

Senate Standing Committee on Economics
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Budget Estimates
4 – 6 June 2013

Question: BET 15

Topic: Administrators and Liquidators

Hansard Page: Tuesday 4 June 2013, Page 94

Senator XENOPHON asked:

Senator XENOPHON: Finally, in terms of administrators and liquidators, Senator John Williams was responsible for instigating what I think was a very useful Senate inquiry back in 2010. That committee reported in September 2010 with a number of recommendations. I do not know whether Senator Williams has raised it with you. So there were a number of recommendations—I thank the secretariat: there were 17 recommendations—to deal with some rogue practitioners out there. But I must say, on the record: I have been dealing extensively, recently, with Austin Taylor, the administrator for Spring Gully Foods, a very well-known South Australian company, and have found him to be terrific in the way that he has been supportive. So there are plenty of good guys out there. But Senator Williams's inquiry was driven by concern about the rogue operators. There were a number of recommendations. What has happened to that? What reforms have there been in respect of administrators and liquidators?

Mr Price: You may be aware that the government released a draft bill and explanatory memorandum dealing with proposed insolvency law reform, for public comment, on 19 December 2012. The draft bill implements the reform package outlined in the government's proposals paper 'A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia', which was released in December 2011. ASIC continues to work with Treasury to provide comments on the draft legislation, consequential amendments and so forth. We have also established an advisory panel which has met twice to consult on aspects of the draft legislation and provide input concerning the implementation of the proposed insolvency law reform initiatives. Treasury and the Attorney-General aim to introduce the law reform in the winter 2013 sittings—

Senator XENOPHON: That is now, isn't it?

Mr Price: as I understand.

Senator XENOPHON: Good luck with that, because we only have two more sittings.

Mr Price: But I am not quite sure of the current status of the bill. That is something you would need to direct towards Treasury.

Senator XENOPHON: But it was due to be pushed through in the last two weeks of sitting.

Mr Price: Sure. In terms of the timing of the bill, that is not something—

Senator XENOPHON: Sorry—you cannot push something through unless you introduce it first! That is right. Thank you, Chair!

Mr Price: But, in terms of the timing of the bill, that is a question you would need to direct towards Treasury.

Senator XENOPHON: Sure. On notice, can you advise in terms of the proposed government reform. I was aware of that process. But to what extent has it picked up on the 17 recommendations made by the Senate committee?

Mr Price: So, you would like us to do a reconciliation of the bill compared to—

Senator XENOPHON: If you consider that unreasonable, then that is fine. But if it can be relatively easily done, then I would like to know the extent to which you consider it has reflected that.

Mr Price: We will take that on notice.

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Answer:

In response to the question, ASIC reviewed the proposed insolvency law reform and considered the extent to which the reforms reflect the 17 recommendations made in the Senate Economics References Committee report into, "*The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*" [September 2010].

On 19 December 2012, the government released, for public comment, an exposure draft of the Insolvency Law Reform Bill 2013 and Explanatory Memorandum dealing with proposed insolvency law reform. Submissions closed on 8 March 2013.

The draft Bill implements the reform package outlined in the government's Proposals Paper: *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* (released in December 2011).

ASIC subsequently established an Advisory Panel (which has met twice) to consult on aspects of the draft legislation and provide input to ASIC concerning the implementation of the government's insolvency law reform initiatives.

ASIC continues to work with Treasury and provide comments on the draft legislation, the consequential amendments, associated regulations and transitional measures.

The following table identifies each recommendation made in the Senate Economics Committee report and how the proposed law reform addresses the recommendation:

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Table 1- The Senate Economics References Committee report* recommendations

compared to the exposure draft: Insolvency Law reform Bill 2013 dated 19 December 2012

(*The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework (September 2010))

Recommendation	Legislative Response
<p>Recommendation 1</p> <p>The committee recommends that the corporate insolvency arm of ASIC be transferred to ITSA to form the Australian Insolvency Practitioners Authority (AIPA). The agency should be governed by the <i>Financial Management and Accountability Act</i> under the Attorney General's portfolio.</p> <p>The Memorandum of Understanding between ASIC and ITSA should be updated to ensure that ASIC provides to the new agency adequate resources and the expertise needed to support the oversight of corporate insolvency sector.</p>	<p>Not adopted – proposed reform instead seeks to align and harmonise corporate and personal insolvency across a number of areas including the registration and disciplinary processes</p> <p>Although this recommendation was not adopted, a review of the MOU between ASIC and ITSA is underway.</p>
<p>Recommendation 2</p> <p>The committee recommends that the government commission the Australian Law Reform Commission to inquire into the opportunities to harmonise Australia's personal insolvency and corporate insolvency legislation. The Commission must report to the government within 12 months of the tabling of this report.</p>	<p>ALRC not commissioned to enquire into harmonisation to ASIC's knowledge</p> <p>Proposed law reform includes many elements that seek to align, to the extent possible, the corporate and personal insolvency regimes – for example, registration and disciplinary processes, funds handling, record keeping and creditor's rights to information</p>
<p>Recommendation 3</p> <p>The committee recommends that a 'flying squad' be established within the new insolvency regulator. The unit should be responsible for conducting investigations of a sample of</p>	<p>Not adopted – although from 1 July 2013 enhanced surveillance of the insolvency profession will occur using new NPP funding</p>

