawyers in the room you will have three different opinions, and you will be able to get the opinion that you want. You will be able to get the opinion that you are independent. For an administrator who will not recognise their lack of independence, I suspect that they will always have to resort the court, because ASIC may have to go to court to take them out. Indeed, ASIC supported the ATO—as I recall, and I may well be wrong—in the Commonwealth of Australia v. Irving. At the end of the day, if someone does not comply, if you put it into the Corporations Act, ASIC have got to take them to the court.

Senator WONG—Do you think there is also an argument—I assume this is one of the reasons behind your statement—that it is better to have the content of what constitutes one's fiduciary duties and obligations explicitly articulated in practical terms? Surely that is one of the good things behind your best practice statement: instead of talking in theoretical terms about one's fiduciary obligations, you have a very clear outline of what you say are best practice guidelines which would flow from those.

Mr Carter—And certainly, as Senator Brandis said, if you come before a judge who takes the independence issues very strongly and you have not complied with an industry statement, your position is looking pretty ill.

CHAIRMAN—I think there are a number of issues, and we are starting to run out of time.

Senator WONG—Could I briefly ask you about discriminatory deeds; that is, deeds of arrangement which alter priority payments under the act? We had quite a bit of evidence about that. I do not know if you considered the transcripts of some of our previous hearings on that issue. Whilst I understand there are sometimes important commercial imperatives for those, there is also a contrary view that sometimes particular employees whose entitlements may end up, by virtue of the deed, having a different priority and so forth, and they have been disadvantaged. I would appreciate your views on that.

Mr Carter—To the extent that discriminatory deeds relate to employees, this is actually a new issue that has been raised with us. I received a letter only three days ago from the Minister for Employment and Workplace Relations. The particular situation that has been raised is where employees have found themselves losing their priority in a deed and they are not being able to claim under GEERS.

Senator WONG—I think there are two issues there. We can discuss the GEERS issue; I think you made reference to it, didn't you?

Mr Carter—Yes, but only—

Senator WONG—But the subrogation issue is, I think, a different issue. I am more interested in whether you think there are any cogent arguments for regulating any aspect of discriminatory deeds, particularly insofar as they relate to employee entitlements.

Mr Carter—There is a decision, again by Justice Branson, in Molit and Lam Soon, which allows for discriminatory deeds if there are commercial imperatives for it. In that situation, the judgment was really that what a certain creditor would get in a liquidation; they were no worse off under the deed, notwithstanding that they were not as well off as the other creditors. The view of the courts is that, provided they are supportable, discriminatory deeds should be allowed.

Senator WONG—What was the Branson decision?

Mr Carter—It was Lam Soon v.—

Senator WONG—Oh, yes, and Molit.

Mr Carter—It was a single judge, Justice Catherine Branson. There is case law that says that they are available. In terms of disturbing priorities, I am not aware of any case law where that has been decided. The IPAA do not have a firm position on this, so I guess I am speaking from my own point of view, and Kim will no doubt present her view in a minute. But, on the face of it, I think it would be our position that there would have to be a huge commercial reason for disturbing the priorities to justify the deed. The fact is that the nature of deeds of company arrangement is that they are designed to be flexible instruments to improve the recovery for the creditors overall. However, if a creditor—and I think this is the line in Lam Soon—is worse off under a discriminatory deed as opposed to what they would be in a liquidation then I think you would find that the courts would overturn it and, on balance, I do not think that is something that we would support.

Senator WONG—Where they would be worse off?

Mr Carter—Where they would be worse off under a discriminatory deed. I think the courts would overturn it anyway.

Senator WONG—There is nothing in the legislation currently which prohibits, though?

Mr Carter—No.

Senator WONG—You could enter into a deed of arrangement which completely altered the priority payments.

Mr Carter—That is right. So if the creditors wanted to pass a deed that saw all of the employee entitlements reduced back to unsecured status you could probably get it up. But I suspect that the first thing that would happen is that they would go to court, and the court would overturn it.

Senator WONG—If the employees were legally represented.

Mr Carter—Yes. Again, there are some guidelines in Justice Branson's decision about that.

Senator WONG—Are they generally accepted in the industry?

Mr Carter—We met with GEERS before we came up here, and we understand that there have been two deeds like that that they have come across. They are more the exception than the rule.

Senator WONG—Two deeds where this issue of the priorities or the subrogation issue have come up, or where both issues have come up?

Mrs Arnold—The issue of employees losing their priority and thus losing the ability to claim under GEERS.

