Chapter 8

The remuneration of liquidators and administrators

> *It is in the area of remuneration that the most obvious conflict between the commercial interests of the practitioner and his or her firm, and the interests of the creditors and the wider public interest is manifest.*[1]

Background

8.1 The level at which liquidators and administrators have been remunerated in Australia has been a source of complaint from creditors. From 2006–2010, eight per cent of insolvency related complaints to the Australian Securities and Investments Commission (ASIC) concerned remuneration issues, including excessive fees and poor disclosure of remuneration. A further 12 per cent of complaints were critical of insolvency practitioners failing to act in a timely manner.[2] This inquiry has also received complaints of overcharging and over servicing by insolvency practitioners.

8.2 Previous inquiries have recommended reforming the remuneration framework for insolvency practitioners in Australia. In 1988, notably, the Australian Law Reform Commission (ALRC) recommended that a statutory board should have exclusive power to determine and set remuneration scales for insolvency practitioners. The ALRC preferred maximum amounts to fixed remuneration scales, but emphasised that fees must be subject to approval by creditors.[3]

8.3 Another inquiry explicitly avoided proposing this type of regulation. In 2004, as part of a review of Australia's insolvency laws, the Parliamentary Joint Committee (PJC) on Corporations and Financial Services argued that in light of concerns about the impact on competition, a scale of maximum fees for insolvency practitioners is 'inappropriate'. The committee insisted that the market must determine the most efficient and cost-effective fee setting mechanism.

8.4 However, the PJC did recognise that enhanced disclosure of the basis of fee setting 'can address some of the concerns expressed by creditors'.[4] Specifically, if creditors can understand and negotiate meaningfully with practitioners about fees, they are better able to protect their interests. Accordingly, the committee recommended that ASIC:

---

1 Professor David Brown and Associate Professor Christopher Symes, *Submission 40*, p. 6.

2 ASIC, *Submission 69*, p. 58.

3 General Insolvency Inquiry, Australian Law Reform Commission, 1988, pp. 379–380. This inquiry was known as the Harmer Report.

4 Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency Laws: A stocktake', June 2004, p. 122.

> …work with the professional bodies to encourage the promotion of best practice standards in remuneration charging and in particular the provision of adequate disclosure of the basis of fees charged by insolvency practitioners and on a more timely basis.[5]

8.5 Both ASIC and the Insolvency Practitioners Association of Australia (IPAA) have since sought to clarify 'best practice standards' in remuneration. In 2008, the IPAA introduced a section in its Code of Professional Practice dealing with remuneration. The Code established three remuneration principles: that the work is 'necessary and proper'; that a claim for a fee is accompanied by 'sufficient, meaningful, open and clear disclosure'; and that approval is gained and recorded before remuneration is drawn. The same year, ASIC released an information sheet giving general information for creditors on the approval of liquidators' and administrators' fees. The sheet included a section indicating to creditors how they might decide if the amount of fees charged by the liquidator or administrator is reasonable.[6]

8.6 There has also been statutory reform of the requirements for insolvency practitioners in setting and receiving their fees. The Corporations Amendment (Insolvency) Bill 2007 amended the *Corporations Act 2001* to require liquidators and external administrators to prepare a report on their fees for creditors. The report must contain information that will enable the committee of creditors to make an informed assessment of whether the proposed fees are reasonable (see paragraphs 8.54–8.56).

Chapter outline

8.7 Despite these clarifications and reforms, there clearly remains disquiet about the fees charged by insolvency practitioners and concern at the lack of effective regulatory oversight. This chapter discusses the issues relating to insolvency practitioners' fees in closer detail. It is divided into the following parts:

- the calculation of, and methods of charging for, insolvency services (paragraphs 8.8–8.15);
- the level at which fees are charged, including the committee's evidence of overcharging and over servicing (paragraphs 8.16–8.27);
- disbursement payments (paragraphs 8.31–8.38);
- the priority given to the payment of insolvency practitioners (paragraphs 8.39–8.52);
- the current regulatory framework including (paragraphs 8.53–8.64):
    - the practitioner's report on proposed fees;

---

5 Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency Laws: A stocktake', June 2004, p. xxii.

6 ASIC, 'Approving fees: A guide for creditors', *Information sheet 85*, 2008, p. 4.

- the remuneration principles and guidelines of the IPAA Code of Professional Practice;
- ASIC's information sheets for creditors on approving fees, liquidation and voluntary administration; and

- the need for better data on fees in the insolvency industry (paragraphs 8.65–8.76).

Methods of charging

8.8 There is no statutory direction or formula to provide a basis for calculating the remuneration of insolvency practitioners in Australia. The statutory and judicial expectation is that remuneration is 'reasonable'.[7]

8.9 The IPAA's Code of Professional Practice notes that the fees of an administrator may be calculated using one of four methods:

- time spent by the administrator and their staff according to hourly rates;
- a quoted fixed fee based on an estimate of the costs; or
- a percentage, usually of the realised assets; and
- a success or contingency fee.[8]

8.10 The IPAA has no preference for the method of calculating fees, although fees are most commonly charged on hourly rates.[9] The IPAA does require full disclosure of the basis for calculation to be provided to the parties that approve the external administrators' fees.[10] This requires a practitioner to maintain a system that requires staff to record:

- the period of time spent;
- the categories of work performed; and
- details of the work being performed.