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<p>insolvency practitioners; some selected at random, others with the aid of a risk profiling system and market intelligence.</p>	
<p>Recommendation 4</p> <p>The committee recommends that section 213 of the <i>Australian Securities and Investment Commission Act 2001</i> be replaced with the following:</p> <p>All hearings, evidence and reasons shall be heard or given in open session unless otherwise ordered by a judge of a Court of any State or Territory or the Federal Court of Australia who may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. Subject to section 216(2), any past hearings, evidence and/or reasons shall be open to inspection by any person, and a register of past matters with the names of parties shall be published and made available for inspection by the public by means of the internet.</p>	<p>Not adopted – under proposed reforms the CALDB is to be replaced with a three member committee comprising ASIC, a registered liquidator chosen by the Insolvency Practitioners Association of Australia and a person appointed by the Minister. This aligns with the disciplinary process currently in place for personal insolvency regime</p> <p>Regulations around the operation of this committee have not been released at this time.</p>
<p>Recommendation 5</p> <p>The committee recommends that the new Insolvency Practitioners Authority establish a licensing system for corporate insolvency practitioners similar to the system currently used by ITSA. Practitioners should be required to renew their license every three years.</p>	<p>Adopted in part in the proposed reforms – they do not establish the Insolvency Practitioners Authority or licensing system but a registered liquidator would need to renew their registration with ASIC every three years</p>

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<p>The new regulator should have the power to suspend a practitioner's license if they are not adequately insured or if a matter referred to the CALDB is of sufficient concern as to warrant suspension.</p>	<p>Adopted in part – ASIC may suspend or cancel a person's registration as liquidator if they do not maintain adequate and appropriate professional indemnity and fidelity insurance</p> <p>Aspect relating to CALDB is not relevant with the proposed disciplinary committee</p>
<p>Recommendation 6</p> <p>The committee recommends that as part of the licensing and re-licensing processes, all corporate insolvency practitioners are required to pay a licensing fee.</p>	<p>Adopted in the proposed reforms – the application fee to become registered as a liquidator is increased and there is an additional fee on first becoming registered and every three years thereafter upon renewal of registration</p> <p>Proposed fees would align with those in the personal insolvency regime</p>
<p>Recommendation 7</p> <p>The committee recommends that it be a condition of a practitioner's first license renewal (ie: after three years of registration) that he or she has completed the IPAA's Insolvency Education Program.</p>	<p>Adopted but modified – it is proposed that an applicant for registration must have completed a prescribed level of formal tertiary studies in insolvency administration specific study (the IPA course would be the minimum requirement)</p>
<p>Recommendation 8</p> <p>The committee recommends that the new Australian Insolvency Practitioners Authority set and administer a 'closed book' written examination. The passing of this examination should be a pre-requisite for gaining a license as a corporate insolvency practitioner.</p>	<p>Not adopted – Australian Insolvency Practitioners Authority not established</p> <p>Proposed legislation requires that an applicant for registration as a liquidator must attend an interview in front of a three party registration committee. That committee would comprise ASIC, a registered liquidator chosen by the Insolvency Practitioners Association of Australia and a person appointed by the Minister. The</p>

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	committee may require the person to sit an examination but this is not a mandatory requirement
<p>Recommendation 9</p> <p>The committee recommends that the new Australian Insolvency Practitioners Authority convene an eight person advisory panel to devise a written examination. The panel should be chaired by the Chairman of the Authority and should also include:</p> <ul style="list-style-type: none">• a representative from the Institute of Chartered Accountants of Australia;• a representative from the Insolvency Practitioners Association (IPAA);• an insolvency practitioner nominated by the IPAA;• two academic experts on insolvency law chosen by the Authority;• a person nominated by the Australian Bankers' Association;• a person nominated by the Council of Small Business Organisations of Australia; and• a person nominated by a consumer advocacy group.	<p>Not adopted – it is not proposed that the Australian Insolvency Practitioners Authority be established</p> <p>The proposed registration committee may require the person to sit an examination but this is not a mandatory requirement</p>
<p>Recommendation 10</p> <p>The committee recommends that the new insolvency regulator work with the insurance industry to ensure that insurance companies notify the regulator if a practitioner's insurance lapses or expires. In these cases, the regulator should contact the practitioner immediately and allow the practitioner 14 days to acquire the policy. If this is not done, the regulator must suspend the practitioner's license.</p>	<p>Not adopted as ASIC retains responsibility for regulating liquidators. However, proposed legislation requires a registered liquidator to provide evidence of insurance before they are registered and each year when they lodge their annual partitioner return and at each renewal of registration (required every three years)</p> <p>The proposed legislation also imposes an</p>