CHAIRMAN—Please excuse us while we attend a division.

Proceedings suspended from 5.47 p.m. to 6.00 p.m.

CHAIRMAN—We have been dealing with deeds of company arrangement and some of their perceived shortcomings in terms of being able to discriminate between creditors. Are there advantages to the broad scope that a deed of company arrangement can encompass?

Mr Carter—The great thing about deed of company arrangements and the reason for the success of voluntary administrations is their flexibility in two regards: firstly, in the ability to be able to put them together with good commercial sense and, secondly, in not having to resort to the courts. Other than getting extensions of time periods, it is a private arrangement that can be reached between the creditors and the company. The objective is to get a better outcome. Ten years ago, before VAs—voluntary administrations—came in, other than receiverships you really only had the liquidation process or schemes of arrangement. With regard to schemes of arrangement it became an absolute nightmare to work your way through the ASIC prospectus

documents. ASIC recognised, as did the community, that they did not work. That gave birth to the voluntary administration procedures.

When they first came out, the voluntary administration procedures were meant to operate in quite a short time zone but, over time, the courts have recognised that that is impractical so extensions of time have been granted for reorganisations. For example, in the case of Pasminco, which was probably one of the largest ones, there was an extension of over 12 months. In terms of Harris Scarfe, where I was involved—I was the receiver—the administrator behind us had an extension of nine months. It was fundamental to keeping that business together.

Senator CONROY—It is still going? It was quite successful?

Mr Carter—The business was sold. Again, if you took a business like Harris Scarfe back to what it was 10 years ago, it may well be that you would not have had the same outcome. The VA process is quite powerful in its flexibility and the protection that it provides for the underlying business. The problem with quite a few of these businesses is that, when they go into insolvency, it starts to fall apart because of lack of confidence and the actions of competitors. Generally, the whole framework collapses. You cannot put it back together. The VA process is designed to protect that, to take a deep breath and to restructure. Again, that restructure is determined by the people who have the money at stake, who are the creditors. That often includes the largest creditors, who are the employees.

Senator CONROY—How entertaining was it to find two sets of books?

Mr Carter—That is a separate issue. That matter is before the court.

Senator CONROY—Sorry, I did not realise.

CHAIRMAN—What about incomplete financial records? Is that a widespread problem?

Senator WONG—Two sets probably counts as incomplete!

Mr Carter—No, there were two sets of complete records—they just did not agree. Incomplete records are a challenge for practitioners. It is unusual to be appointed to a company that has up-to-date financial records although it happens quite often, particularly with public companies. But most of the insolvency activity is in the smaller end of the market. You would generally find that accounts are behind or have been perhaps constructed in a manner that is sensitive to or supportive of the way the directors want to see it. That is part of our role and that is what the Corporations Law expects of us: that we will go through and investigate the accounts that may be otherwise sympathetic to the directors.

CHAIRMAN—The tax office has suggested that administrators and liquidators should be required, where necessary, to reconstruct company accounts to a standard sufficient to facilitate the performance of their duties under the act. Do you accept that as a practical suggestion? If so, what would be the consequences for liquidators?

Mr Carter—I have two comments on that. Often you have to reconstruct the records to be able to conduct an investigation properly—for instance, insolvent trading or directors' loan

accounts. One of the big issues that exists in liquidations in particular is the fact that the books and records may not be there and that, as well as no books and records, you have no assets. This is where we come to our phoenix company type of thing where the directors have deliberately run the business out of assets and there is nothing there to fund the liquidation. So the liquidator is faced with a decision: does he or she spend the money to reconstruct the records or go back to the creditors and say, 'If you are prepared to fund me, then I am prepared to reconstruct the records.' A problem that we have put in our submission is that a strategy for directors of phoenix companies is to leave a shell and ultimately the ATO or some other creditor may wind it up and you have to go back and recreate it. What we are saying is that in many situations that just does not happen because there are no resources to pay for it.

CHAIRMAN—Another issue that has been raised is the timing of the first and second meetings, both the timeframe within which the first meeting has to be held and then the timeframe within which the second meeting has to be held. As an example, Ernst and Young submitted to us that in more complex and difficult situations a convening period is not sufficient for the administrator to properly consider all the alternatives. What is your view of the convening time frames?