8.11 For time based charging, the practitioner must ensure that the number and qualifications of staff allocated to an administration is appropriate for the nature of work being performed. The IPAA Code notes that a balance needs to be found between having sufficient staff to undertake the required tasks and over servicing the administration.[11]

---

7 See section 473(1) of the *Corporations Act 2001*; *Korda; Stockford Ltd* (2004) 52 ACSR 279. Associate Professor David Brown, *Supplementary submission*, p.2.

8 IPAA Code of Professional Practice, p. 99.

9 IPAA Code of Professional Practice, p. 67.

10 ASIC, *Submission 69*, p. 5.

11 IPAA Code of Professional Practice, p. 99.

Criticism of the hourly rate of payment

8.12 Some witnesses argued that the hourly rate of payment encouraged overcharging. Professor Scott Holmes of the University of Newcastle argued in his submission that:

> Charging for services by the hour does not encourage an efficient allocation of time and time allocated can prove difficult to dispute. Often the fees accrued are substantial and there is no formal mechanism for review, other than creditors calling a meeting and requesting a report. There is no real control over outgoings, as the VA can basically operate at their discretion in administering their duties. All of this has proven attractive to some individuals, rorting the latent opportunities this provides.[12]

8.13 Associate Professor David Brown of the University of Adelaide argued that 'no amount of information or guidelines in a Code about method and basis of calculation can prevent allegations that actual rates applied to time are excessive'.[13] He also claimed that in the absence of caps on remuneration, it is very difficult for a court as the final arbiter to assess or fix 'reasonable' remuneration.[14]

8.14 Mr Ian Fong of Carlovers Carwash Limited and Berjaya Corporation Berhad told the committee of his preference for a fixed price regime because it will 'incentivise the practitioner to do the work as quickly as possible…and allows the creditors and the owners of the business to assess the cost benefit of choosing administration or liquidation upfront'.[15]

8.15 Similarly, Mr Pierre Della-Putta argued that many of the standard services that liquidators undertake should be at a fixed scale of charges set by an independent ombudsman. He argued that hourly rates should be used only where no other system is possible.[16]

The level of fees charged by liquidators and administrators

8.16 Most of the committee's evidence on the issue of liquidators' and administrators' remuneration was concerned not with how fees are set per se, but the level at which they are charged. This section looks at some of the factors that may—reasonably or otherwise—contribute to the high cost of a liquidator or administrator's appointment. These include:

- the complexity of the work and the difficult task of disseminating company accounts;

---

12 Professor Scott Holmes, *Submission 21*, p. 18.

13 Associate Professor David Brown, *Submission 40*, p. 8.

14 Associate Professor David Brown, *Submission 40*, p. 6.

15 Mr Ian Fong, *Committee Hansard*, 14 April 2010, p. 43.

16 Mr Pierre Della-Putta, *Submission 10, Supplementary*, p. 3.

- the insolvency practitioner's high level of exposure to risk;
- where a practitioner performs fee generating tasks that are extraneous to the liquidation, thereby extending the time charged;
- the need to employ third parties to assist with the liquidation; and
- a practitioner overcharging to compensate for lack of fee generating opportunities on small insolvency jobs.

Support for the current fee-setting system

8.17 Some witnesses to (and commentary during) this inquiry expressed support for the current system of remunerating insolvency practitioners. They noted that while there might be cases of overcharging, insolvency practitioners by and large earn their rewards within a system of remuneration that is fair and appropriate.

8.18 In May 2010, former High Court Judge Michael Kirby argued that the 'pernickety' work of administering an insolvency is inherently expensive because of the 'intensive nature of the investigation of accounts that insolvency practitioners must analyse and understand'. He added that unless the public is willing to absorb all such costs, a significant burden on creditors is virtually inescapable'.[17]

8.19 Mr Geoffrey McDonald, a former insolvency practitioner (see chapter 5), told the committee that as a liquidator:

> …you may or may not recover your fees. For a number of years the fact that fees have not been recovered on insolvency appointment has been the justification for having a relatively high base rate of fees. I do not see that as necessarily the problem that needs to be addressed.[18]

8.20 Mr Mark Korda, partner at the large liquidation firm KordaMentha, wrote in a submission to this inquiry that the focus on liquidation costs is understandable given that stakeholders are losing money. However, Mr Korda defended the current system of insolvency practitioners being paid predominantly on hourly rates in preference to a system where liquidators receive a percentage of proceeds. He noted:

> We have considered fees being paid as a percentage of realisations. The problem then will be insolvency practitioners will be accused of a quick sale of the assets so as to get paid. We also note that investment banks in the restructuring areas charge significantly more than the hourly rate based insolvency professionals. The hourly rates of the insolvency professionals administering the larger companies are at the lower end of the standard rates of accounting and legal professions.[19]

---

17 Mr Michael Kirby, 'Bankruptcy and Insolvency: Change, Policy and the vital role of integrity and probity', Address to the IPAA National Conference, 19 May 2010, pp. 25–26.

