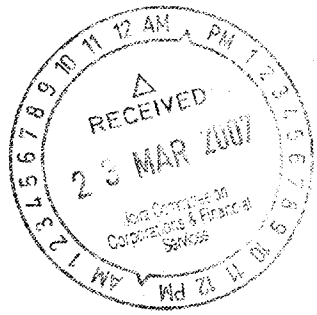
19 March 2007



Mr David Sullivan
Secretary
Parliamentary Joint Statutory Committee
Corporations & Financial Services
PO Box 6100
Parliament House, Canberra, ACT 2600

Dear Sir

Re: Insolvency Reform

I refer to our telephone conversations and previous correspondence.

My thanks must go to the committee, for including my submission on the website, and for pushing the point with Treasury at the Public Hearing on 5 March 2007. I found the comments on page 16 of the Hansard interesting reading. My apology for not being able to attend as the cost to travel to Melbourne was too great.

It is good that you have received submissions in relation to the reforms, a summary of which is as follows:

Body	**Broad Perspective**
Australian National Audit Office	Technical legal matters
IPAA	Benefits to External Administrators
Chartered Secretaries	Directors and governance
Australian Finance Conference	Financiers (equipment mainly)
Australian Chamber of Commerce	Employees
ASIC	Insolvency Administration
Dr David Morrison etc	VA Procedures and Employees
Dr David Morrison	Creditors being wise in their dealings
Commonwealth Ombudsman	Complaints against Liquidators
The Treasury	Technical amendments
ACTU	Employees
CPA Australia & ICAA	Technical Amendments
Law Council	Technical Amendments
AMWU	Employees / Inadequacy of GEERS

My submission was the only one, I believe, to take a step back from the detail and consider the big picture, particularly as it relates to creditors. I would have thought that if creditors were the body who External Administrators have a duty to act in the interests of, that having a submission from this part of the Australian Business Community would have been critical. The problem, as we both know, is that there is no representative body to write such a submission.

Well you do have a submission, and it dates back to the first letter written to Senator Chapman by me in November 2005, which has been followed up with numerous other letters and telephone conversations.

The others have been written by bodies who you would expect to make a submission about the reforms, for they have the time and resources to do so. In fact, I would go one step further, and state that there was an expectation from your committee that they would make a submission; such was your written invitation to them. Were creditors invited to make submissions? I question how comprehensive the enquiry can be, given that the views of a significant stakeholder, being creditors, has been represented by only one submission, as opposed to the 13 others.

In relation to my ongoing views of the injustices of unfair preferences, I note the comments from Mr Donnan from Treasury on page 16:

- the preference provisions have been part of insolvency law since the time of Queen Elizabeth
- it would look very odd to take the act
- creditors would find plenty of opportunities to criticise the law.
- it is unclear that preferences recoveries are just used to pay liquidator's remuneration.
- we see many instances where preference recoveries go back to creditors, but the there is no empirical data to support this view, or that it is anecdotal and ad-hoc.
- there is a lot of case law on preferences and large amounts involved in large insolvencies.
- again, it would seem very odd for an insolvency law not to have those provisions in it.

Mr Donnan obviously has not read my submission very carefully. I make the following counter arguments:

- just because it has been around since the time of Queen Elizabeth, does not make it right. Again I am hearing the words, 'long established practise' that Matthew Brine has responded to me with previously. This shows that Treasury is not serious about sections of the law that are being abused.

- that it would look odd? The fact is that the spirit of the law, being a redistribution of funds to creditors, in my experience is not occurring. It is seen as revenue source to liquidators. Mr Donnan admits that there is not sufficient empirical evidence to ascertain what is happening in practice.

- that creditors would abuse the law. Again my submission has stated that creditors should not be penalised for commercially collecting outstanding debt, when they have dealt with a company in good faith. COD terms, pay now stickers, legal letters and payment plans are all fair game for liquidators to send demands to creditors. I reiterate, I am not referring to creditors who come up with an uncommercial scheme to put themselves in a preference position.

- it is unclear whether preference recoveries are just used to pay Liquidator Remuneration. I will site the $120,000 preference example that I have referred to previously from the Australian Taxation Office, of which none of that money went back to creditors, even though at that point the liquidator had only accrued $50,000 on the job. He had not intention of redistributing the rest.

- that there is a lot of case law. Perhaps a liquidator should be sure that a court would find in his or her favour before sending the demands in the first place. If the court is to uphold the spirit of the law, it should prescribe how much the liquidator can keep for fees, and how much should go to creditors.

- he uses the 'odd' argument again. The provisions are not operating within the spirit they were intended. It goes against the concept of fairness that Australian society prides itself on.

I commend the work that the committee has done to date, and also appreciate that legislation needs to be passed, particularly in light of the forthcoming Federal Election. I am not really concerned with the amendments, as there has been opportunity for public comment, except for two of the proposals:

1. Extending the relation back day period. You really should not propose this, in light of the lack of empirical evidence that exists about the operation of the preference recovery provisions.

2. The Assetless Administration Fund. As stated previously, External Administrators are very good at assessing risk when they accept an appointment. Where there are jobs that run out of funds, there are others where there is a surplus of funds that cover these losses. That is the nature of the industry.

I also urge the committee to keep the inquiry open, or begin a new inquiry into the preference provisions. I have also raised a number of other unresolved issues in previous correspondence that I believe warrant further investigation.

In closing I would like to thank yourself and Senator Chapman for your willingness to listen to my concerns.

I welcome the opportunity to be involved in this debate further. I can be contacted during business hours on Again I ask that my personal details are kept confidential.

Yours faithfully