Mr Carter—Our submission is that there should be some changes to the timeframes, particularly for the second meeting. We are saying that there should be an extension that is allowed by the creditors on voting rather than on us having to resort to the courts. Generally, a properly prepared application to the Supreme Court or the Federal Court will grant the administrator the extension of time. Again, you cannot dictate what jobs are going to need extensions and what are not, but with the larger jobs generally you will take an extension of time to properly conduct your investigation and prepare your section 439A report. We say in our submission that that should be for the creditors to decide unless it goes to an unreasonable length, in which case you should make application to the courts.

CHAIRMAN—In relation to the issue of whether a company goes into administration or liquidation, you have suggested that the voluntary administration procedure be amended so that with the administrator's consent creditors can resolve to place the company into liquidation at the first meeting of creditors. An alternative that has been suggested is that company directors should be able to place a company into liquidation informally and speedily, in the same manner as they can place a company into administration. Would you care to comment on the relative merits of your proposal as against that suggestion?

Mr Carter—As it stands at the moment, there are basically three ways you can deal with it. You can appoint an administrator, which can literally be done in five minutes—it is as quick as getting married—and has severe consequences.

CHAIRMAN—Just as severe as getting married!

Mr Carter—And they are both very difficult to get out of. So it can literally happen quickly, and that is a comparison I often use with directors so that they understand the gravity of what they are getting into. Then there is the creditors voluntary process. That does take time and there is a hiatus period between making the decision to go into liquidation and holding the meeting. Hardly anyone uses creditors voluntary processes anymore. Then there is the third way, where you can apply to a court for the appointment of a provisional liquidator. That brings the court

into play and places the company into official liquidation. The easiest and cheapest way of doing it is to put it into voluntary administration. We are saying ultimately that, if the creditors are saying, 'This is just going to go into liquidation,' why not do it at the first meeting if that is going to be the obvious outcome? It does away with the creditors voluntary process requirements.

Mrs Arnold—I would just add that when we were drafting our submission, we initially thought about the situation where the directors could place the company into creditors voluntary liquidation, as they currently do now with voluntary administration, but it was felt that this process of going to the first meeting gives creditors the option to decide. So there is some involvement of the creditors and different views can be heard. You can have the initial meeting, which is similar to how a CVL is at the moment in that there is a meeting of creditors. So you have that meeting of creditors and the process can commence there. We did consider the alternative of directors being able to place the company straight into creditors voluntary liquidation, but we ended up believing that the option we put forward was a better alternative.

Senator MURRAY—A point made earlier by Senator Wong—and it is a matter which all members of this committee are very alert to in Corporations Law—went to the question of minorities. What Senator Wong said was that, when you use the word 'creditors', the language assumes a block of people who are in agreement. But what this committee has always concerned itself with is protecting minorities in Corporations Law circumstances of, for instance, takeovers or mergers. There is the issue of dominant creditors who rank high and may be able to overwhelm others who might have a different view. How far do your propositions take into account their interests and protecting them?

Mr Carter—I will make two comments. First of all, it is absolutely fundamental that the creditors have input. Kim was correct in outlining the thinking process that we went into in terms of how a company could be put into liquidation at the first meeting. I have actually had situations where we have said to the creditors that a company should go into liquidation and, for a variety of reasons—notably, the recovery of preferences—the creditors have said, 'We don't want that to happen; we'll actually put money up, because all we're going to have to do is disgorge preferences.' So the creditors made another decision.

In terms of your second comment, Senator, the way that the voting works is that for a vote to be successful you need 50 per cent in number and 50 per cent in value. In the situation where you have one large creditor for $1 million and you have 10 small creditors of $50 each, assuming they are voting against each other, you would have a majority value but not a majority in number. There is then a procedure that allows the chair of the meeting, which is the administrator, to exercise a casting a vote. There is no positive obligation for them to exercise a casting vote, but there is that discretion there.

Our guidelines are that, in general, you should vote with the dollars but it is not obligatory. In that situation, if a practitioner chose not to exercise their casting vote, the motion would lapse. So it is not a matter of the dollars always being able to prevail over the smaller number of creditors. That can be quite relevant, for instance, where you have a financier who might be owed several millions of dollars and they are seeking for an outcome in one way and you have a whole bunch of employees who are owed very small amounts of money who want an outcome another way. Does that answer your question?

Senator MURRAY—It helps, yes.

CHAIRMAN—In relation to the method of voting by creditors under voluntary administration, there has again been some criticism raised that it leaves too much power in the hands of the administrator, particularly where there might be a casting vote to be acted on by the administrator, say, in relation to the issue of removing the administrator at a second meeting. What is the association's view on that issue of the method of voting?