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<p>The regulator should sight the insurance documents of practitioners as part of its 'flying squad' activities.</p>	<p>obligation for the registered liquidator to notify ASIC if they cease to hold adequate insurance (a penalty is imposed for failure to do so) and ASIC can either cancel or suspend a liquidator's registration if the registered liquidator ceases to hold adequate insurance</p> <p>"Flying squad" not adopted but additional funding provided (effective 1 July 2013) for enhanced surveillance activity.</p> <p>ASIC has already conducted a project focused on registered liquidator insurance.</p>
<p>Recommendation 11</p> <p>The committee recommends that the <i>Corporations Act 2001</i> be amended to impose a penalty on registered insolvency practitioners who operate without PI insurance.</p>	<p>Adopted – the reforms propose a penalty of 1000 penalty units for intentional or recklessly failing to hold adequate insurance. Otherwise, the current penalty for failing to have adequate insurance is 60 penalty units</p>
<p>Recommendation 12</p> <p>The committee recommends that the major accountancy bodies—the Institute of Chartered Accountants of Australia, CPA Australia and the National Institute of Accountants—establish a fidelity fund to ensure that creditors are insured for fraud and wrongdoing.</p>	<p>Not adopted to ASIC's knowledge</p>
<p>Recommendation 13</p> <p>The committee recommends that section 1282(2)(a)(i) of the Corporations Act is amended to read:</p> <p>"...is an Australian Legal Practitioner holding a current practising certificate with at least five years' post admission experience as a practising</p>	<p>Uncertain – the corporations regulations are to prescribe required knowledge and experience under the proposed reforms. Draft regulations have not yet been released.</p>

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<p>commercial lawyer; and / or ...holds a Masters of Business Administration with at least five years' commercial experience"</p>	
<p>Recommendation 14</p> <p>The committee recommends that as part of the proposed licensing system, the insolvency regulator can suspend a liquidator's license if they believe overcharging has occurred.</p>	<p>Not adopted – but the proposed legislation includes increased powers for ASIC, creditors and the court to review the remuneration of a registered liquidator</p>
<p>Recommendation 15</p> <p>The committee recommends that section 503 of the <i>Corporations Act 2001</i> be amended to insert the following provision:</p> <p>For purposes of this section, cause shown includes:</p> <p>(a) A vote of no confidence by a majority of creditors;</p> <p>(b) Where it appears time based charging of the incumbent liquidator has not or will not result in a reasonable cost-benefit analysis for the company.</p>	<p>Not adopted – section 503 of the Corporations Act 2001 would be repealed as a consequence of other amendments.</p> <p>Proposed reforms include:</p> <ul style="list-style-type: none"> • a new power for creditors to remove and replace an appointed registered liquidator by resolution of creditors; and • new provisions for court supervision of registered liquidators which give standing to creditors to apply to court for the court to inquire, and make orders, in relation to an external administration
<p>Recommendation 16</p> <p>The committee recommends that the new insolvency regulator work with the IPAA and the Institute of Chartered Accountants to ensure that insolvency practitioners comply with the remuneration report template set out in the IPAA</p>	<p>Not adopted in proposed legislation.</p> <p>ASIC has a project (which has been ongoing since 2010) where it reviews compliance by registered liquidators with the requirements of</p>

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<p>Code of Professional Practice.</p>	<p>the Act around approval of remuneration. ASIC released reports for 2011 and 2012 that set out the results of that project work</p>
<p>Recommendation 17</p> <p>The committee recommends that within the new Insolvency Practitioners Authority, there is a unit established that is responsible for gathering, collating and analysing data on a range of corporate and personal insolvency matters. The data must be made publicly available in the Authority's Annual Report and online. There should be no charge for accessing these data.</p>	<p>Not adopted in proposed legislation.</p> <p>Current non legislative driven changes to ASIC form EX01 (an electronically lodged report concerning alleged offences by company officers and other matters), Form 505 (notice of appointment) and Form 5047 (lodgement of a deed of company arrangement) are initiatives aimed at improving ASIC's gathering and reporting of better information on aspects of corporate insolvency administrations in Australia.</p> <p>Proposed reforms to section 136 of the ASIC Act will require ASIC to report on the activities it has undertaken in the exercise of its powers and the performance of various regulatory functions related to insolvency.</p>