18 Mr Geoffrey McDonald, *Committee Hansard*, 13 April 2010, p. 35.

19 KordaMentha, *Submission 32*, p. 2.

8.21 Another large insolvency firm, McGrathNicol recognised that liquidators' fees can often be a vexed issue, particularly with small and medium sized businesses where the costs of insolvency relative to available assets is high. However, the firm argued that the current provisions on creditor approval of fees, rights of oversight by ASIC and appeal to the courts 'adequately provides for the protection of creditors interests'.[20] McGrathNicol argued that in cases where the fee framework may have failed creditors, it is important to address the source of the problem rather than pursue wholesale reform of the system. It noted that these problems could include poor understanding by complainants and the community generally as to the real costs of insolvency.[21]

Criticism of liquidators' excessive fees

8.22 Several submitters and witnesses to this inquiry were critical of the largesse of insolvency practitioners' fees. Most notably, Mr Geoffrey Slater, a barrister, told the committee that the insolvency industry is:

> …an industry of 663 people where people are making millions of dollars a year…For some of the larger firms in Australia we are talking well over $4 million, or $5 million or $6 billion per year for the partners of the insolvency. That is more than any of the partners make at the big firms such as Allens Arthur Robinson or Clayton Utz or anywhere like that. I think even the Prime Minister only earns about $300,000 or $400,000 a year. So the lowest paid liquidator earns three times more than the Prime Minister—something that the committee might want to consider.[22]

8.23 In his evidence to the committee, Mr Slater recited excerpts of court judgments critical of liquidators and their fees. He noted the comments of Justice Palmer in *Hall v Poolman* 2009 [NSWCA]:

> A liquidator is appointed to salvage as much as possible for the benefit of creditors. If a proposed course of action—whether it be a legal proceeding or a commercial transaction—is not likely to produce a worthwhile benefit for creditors, the liquidator should not undertake it simply because it will generate enough to pay the liquidator's fees in undertaking that very transaction or litigation—a practice which is familiarly known in the market place as 'churning and burning'.[23]

8.24 As chapter 5 discussed, the Ariff case highlights the worst excesses of liquidators' fee practices. Mr Fong told the committee that:

---

20 McGrathNicol, *Submission 30*, p. 1.

21 McGrathNicol, *Submission 30*, p. 1.

22 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, pp. 48–49.

23 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, p. 50. For a legal perspective of this case, see: http://www.aar.com.au/pubs/insol/foinsolapr09.htm (accessed 22 May 2010).

> …one of his staff charged $60 for reading an article in the newspaper about him. When we first broke this story to the media *The Australian* published an article. His staff charged $60 just to read an article about his boss doing something wrong.[24]

8.25 Professor Holmes wrote in his submission that once a liquidator is appointed and a fee schedule approved, creditors have little control over the hours worked and the fees accrued. He added:

> This is compounded by the fact that there are no controls over the associated value of outgoings incurred by the VA. There is also no need to keep returning to the creditors, or creditors' panel, to seek approvals for drawing down fees and outgoings. As a result, Ariff went off to luxury resorts, hired limousines and paid his father (who had no role in the actual administration of Carlovers) a retainer of $10,000 a month in undertaking the Carlovers administration.[25]

Cross subsidising

8.26 The committee heard evidence that some liquidators deliberately inflate their costs on the larger, long-running insolvencies to make up for the lack of work (and opportunities to fee gouge) in smaller jobs. This observation was made by Mr Slater:

> A lot of the jobs that official liquidators take on they lose money on. If we are really being honest about this, what we have is a system whereby we let people make up for the loss jobs by absolutely ripping off people on the good, fat and juicy jobs. So it is a cross-subsidy, and that is a nasty little fact that nobody really wants to talk about because to really solve that we have to talk about government funding of loss jobs. The government probably just does not want to fund that. That is how we would solve the problem.[26]

8.27 Associate Professor David Brown noted that under the 'cab rank' principle, official liquidators receive small liquidations and 'do not necessarily get paid for those'. However, he noted that liquidators 'do okay on the bigger jobs'.[27] Associate Professor Christopher Symes suggested that ASIC could be made responsible for undertaking no-asset liquidations.[28]

8.28 Ms Kate Spargo, Chairperson of the Accounting Professional and Ethical Standards Board, commented on the potential for cross-subsidisation in terms of the responses of different-sized firms. She told the committee that:

---

24 Mr Ian Fong, *Committee Hansard*, 14 April 2010, p. 41.

25 Professor Scott Holmes, *Submission 21*, p. 6.

26 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, p. 52.

27 Associate Professor David Brown, *Committee Hansard*, 9 April 2010, p. 23.

28 Associate Professor Christopher Symes, *Committee Hansard*, 9 April 2010, p. 25.

> …If there is a lot of that work available to a good firm then they have a greater capacity to also take some other work that may not be at that sort of rate. Some firms will not do that. Some firms will entirely look for the stuff at the other end that I mentioned and will not do any. A lot of good firms who want a good corporate reputation might temper what they do a bit in terms of who the client is and so on. As soon as I say that it sounds wrong, but there are ways to do it that are not wrong.[29]

8.29 Ms Spargo was asked her view of a model whereby the government agency performed the 'low end' jobs to free up the other work. She responded:

