

The Senate

---

Economics

References Committee

---

The regulation, registration and  
remuneration of insolvency  
practitioners in Australia:  
the case for a new framework

September 2010

© Commonwealth of Australia 2010

ISBN 978-1-74229-227-4

Printed by the Senate Printing Unit, Parliament House, Canberra.

# Senate Economics References Committee

## Members

Senator Alan Eggleston, Chair	Western Australia, LP
Senator Annette Hurley, Deputy Chair	South Australia, ALP
Senator David Bushby	Tasmania, LP
Senator Julian McGauran	Victoria, LP
Senator Louise Pratt	Western Australia, ALP
Senator Nick Xenophon	South Australia, IND

## Substitute Member:

Senator John Williams (replacing Senator Julian McGauran)	New South Wales, NP
--	---------------------

## Participating Members

Senator Doug Cameron	New South Wales, ALP
Senator Concetta Fierravanti-Wells	New South Wales, LP

## Secretariat

Mr John Hawkins, Secretary  
Dr Richard Grant, Principal Research Officer  
Mr Glenn Ryall, Senior Research Officer  
Dr Robyn Clough, Principal Research Officer  
Mr CJ Sautelle, Research Officer  
Ms Meredith Bond, Executive Assistant  
Ms Hanako Jones, Executive Assistant  
Mr Joshua See, Executive Assistant

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3540  
Fax: 02 6277 5719  
E-mail: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)  
Internet: [http://www.aph.gov.au/senate/committee/economics\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/economics_ctte/index.htm)



# TABLE OF CONTENTS

<b>Membership of Committee .....</b>	<b>iii</b>
<b>Acronyms .....</b>	<b>xiii</b>
<b>Glossary .....</b>	<b>xv</b>
<b>List of Recommendations .....</b>	<b>xix</b>
<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction .....</b>	<b>1</b>
Background.....	1
The focus of the inquiry .....	1
Conduct of the inquiry.....	3
Submissions .....	3
Public hearings .....	3
Acknowledgements .....	4
Past inquiries and reform.....	4
Context of the inquiry.....	6
Key themes and the structure of the report.....	7
<b>PART 1 .....</b>	<b>9</b>
<b>Chapter 2.....</b>	<b>11</b>
<b>An overview of the corporate insolvency industry in Australia.....</b>	<b>11</b>
Market size .....	12
Industry profile .....	12
ASIC's activities .....	15
Final comment .....	16
<b>Chapter 3.....</b>	<b>17</b>

<b>The role and duties of liquidators and administrators in the insolvency process in Australia</b> .....	<b>17</b>
The administration of companies in financial difficulty .....	17
The role of an administrator—an overview .....	18
The role of a receiver—an overview .....	18
The role of a liquidator—an overview .....	19
Secured and unsecured creditors .....	19
Voluntary administration.....	20
Commencement and effect of voluntary administration .....	20
First creditors' meeting .....	23
Second creditors' meeting—deciding the company's future .....	24
Deeds of company arrangement .....	24
Administrators' fees .....	26
Receivership .....	27
Distribution of funds.....	28
Receivers' fees .....	28
Conclusion of a receivership .....	29
Creditors' scheme of arrangement .....	29
Winding up (liquidation) .....	29
Effect of winding up on company officers and creditors .....	30
Distribution of funds.....	31
Creditors' meetings .....	32
Committees of inspection .....	32
Creditors' rights .....	33
Liquidators' fees .....	34
Conclusion of the winding up .....	35
Treatment of employees' entitlements .....	35
Voluntary administration.....	35
Receivership .....	37

Winding up (liquidation) .....	37
Duties and responsibilities of a liquidator and the 'fit and proper' provisions of the Corporations Act.....	38
Fiduciary duties .....	38
Duties of care and skill .....	39
Other duties .....	39
The 'fit and proper' provisions in the Corporations Act .....	40
<b>Chapter 4.....</b>	<b>43</b>
<b>The role of the regulator, disciplinary body and industry representative: ASIC, the CALDB and the IPAA.....</b>	<b>43</b>
Australian Securities and Investments Commission .....	43
Insolvent trading and ASIC's role .....	44
Companies Auditors and Liquidators Disciplinary Board .....	45
Insolvency Practitioners Association of Australia .....	46
<b>PART II.....</b>	<b>47</b>
<b>The evidence that the regulation of the insolvency industry needs reform ....</b>	<b>47</b>
<b>Chapter 5.....</b>	<b>49</b>
<b>'Bad apples' or systemic failure: perceptions of the insolvency industry .....</b>	<b>49</b>
The Ariff case .....	49
Singleton Earthmoving.....	51
Carlovers Carwash Limited.....	52
Adamstown Rosebud Sport and Recreation Club .....	53
YCW Leagues Club.....	54
Mr Ariff's deregistration.....	55
Other disciplinary cases.....	55
Submitters' reflections on the state of the insolvency industry .....	58
A generally well-performing industry.....	58