Mr Carter—First of all, at the second meeting you cannot remove the administrator.

CHAIRMAN—Sorry, is it the first meeting?

Mr Carter—It is the first meeting. Generally, at the first meeting, an administrator cannot vote on anything where he or she has a pecuniary interest. In that situation, faced with a casting vote that meant that they stayed in, they could not, or should not, exercise it.

Mrs Arnold—The courts have held that because, generally, the resolution is that the administrator be removed and be replaced with X they can actually vote against it because the regulation only requires that you cannot vote in favour. Because you would be voting against your removal, not for your removal, the courts have actually held that the administrator can exercise their casting vote in that instance because they are actually voting against the resolution and the regulation only says that you cannot vote in favour of a resolution that provides you with financial benefit. The regulation is phrased just a little bit differently.

CHAIRMAN—Please excuse us while we attend a division.

Proceedings suspended from 6.15 p.m. to 6.37 p.m.

CHAIRMAN—I am sorry that we have had these serial interruptions, but that is the way this place operates when parliament is sitting. One of the other issues that has been raised is the cost of external administrations. Are you aware of concerns that have been raised by some people with regard to the adequacy of the disclosure of fees?

Mr Carter—Before I comment on that I will just clarify an answer that I gave you as the senators were walking out the door. It was in relation to the casting vote at the first meeting. In fact, as Kim quite rightly says, with the way that the provisions are at the moment, the administrator can actually vote against a resolution to have himself or herself removed, and that is a bit of an anomaly in the provisions. On page 4 of our submission of 23 July, we propose that that be changed and that the administrator not be able to vote on any general proxy where they have an interest—and in particular not be able to exercise the casting vote. To answer the question you put before: the cost of insolvency is traditionally a sensitive issue. The nature of the way that insolvencies are run these days is that they are surrounded by heavy legal issues, threats of litigation, duties of care. What it means is that the job of the insolvency practitioner is a lot more challenging and therefore more expensive than it was.

Having said that, we have issued a statement of best practice in relation to remuneration. Up until 1999, with the last adjustment being in 1997, we used to issue scales of fees—that is, recommended hourly rates. The criticism of that was that it was anticompetitive, and there was

some criticism from the courts. We then went through a process of issuing a general statement of best practice in relation to remuneration, which was issued a couple years ago. That talks again of full disclosure to creditors and making sure that the basis of remuneration is known up front. Generally our practitioners charge on an hourly basis. Those rates must be disclosed up front. If, at the end of the day, the creditors remain aggrieved, they can apply to the court for that to be reviewed. Alternatively, if they choose not to approve the fees, then the administrator must apply to the court to have them taxed.

I think that the nature of fees will always attract some publicity because they can be quite significant—in some of the larger jobs the fees can be millions of dollars. If you deal with the larger users of our services—for instance, the financiers, the banks and people like that—they have agreed rates. The main thing that we need to engender and ensure is transparency in the setting of those fees, and make sure that creditors are properly advised of them. I suspect it is the same with any profession: there will always be ways of improving the way that we deal with the fees, but the fees are the fees.

CHAIRMAN—You have referred to the role of the courts as having the capacity to have fees taxed, and so on.

Mr Carter—Yes.

CHAIRMAN—The AWU suggested the establishment of some external, reputable body or a government department to monitor or even to set fees charged by administrators. What would you see as being the advantages or disadvantages of that proposal?

Mr Carter—The setting of fees is something that has generally been branded as being anticompetitive. The establishment of hourly rates, for instance, is only one aspect of the cost of a job; there is also the number of hours that have been spent and you have it by the relevant person. It comes back to issues that we were raising before—and this works against the roster system: you need to have people who are competent in the area and the organisation needs to be appropriately staffed. You could take a job and have a practitioner on it who is appropriately qualified to take the job, and the fees could be a lot less than for a practitioner who is not qualified to take the job. There are so many different variations in the ways that the fees are set that it becomes very difficult. That is one of the reasons that we did away with the scale. In terms of setting another body to take away the taxation procedure from the courts and effectively put it into another body, the courts are there and they fill this role with solicitors, so I do not know why you would want to establish another body.

CHAIRMAN—Could I ask a question about section 420A of the Corporations Act: the controller's duty of care in exercising power of sale. An issue was raised with this committee some time ago—not in relation to this insolvency inquiry but in relation to banks—about the case, JEOGLA Pty Ltd v. ANZ. I do not know whether you are familiar with that.