> I think the dilemma is that the smaller entity…is often less well resourced, has less sophisticated advisers et cetera and has a board that is less sophisticated…So it is often the entity that really needs the help the most. It often needs it at quite a sophisticated level. If you go up to the other end of the spectrum with big entities, often they are extremely well resourced, they have plenty of advisers and they have plenty of people hanging off them.[30]

Criticism of the court appointed liquidation process

8.30 The committee heard some criticism that the court appointed liquidation process is inefficient and contributes to high fees. In his submission, Mr Della–Putta identified a number of structural problems in the court appointed process which enables liquidators to maximise their profits. These include:

- where solicitors actively encourage a court appointed liquidation process as a means to resolve a dispute even if the company is not in financial difficulty without any obligation to advise clients as to the accurate cost and length of time of the process and with the knowledge that solicitor fees will be paid during the liquidation process;
- liquidators engaged on a non-competitive basis with no obligation to define a scope of work and time line, or competitive fee proposal and under no obligation to proceed only with work which is only required to maximise return to shareholders or statutory obligations; and
- where the Court is in no position to make a detailed assessment of whether the liquidator's claim for fees is reasonable without detailed information from the shareholders which the liquidator is in a position to actively discourage.[31]

Disbursements

8.31 Insolvency practitioners must account to creditors for disbursements or third party costs. These expenses must be 'reasonable and necessary' although they are not

29 Ms Kate Spargo, *Committee Hansard*, 9 April 2010, p. 33.

30 Ms Kate Spargo, *Committee Hansard*, 9 April 2010, p. 33.

31 Mr Pierre Della-Putta, *Submission 10*, p. 3.

part of a practitioner's remuneration. ASIC's submission to this inquiry noted that disbursement expenses might include:

(a) retrieval costs for recovering the company's computer records;

(b) storage costs for the company's books and records;

(c) legal fees;

(d) real estate agent's and auctioneer's fees; and

(e) stationery, photocopying, telephone and postage costs.[32]

8.32 Insolvency practitioners are not required to seek creditor approval for disbursements, but creditors do have the right to question these costs and can challenge disbursements in court.[33]

Criticism of excessive disbursement payments

8.33 The committee also received comment that liquidators have been able to circumvent the provisions of 449E of the *Corporations Act* and inflate their remuneration through disbursement payments. Mr Stephen Epstein SC gave the following example:

> The liquidator will employ a third party to, say, send out notices to creditors. The provision of that service, the posting out of circulars to creditors, can have within it a profit element for whoever gets paid for it. So if the liquidator does it himself, his profit in undertaking the task of posting the circulars is part of his remuneration. If he engages an outside party to post out the circulars to creditors and pays that outside party and treats it as a disbursement then that charge is not the subject of regulation in the same way that remuneration is. Where it is part of the insolvency administrator's function, it ought to be remuneration and not disbursements.[34]

8.34 Mr Epstein suggested to the committee that a solution might be to have regard to the decided case law on the meaning of remuneration and codify the judicial definition of remuneration 'in some more complete fashion than simply using the word without any explanation to it'.[35] He added:

> What I am saying is that what is in truth remuneration and not disbursements should be the subject of the regime which section 449E prescribes…the insolvency administrator ought not to be allowed to outflank the regime for remuneration, which section 449E prescribes, by

32 ASIC, *Submission 69*, p. 42.

33 IPAA Code of Professional Practice, p. 95.

34 Mr Stephen Epstein, *Committee Hansard*, 13 April 2010, p. 31.

35 Mr Stephen Epstein, *Committee Hansard*, 13 April 2010, p. 31.

> characterising payments which in substance are remuneration as activities which are merely disbursements.[36]

8.35 Mr Bill Doherty argued in his submission to this inquiry that disbursement payments are an unusual feature of the insolvency industry. He noted that 'one could reasonably expect' that the hefty hourly fees that insolvency practitioners charge for both themselves and their 'managers' would reflect an overhead component. Instead, photocopying, printing and internal meeting room hire is all charged additionally.[37]

8.36 Mr Slater also identified disbursement payments as a potentially expensive and hidden area of liquidators' fee structure. He likened the liquidation process to appointing a shark and the third party payments as 'a whole lot of fish feeding behind'. Mr Slater elaborated:

> You hear the headline figure the administrator, the liquidator or the insolvency practitioner—or whatever description you want to give them—is going to charge you $400, $600 or whatever per hour. What they do not mention is that there are clerical staff at $300 an hour, the girl who serves up the tea and coffee at the creditors' meeting is being billed out at $300 an hour and the photocopies are being charged out at $2 page and so are the emails. Very quickly you get a cascade effect where you are not supporting the liquidator; you are supporting an entire colony of people who are sucking off the corpse of these companies. Suddenly, then comes a creditors' meeting and they go to approve the remuneration—which is another problem. They say my remuneration is X but, 'We forgot to mention all these disbursements'.[38]

8.37 Various submitters gave their own personal experiences of where third parties were engaged on an anti-competitive or unnecessary basis at substantially above market value. Mr Della-Putta, for example, noted that in his experience a sales agent was employed, a contractor to clear the site and legal advisers 'to dissuade us from objecting to the liquidator's claim for remuneration'.[39]

8.38 Mr Della-Putta recommended that liquidators should only engage third parties on a competitive basis if it is required to facilitate the liquidation or is likely to increase the return to shareholders. Third parties nominated by shareholders to perform work should be selected by liquidators on the basis of at least two fee proposals for any services. Further, he recommended that copies of all invoices from third parties should be provided as part of the report to creditors.[40]

---

36 Mr Stephen Epstein, *Committee Hansard*, 13 April 2010, p. 32. *Submission 28*, p. 3.

37 Mr Bill Doherty, *Submission 9*, p. 3.

38 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, p. 54.