A bad industry .....	60
ASIC's view .....	61
The need for targeted reform.....	61
Summary.....	63
<b>Chapter 6.....</b>	<b>65</b>
<b>The evidence of regulatory failure and the need for a more proactive approach .....</b>	<b>65</b>
Identifying regulatory failure .....	65
Criticism of ASIC's role .....	66
ASIC's reactive, complaints-based approach .....	66
ASIC's unresponsiveness to complaints .....	68
Lack of communication with creditors.....	72
Is ASIC under resourced?.....	73
Criticism of the Companies Auditors and Liquidators Disciplinary Board .....	74
Independence from ASIC .....	75
A protracted process .....	76
Few cases and few findings.....	77
Trivial matters .....	77
Summary.....	78
<b>Chapter 7.....</b>	<b>79</b>
<b>The system for registering insolvency practitioners .....</b>	<b>79</b>
The registration process.....	79
Broadening the practitioner base.....	80
ASIC's view .....	82
Tightening requirements.....	82
An interview process .....	83
A written examination .....	84
Professional Indemnity Insurance .....	85



Criticism of ASIC's monitoring of professional indemnity insurance .....	86
Run-off cover.....	87
A licensing regime.....	88
License renewal .....	89
Stratifying registration.....	90
A single registration body .....	91
Professional education.....	92
Summary.....	93
<b>Chapter 8.....</b>	<b>95</b>
<b>The remuneration of liquidators and administrators .....</b>	<b>95</b>
Background.....	95
Chapter outline .....	96
Methods of charging.....	97
Criticism of the hourly rate of payment .....	98
The level of fees charged by liquidators and administrators.....	98
Support for the current fee-setting system .....	99
Criticism of liquidators' excessive fees .....	100
Disbursements .....	102
Criticism of excessive disbursement payments.....	103
Priority payment for liquidators .....	105
Alternatives to the priority system .....	107
The regulation of liquidators' and administrators' fees.....	107
What is 'reasonable'? .....	108
Disclosure and the practitioner's remuneration report.....	108
The need for better data on fees in the insolvency industry.....	110
Educating the public as to what is 'reasonable' .....	113
Summary.....	114

<b>PART III .....</b>	<b>115</b>
<b>Reforming Australia's corporate insolvency system.....</b>	<b>115</b>
<b>Chapter 9.....</b>	<b>117</b>
<b>The need for better data.....</b>	<b>117</b>
A familiar theme .....	117
The need for better data on insolvencies .....	119
ASIC's forward program .....	119
Criticism of ASIC's approach.....	120
The IPAA's view .....	120
Academics' perspectives.....	121
Options for reform.....	123
Committee view.....	124
<b>Chapter 10 .....</b>	<b>125</b>
<b>Options to improve the framework for regulating and remunerating the insolvency profession in Australia .....</b>	<b>125</b>
A specialised insolvency regulatory agency .....	125
Submitters' views.....	128
Complaints handling.....	130
Proactive regulation.....	130
Systematic surveillance—an annual or biennial review .....	130
Random surveillance—A 'flying squad' .....	133
The Companies Auditors and Liquidators Disciplinary Board.....	133
An Insolvency Ombudsman .....	134
Professional bodies' view of an Insolvency Ombudsman .....	136
Voluntary administration and Chapter 11 Bankruptcy process .....	138
Concerns with the Chapter 11 model .....	139
Corporate responsibility and phoenix companies .....	140

Remuneration .....	141
Fee setting and pricing control .....	141
A set fee for 'no asset' jobs .....	142
Competitive tendering .....	143
Broadening the base .....	143
Better disclosure on fees.....	143
Better information on fees .....	144
Registering practitioners.....	144
Broadening the base .....	144
A licensing system.....	145
A panel interview .....	145
A written exam .....	145
Stratifying registration.....	145
Professional indemnity insurance.....	145
Summary.....	146
<b>Chapter 11 .....</b>	<b>147</b>
<b>The committee's views and recommendations.....</b>	<b>147</b>
Regulating the profession.....	147
Proactive surveillance.....	149
An Insolvency Ombudsman .....	150
Registration.....	152
A written exam and / or an interview .....	153
Professional indemnity insurance.....	154
Remuneration .....	155
Introducing competition .....	156
Dismissing a liquidator.....	157
Disclosure .....	157
Better data.....	158

A final comment .....	158
<b>APPENDIX 1 .....</b>	<b>161</b>
<b>Submissions Received.....</b>	<b>161</b>
<b>Additional Information Received.....</b>	<b>163</b>
<b>APPENDIX 2 .....</b>	<b>165</b>
<b>Public Hearing and Witnesses .....</b>	<b>165</b>