Mr Carter—No.

CHAIRMAN—I am trying to think of the name of the individual: Mr Richard Wright, I think, was the principal of that company. That involved a situation where stud cattle were sold at commercial cattle prices rather than at stud prices. The issue was raised with us. Although the

court, in due course, found against the insolvency practitioner in that case, the complainant still did not seem to be getting satisfaction for what he regarded as fair recompense from the bank. I guess that, in a sense, is a separate issue. However, it was found that the receiver failed to take reasonable care to sell the property—in that case, the cattle. Do you think this is an area of the law that could be improved, in terms of providing insolvency practitioners with guidelines that provide for assets of companies to be sold at maximum prices?

Mr Carter—No. I think it would be very dangerous to have it enshrined in a statute, because the commercial situation varies from asset to asset. There is a heavy obligation in section 420A which has a strong history of precedent supporting it. One of the principal obligations of section 420A is to get the best price possible in the market. What happens is that prices in markets vary from time to time and, inevitably, particularly if you are a guarantor, there will be disappointment with the prices that are achieved for assets. A simple example would be a that house in Sydney that was sold by a liquidator five years ago would now be worth a lot more. I think it comes back to the skill of the professional. That is a fundamental aspect. In this case, as I recall it, there were issues relating to the skill and thought that went into the sale of the assets and how that was properly dealt with, and I think that no value was put on the stud.

Mrs Arnold—And whether the practitioner involved chose the right sort of people to give him advice in relation to those cattle.

Mr Carter—I suspect there will be aggrieved creditors in every insolvency administration, but the guidelines for realising assets are pretty well enshrined in the precedents. I am not sure whether you could achieve anything with a statute. There will be assets that, for instance, you would not advertise for sale, because to advertise them would be to destroy the value of the asset.

CHAIRMAN—We did cover GEERS in part, but I would like to ask you a question in relation to a comment made by the Department of Employment and Workplace Relations which is contrary to the view expressed in your submission, where I think you said that the department is powerless to be active as a creditor or to help in the process of funding litigation et cetera. The officer declared:

... we are on creditor committees and we are an active creditor. In terms of the issue of funding litigation, most employee creditors would not be in a situation where they could fund litigation, and we would consider each and every case on a case-by-case basis to determine whether it would be appropriate for the Commonwealth to fund litigation.

Do you think that is a fair claim by the department, or do you still have concerns in relation to GEERS?

Mr Carter—Since hearing that evidence, we have spoken to GEERS. We think there is some doubt that they have the legal standing to be on those committees. A simple example is an employee who has had part of their claim satisfied by GEERS and part not. That does not mean there are two creditors. Who is the creditor—the employee or GEERS? Does that mean you have two votes? That does not work. Our submission was saying that GEERS have a valuable role to play and, other than the ATO, are fast becoming the most common creditor in insolvency administrations. It is important that their role and their standing are clarified. The point I made in my opening statement is that GEERS appear to have misunderstood what we are saying. We are

not saying that they are not being active; we are saying that, if they are being active, we are not sure they have the standing to be active; and we are saying that that point should be clarified to ensure they can be active.

CHAIRMAN—Another issue being raised is the superannuation guarantee charge and the fact that, in the past, it has been much in arrears when a company goes into liquidation. To what extent do you think the introduction of the quarterly payment requirement for the superannuation guarantee charge will overcome that problem? Is there a need to further tighten up that area?

Mr Carter—I think it will help diligent companies, but there is still going to be the problem that, if a company needs to buy some resources or something for production, it will buy that before it pays the super. The whole superannuation issue is an area that needs to be looked at. In fact, we have a diagram of the different issues in one of our submissions, because it is inconsistent and grey across a number of areas, particularly in relation to the different types of administrations.

Mrs Arnold—We are quite concerned that, although the intention is for super to have a priority, because of inconsistencies between the superannuation legislation and the Corporations Act there is a grey area, and superannuation may not be getting the priority it deserves once it becomes a debt due to the Commonwealth. We really think that this needs to be looked at and resolved.

Mr Carter—On the other side, you have directors who are given an elevated status in superannuation that they do not receive under the Corporations Law. So, again, there is anomaly the other way.

CHAIRMAN—There being no further questions, I thank both of you for your appearance before the committee. Your evidence has certainly been very valuable to our inquiry and will be one of the main factors in determining some of the outcomes. Thank you very much for your patience in putting up with the interruptions that we have had.

Committee adjourned at 6.51 p.m.