39 Mr Pierre Della–Putta, *Submission 10, Supplementary*, p. 3.

40 Mr Pierre Della-Putta, *Submission 10, Supplementary*, p. 3.

Priority payment for liquidators

8.39 Insolvency practitioners' remuneration is paid in priority to payments to various other groups, including unsecured creditors. Subsection 556(1)(a) of the *Corporations Act* provides that all proper costs, charges and expenses of and incidental to the winding up (including the remuneration of the liquidator) are payable out of the property of the company in priority to all other claims.

8.40 ASIC notes that generally, the order in which funds are distributed is:

(a) costs and expenses of the liquidation, including liquidators' fees;

(b) outstanding employee wages and superannuation;

(c) outstanding employee leave of absence;

(d) employee retrenchment pay; and

(e) unsecured creditors.

8.41 Each one of these categories must be paid in full before the next category is paid. If there are insufficient funds to pay a category in full, the available funds are paid on a pro rata basis and the next category will be paid nothing.[41]

8.42 The Law Council of Australia argued in its submission that the insolvency practitioner may take on personal liability and their personal expenditure and remuneration is often uncertain. A practitioner may take on litigation with a view to recovering assets or returning transactions, in which case they face personal liability for all costs and expenses in the litigation.[42] The Council thereby argued that in the absence of statutory or standard remuneration for activity in winding up assetless companies, the priority of payment for insolvency practitioners should be maintained.[43]

8.43 The Law Council did recognise the 'understandable dissatisfaction' arising from individuals who have already suffered from a corporate failure, are unfamiliar with the system 'and see practitioners charge large sums of money, which are paid out in priority to their own claims'. Nonetheless, it argued that:

> …given the personal exposure of practitioners, there is no other readily apparent system, which would operate fairly or mitigate the risk in fair manner for practitioners or the public.[44]

8.44 The IPAA defended the priority payment system on the following basis:

---

41 ASIC, 'Liquidation: A guide for creditors', *Information Sheet 45*, p. 7.

42 Law Council of Australia, *Submission 68*, p. 4.

43 Law Council of Australia, *Submission 68*, p. 5.

44 Law Council of Australia, *Submission 68*, p. 4.

> Without such a priority, it is unlikely that an insolvency practitioner would be prepared to undertake the work. An insolvent company necessarily has a deficiency of assets over liabilities, and without a priority, the insolvency practitioner would have no expectations of being paid, except in relatively few instances. In this scenario, there would be no reason for a practitioner to accept the appointment and its associated risks. In no other profession is a highly qualified professional expected to work for free on a regular basis.[45]

8.45 Mr Bill Doherty, a victim of Mr Ariff (see chapter 5), took issue with this argument. He told the committee that:

> …the Insolvency Practitioners Association said in…[its] submission that the IPs take on considerable risks which help to justify their extraordinary fees—firstly, the risk of litigation. Actually they do not take a risk there, because what they do is use the company they have seized control of as a litigant. Also, that in taking on assetless administrations they have the financial risk. They do not, because they simply do not do anything when they have them.[46]

8.46 Other witnesses offered broader criticism of the priority payment system, arguing that liquidators' fees effectively accounted for all costs recovered. This point was made by Mr Fong of Carlovers Carwash Limited:

> …the current system is very costly and inefficient. The fact that fees to liquidators and lawyers usually equal what is recovered with no return to creditors, again, says it all. You need to introduce a fixed price regime or introduce more competition to reduce costs.[47]

8.47 Mr Andrew Garrett, a winemaker, wrote in his submission that the priority payment works against the public interest by encouraging insolvency practitioners to make a claim over 'as many assets as possible to ensure the payment (and overpayment) of fees'. He added:

> Often the claims of insolvency practitioners over assets can include unrelated assets that they know cannot be related to their appointment but by making those claims the goal of the practitioners is not to act in the public interest or properly exercise quasi judicial power but rather to act solely in a personal interest resulting in the binding of all classes of assets in claims that will require resolution by a court. As a result of binding all classes of assets (related and unrelated) in such a way; an aggrieved person is rendered impecunious. This has the unenviable consequence of resulting in an aggrieved party often being unable to fund the acquisition of legal advice and effectively contest the actions of insolvency practitioners.[48]

---

45 IPAA, *Submission 36*, p. 22.

46 Mr Bill Doherty, *Committee Hansard*, 14 April 2010, p. 9.

47 Mr Ian Fong, *Committee Hansard*, 14 April 2010, p. 37.

48 Mr Andrew Garrett, *Submission 13*, p. 2.

Alternatives to the priority system

8.48 The remuneration of insolvency practitioners in the United Kingdom may be set based on assets handled, time spent or a fixed fee. At the first creditors' meeting, the practitioner may propose that fees be paid either:

- as a specified percentage of the value of either the property the IP has to deal with (administration) or the assets which are realised or distributed or both (insolvent liquidation);
- by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration/liquidation; or
- on a fixed basis, as of April 2010.[49]

8.49 The practitioner is able to use any of the three bases, or a combination of these methods, to set his or her remuneration. Different bases may be applied to different functions performed by the practitioner (Amendment to Insolvency Rules 2010).[50]

8.50 In the United States, remuneration is determined by a court. The United States Trustee is responsible for reviewing claims under section 330 and filing objections with the Court, where appropriate.[51]

8.51 In New Zealand, a liquidator is entitled to charge reasonable remuneration for carrying out their duties. An Official Assignee who is appointed as a liquidator must charge remuneration in accordance with rates prescribed by the Governor General under section 277 of the Companies Act.[52]

8.52 Canada's system of paying insolvency practitioners is somewhat similar to Australia's. Section 39 of Canada's Bankruptcy and Insolvency Act establishes that the remuneration of the trustee is voted on by a meeting of creditors. However, where the remuneration of the trustee has not been fixed by creditors, the trustee may receive remuneration in a sum not exceeding 7.5 per cent of the amount remaining out of the realisation of the debtor after the claims of the secured creditors have been paid or satisfied.[53]

The regulation of liquidators' and administrators' fees

8.53 This inquiry has raised questions about the adequacy of current arrangements to monitor both an individual practitioner's fees and the fee structure of the insolvency

---

49 Office of Fair Trading, 'The market for corporate insolvency practitioners: A market study', June 2010, pp. 21–22.

50 Office of Fair Trading, 'The market for corporate insolvency practitioners: A market study', June 2010, pp. 21–22.

51 ASIC, *Submission 69*, pp. 112–113.

52 ASIC, *Submission 69*, pp. 112–113.

53 ASIC, *Submission 69*, p. 113.

industry at large. This section considers the committee's evidence and consideration of these issues.

What is 'reasonable'?

8.54 A key issue in the regulation of liquidators' fees is how to indicate to creditors that the fees are 'reasonable'. In December 2008, ASIC published Information Sheet 85 titled *Approving fees: A Guide for creditors*. It details the requirement that the external administrator must send creditors a report when seeking approval of fees. It advises that if work is yet to be carried out, a dollar cap should be set and if the work exceeds this figure, a further creditors' meeting should assess whether to approve a further amount of fees.

8.55 The Information Sheet also notes a range of factors to guide creditors in deciding whether the administrator's fees are reasonable and the options for creditors if they believe the fees are not reasonable.[54] These factors are:

- the method used to calculate fees;
- the major tasks that have been performed;
- the fees for each of the major tasks;
- the size and complexity of the external administration;
- the amount of fees previously approved;
- where the fees are calculated on a time basis:
    - the period over which the work was performed;
    - the time spent by each level of staff on each task; and
    - if there are fees for future work, whether they are capped.[55]

8.56 Most of these factors should be apparent from the remuneration report.

Disclosure and the practitioner's remuneration report

8.57 As mentioned earlier, the *Corporations Amendment (Insolvency) Act 2007* introduced a requirement that insolvency practitioners must prepare a report setting out such matters as will enable the approving body to make an informed assessment as to whether the proposed remuneration is reasonable. The report must include a summary description of the major tasks performed and planned and the costs associated with those tasks.[56] This requirement is established in subsections 449E(5), 449E(6), 449E(7), 473(11), 473(12), 499(6) and 499(7) of the Corporations Act.

---

54 ASIC, 'Approving fees: A guide for creditors', *Information Sheet No. 85*, p. 4.

55 ASIC, 'Approving fees: A guide for creditors', *Information Sheet No. 85*, p. 4.

56 ASIC, *Submission 69*, p. 40.

8.58 Insolvency practitioners must also lodge an account detailing their receipts and payments at the end of the six month period beginning on the date of their appointment. They must then lodge an account for every six month period thereafter during which they are the administrator of the company, detailing the aggregate amounts of receipts and payments since their appointment (Corporations Act, subsection 438E(1)). ASIC may cause the accounts of any administrator to be audited by a registered company auditor (subsection 438E(3)). The cost of this audit is fixed by ASIC, and forms part of the expenses of administration (subsection 438E(7)).

A liquidator's view

8.59 Mr Bryan Hughes, Managing Director of Pitcher Partners, urged in his submission to this inquiry that the existing 'extensive remuneration requirements' are not added to. He noted that in accordance with the IPAA Code, practitioners must prepare remuneration reports each time that approval for remuneration is sought. These reports are on average 20 pages in length and address both retrospective and prospective remuneration. Mr Hughes argued that, if anything, the committee's inquiry into the matter of remuneration might consider:

> Whether current Administrator's Reports contain too much information for the average stakeholder to comprehend? Whether the information is meaningful and able to be understood? Whether all stakeholders read such a lengthy report? As always, there should be a cost/benefit analysis of the Remuneration Report, especially when you consider the costs incurred to provide this information, including staff hours required in reviewing timesheets, preparing the report, additional photocopying and postage requirements, which can be significant if you have 200 creditors or more.[57]

8.60 In its submission, Pitcher Partners provided an example of an Administrator's Report to Creditors (pursuant to section 439A of the Corporations Act), which includes a remuneration report.[58] The remuneration report follows the template set out in the IPAA's Code of Professional Practice.

8.61 The first section of the report lists expenses incurred to date, along with a table showing the standard scale of fees for various staff classifications within the firm. There is also a section on disbursements divided into externally provided professional services (legal fees), externally provided non-professional costs (taxis, parking, postage and advertising), and internally provided non-professional costs (photocopying, telephone, fax and mobile use).

8.62 A separate section of the remuneration report sought approval for prospective expenses. It gave two options:

---

57 Pitcher Partners, *Submission 47*, p. 2.

58 Monarch Gold Mining Company Limited

- if a deed of company arrangement is approved, the firm 'will seek remuneration for the administration and deed administration not to exceed $606,993, plus GST and disbursements'; or
- if creditors resolve to wind up the company, the firm 'will seek remuneration for the administration and *liquidation*, not to exceed $1,043,256'.[59]

8.63 For both options, the report gave an anticipated time period, a general description of the likely tasks and a list of the specific actions the firm would undertake to deliver these tasks.

Criticism of the fee vetting process

8.64 Some witnesses expressed concern that insolvency practitioners are not subject to the same rigour in scrutinising their accounts as are other professions. Mr Greg Nash told the committee that:

> As a lawyer, my accounts are subject to strict scrutiny—absolutely strict scrutiny. I have to have cost agreement. I have to advise people on how they can challenge my account. I have to have my account submitted for assessment. If I miss some technical detail, I run the risk of not being paid at all for any of my work. Liquidators do not do that. They just give you a list of their charge-out rates. They are supposed to be approved by the court and really that is just a rubber stamp. The court approves whatever is put in front of them. I have never seen a court not approve a liquidator's set of fees.[60]

The need for better data on fees in the insolvency industry

8.65 For the committee, one of the most striking deficiencies in the insolvency regulation framework is the lack of public detail on the fees of the insolvency industry. ASIC's Annual Reports contain no detail on liquidators' and administrators' remuneration.

ASIC's plans

8.66 Encouragingly, ASIC's submission noted that it intends to:

- obtain statistical data from practitioners to allow an assessment of the relationship between asset recoveries, remuneration charged and returns to creditors. Results will be made available to creditors and the market; and
- capture detailed information of insolvency remuneration and other key financial data following a redesign of Form 524 (Statement of Receipts and Payments) and implementation of improved electronic data capture systems.[61]

---

59 Pitcher Partners, *Submission 47*, p. 48 of Administrator's report.

60 Mr Greg Nash, *Committee Hansard*, 14 April 2010, p. 7.

61 ASIC, *Submission 69*, p. 79.

8.67 In its supplementary submission, ASIC noted that its forward program includes a project titled *Remuneration: Approval compliance and surveillance project*. The project includes consultation on what further information and disclosures should be made to relevant stakeholders to increase the level of informed approval decisions. ASIC adds that it may also consult and obtain industry feedback on the appropriateness of using 'cost assessors' as an alternative for stakeholders to assess the 'reasonableness' of remuneration.[62]

8.68 The Chairman of ASIC, Mr Tony D'Aloisio, gave the committee an overview of the rationale and focus of its future work on liquidators' fees:

> [W]e want to delve much more deeply into the level of fees to see whether we can come up with guides about relating them to the value of assets recovered, for example. If you recover 50c in the dollar but it costs you 10c to get that 50c, if you have that sort of information as a creditor, you might regard that as good value. If you have recovered 20c in the dollar but in actual fact it then costs you 18c or 20c for that, as a creditor you are going to be pretty annoyed...[N]ow that the framework has the disclosure, the returns and the forms which give you this information, our challenge is going to be, through surveillance and through specific cases, to delve into the quality of the remuneration, the return and the advice that was given. We think that is really to work with the professional because at the end of the day that is a reputation issue for the profession and for the practitioners.
>
> …
>
> They have to demonstrate to their clients, ultimately to the market, that the fees being charged in the context of what work was needed to recover assets in that particular insolvency are reasonable. I see our role in our forward program on the fees is to move from disclosure to testing the quality of the disclosure and to assist creditors to then make judgments about whether they have been treated fairly.[63]

8.69 Several submitters to this inquiry have argued the need for insolvency practitioners' fees to be collated, published and independently analysed on an industry-wide basis. They claim that a central and publicly accessible database of insolvency practitioners' fees would:

- enable a comparison of the level of liquidators' and administrators' fees in Australia relative to other nations;
- allow ASIC to monitor a given practitioner's fees relative to an industry average to indicate possible overcharging; and
- educate the public about what costs are reasonable in a typical insolvency.

62 ASIC, *Supplementary submission*, pp. 16–17.

63 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, pp. 17–18.

A basis for comparison

8.70 Dr Colin Anderson from the Queensland University of Technology argued in his submission the need for a better system of data collection on insolvency practitioners' fees (among other matters) to allow an international comparison of fee levels. He observed:

> Currently there are academics such as ourselves and other colleagues at various institutions around Australia who are willing to engage in research in areas relevant to the enquiry but it is almost impossible to obtain the appropriate data because it is simply too expensive to purchase it from ASIC and possibly for financial reasons ASIC is unable to provide it without payment. Whilst research funding is available to a certain extent it will not cover the purchase of data. If we take one area relevant to this enquiry – the professional remuneration and fees charged by insolvency practitioners. We have no comprehensive data upon that. There is no comprehensive data enabling any meaningful comparisons or conclusions to be drawn. We would contrast this with the position in the United States where funding by the profession itself has enabled comprehensive data to be collected in this area. If such data were able to be collected in Australia some international comparisons might be possible to see if charges here are higher than in comparable countries. Because of our system it is not possible to obtain this data outside of the government agencies of ASIC and ITSA.[64]

8.71 Mr Jeffrey Fitzpatrick from Flinders University argued that the collation of statistics on insolvency matters could be done by an independent agency. The agency could be the Productivity Commission, the National Institute of Labour Studies at Flinders University, the Australian Institute of Criminology, or a new insolvency unit designated to look specifically at insolvency statistics.[65]

Monitoring an insolvency practitioner's fees

8.72 Better data on insolvency practitioners' fees would also serve as a regulatory tool for ASIC to monitor overcharging and complaints against individual practitioners. As Mr Slater told the committee:

> Every time a liquidator does a job they have to put in a detailed report as to how much money they make from the job and so on. Does anybody actually collect all of this data and put it into a central database? No. Should they? Yes. What would it tell us? It would tell us how much they are charging. More to the point, it would operate as what we call a mineshaft canary with respect to whether the fees are getting too big or there are too many complaints. You could simply look at a histogram of complaints per practitioner, in the same way that Medicare looks at doctor fraud—they say, 'You've got a few too many pathology reports here' or 'Look at this guy:

64 Professor Colin Anderson, *Submission 79*, p. 3.

65 Mr Jeffrey Fitzpatrick, *Committee Hansard*, 9 April 2010, p. 14.

> there is this huge spike.' That is how they home in on people and use their resources more efficiently. These are the basic sorts of things that should be done at ASIC, which are not done.[66]

8.73 Associate Professor David Brown from Flinders University also acknowledged that one of the problems in the insolvency area is the lack of statistics. He argued that, notwithstanding the existing fee disclosure requirements, this is a legitimate role for a body like an ombudsman to independently assess the reasonableness of liquidators' fees. Associate Professor Brown told the committee:

> I think the IPA code of professional practice devotes quite a lot of its pages to remuneration and to disclosure of the basis of remuneration of insolvency practitioners. This information is put before creditors who, after all, are the ones who normally have the decision as to whether the remuneration could be approved. However, as I have just said, creditors might not always have sufficient skills to access that information. Notwithstanding that there is nowadays more detailed disclosure both through the IPA code and through various court decisions, I think, as Dr Brand identified, a lot of creditors are not repeat victims and therefore are not able to assess the information that comes to them, so some other channel for assessing whether the remuneration rates are value for money is certainly to be welcomed. Whether that is through the ombudsman using some sort of independent assessor or whether the courts need an independent assessor when cases come to court on remuneration is something else that could be developed.[67]

Educating the public as to what is 'reasonable'

8.74 Dr Vivienne Brand from Flinders University acknowledged the need for greater education of creditors to understand the work of liquidators and what a reasonable fee structure might look like. She told the committee that creditors:

> …might well live and work in an economy where to charge $850 an hour is just unbelievable. They do not know what the normal run of a liquidation would look like, so they cannot really tell if they are being ripped off. They do not have the information that the liquidator has. They do not have access to the full understanding of the company's operations. It is very hard for them to make an informed decision about whether or not the liquidator is doing the right thing. I think the liquidator is, most of the time…That is perhaps where an ombudsman has a particular role, because they might be able to help those people understand: this is how it is and, in this particular case, perhaps what happened had to happen.[68]

---

66 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, pp. 50–51.

67 Associate Professor David Brown, *Committee Hansard*, 9 April 2010, p. 18. *Submission 40*, p. 4.

68 Dr Vivienne Brand, *Committee Hansard*, 9 April 2010, pp. 14–15.

8.75 In his evidence to the committee, Mr Fitzpatrick argued that an industry ombudsman would assist to 'throw some sunlight onto the issue of fees'. He envisaged that an ombudsman would also:

> …probably be able to have an educative role as well so that the creditors would have access to information about what is involved, what the fees are or what the fees should be so they have got some idea of what is going on.[69]

8.76 The issue of educating the public on a reasonable fee structure, and various other matters relating to the insolvency profession, is discussed in more detail in chapters 10 and 11.

Summary

8.77 This chapter has considered the often vexed issue of insolvency practitioners' fees. It has identified specific areas of tension including overcharging through excessive disbursement payments, unnecessarily prolonging an appointment and 'cross-subsiding' jobs. The chapter also observed the fairly weak current incentives for practitioners to become more price-competitive, particularly given the security of the priority payment system and in the absence of a competitive tendering process.

8.78 Nonetheless, as chapters 10 and 11 discuss in more detail, there are currently in place important fee disclosure requirements for insolvency practitioners. This is an important basis for better data on practitioners' fees and better regulation of overcharging and over servicing.

69 Mr Jeffrey Fitzpatrick, *Committee Hansard*, 9 April 2010, p. 13.