



28 October 2013

The Manager
Senate Standing Committees on Economics
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Dear Sir

The performance of ASIC

The Insolvency Practitioners Association (IPA) is the professional body representing company liquidators and trustees in bankruptcy, as well as lawyers, financiers, academics and others practising in or otherwise interested in insolvency law and practice.

We have previously made submissions to this Committee in relation to its 2010 inquiry into liquidators and their regulation by ASIC. The Committee issued a report in September 2010 – The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the case for a new framework (the Committee's 2010 report).

We note that the terms of this inquiry (the Committee's current inquiry) are into the performance of ASIC generally, and in so far as ASIC remains as the corporate insolvency regulator, we offer this submission to assist the Committee.

We also anticipate that matters in relation to insolvency may be raised by people making submissions, or by the Committee, and we offer our further assistance to the Committee on insolvency issues as it may require.

If significant matters relating to insolvency are raised in the course of this Inquiry, please note that we are happy to appear to give evidence and also to provide any briefings or information that may be of assistance to Committee members or the Secretariat.

Overview

The structure of this submission is that we first explain developments since the Committee's 2010 report, by reference to what the Committee recommended in relation to ASIC and its regulation of practitioners, what the government's response was to those recommendations, and what law reform has occurred or been proposed. We also explain what action the IPA has taken, in so far as it is relevant to the regulation of corporate insolvency practitioners by ASIC.

We conclude with some general comments about the performance by ASIC.

1. Developments since the Committee's 2010 report

We think it may be helpful if we refer to developments since the Committee's 2010 report, in particular the government's decisions about it, and to the Insolvency Law Reform Bill 2013, which addresses a number of matters raised in the Committee's 2010 report.



The Committee's 2010 report

The Committee's 2010 report recommended that the 'corporate insolvency arm' of ASIC be transferred to ITSA (now AFSA) to form the Australian Insolvency Regulation Authority (AIPA) – recommendation [1]. The Committee also recommended that the ALRC be asked to inquire into harmonisation of our personal and corporate insolvency laws [2].

Other recommendations of the Committee were predicated upon the establishment of AIPA, which, as we explain below, has not proceeded. However many of the Committee's recommendations remain relevant in so far as they relate to ASIC.

Relevant recommendations were that ASIC have 'flying squad' powers to insolvency practitioner regulation [3]; that the IPA remuneration reports be extensively applied [16]; and that ASIC do more to gather statistics [17]. We make comment on these in this submission. If the Committee wants our comments on the progress of its other recommendations [4]-[15], some of which relate to ASIC, we would be pleased to do so.

Chronology since that report

In 2010, the government rejected the Committee's recommendation that the corporate insolvency arm of ASIC be transferred to what is now AFSA to form the AIPA. There has also been no reference to the ALRC as the committee recommended.

In September 2010, shortly after the release of the Committee's 2010 report, the Productivity Commission issued a report recommending a harmonisation of personal and corporate insolvency laws, and a re-examination of the need for a single regulator.

In December 2012, after a long process of consultation, in which IPA actively participated, the government released an exposure draft of the Insolvency Law Reform Bill 2013.

In March 2013, the IPA made a detailed submission, which is attached.

By reference to the Committee's 2010 report, and relevant to this ASIC inquiry, the Bill seeks to harmonise the laws between personal and corporate insolvency in so far as they relate to practitioner regulation, but to retain the separate and existing roles of AFSA and ASIC. Significantly, the Bill seeks to impose a positive obligation on ASIC and AFSA to co-operate in relation to the regulation of practitioners who are both trustees and liquidators.

We understand that the Bill remains under consideration.

IPA activity since the 2010 report

Having regard to the recommendations of the Committee's 2010 report, the IPA has continued to provide assistance and guidance to our members in the insolvency profession – both trustees and liquidators – to the extent that the laws and separate regulatory regimes allow that.

In particular, we have this year (2013) conducted a second major review of our IPA Code of Professional Practice, which was first issued in 2008, and which was reviewed for its second edition in 2011. This review for the 3rd edition followed an extensive consultation with our members, AFSA and ASIC, and the ATO, and other government and industry stakeholders. The Code continues to provide detailed guidance on remuneration, independence, communications, timeliness etc, which apply to all our members whether they work in corporate or personal insolvency or both. We had particular regard to recommendation 16 of the Committee's 2010 report, and have revised our remuneration report template and otherwise continued to refine our guidance to members on remuneration claims.

We are pleased to see that both ASIC and AFSA refer to the IPA Code in relation to their own regulatory guidance on remuneration, and other issues such as independence and communications.



IPA also now publishes annually the IPA Handbook, which contains the IPA Code, and the IPA Constitution and Regulations [themselves recently revised], as well as the relevant insolvency sections of the Corporations Act and regulations, and the Bankruptcy Act and regulations. For the assistance of the Committee, a 2013 IPA Handbook is enclosed.

The IPA also continues to offer comprehensive training on remuneration, independence and other issues that are topical to good professional practice.

IPA meets regularly and productively with each of ASIC and AFSA, both in relation to broader issues of law and practice, and in relation to technical and legal issues. We are proposing to make these joint meetings, if each regulator agrees. We also engage regularly with other quasi-regulators such as the ATO, the Department of Employment and the FWO, each of whom themselves liaise with ASIC on regulatory issues concerning insolvency and other areas.

2. Responses to the individual terms of reference

By reference to the terms of reference, we make what we consider are informative and educative comment under the respective headings.

- *the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies.*

The IPA notes that ASIC has increased its liaison with other regulators in insolvency, in particular AFSA and ATO, in recent times. We believe there is scope for liaison and collaboration between the relevant regulators and other agencies to increase further.

The IPA itself works closely with each of ASIC and AFSA and draws common matters to their attention. While the legislative alignment of corporate and personal insolvency laws awaits the government's decision on the progress of the ILRB, the IPA continues to give practice and legal guidance to all our members whether they are regulated by ASIC as liquidators or by AFSA as trustees.

To some extent, we consider the IPA operates as a conduit to and between the regulators in relation to common regulatory issues affecting the profession.

We note one example of insolvency agency collaboration is the inter-agency Phoenix Forum, comprising ASIC, ATO, DE, FWO, AFP and others. The IPA itself, through its submissions and presentations, has done important work in relation to the regulation of unlawful phoenix misconduct, including the IPA President's involvement on a panel with ASIC and others on phoenix misconduct at ASIC's summer school in March 2013. In addition, all registered liquidators report both to ASIC and ATO on suspected phoenix misconduct.

The issue raised by the Committee's 2010 report about the separate regulation of the profession by ASIC and AFSA remains, although this will be addressed to some extent by the ILRB.

In daily practice, around 200 of our members are regulated by AFSA in relation to personal insolvency, and around 600 of our members are regulated by ASIC in relation to corporate insolvency. A significant portion of these members are regulated by both ASIC and AFSA. Each regulator has its own guidance and regulatory requirements, which are not necessarily consistent, or at least which are issued without reference to the other. Our members are the subject of separate file audits and review by each of ASIC and AFSA.

While this is to an extent dictated by the separate laws that Australia has for personal and corporate insolvency, many of the regulatory issues are common to both, for example remuneration, independence and communications with creditors. It is also a regulatory burden on our members.



While a joint regulator is not proposed, we consider there could be more regulatory collaboration between ASIC with AFSA. As we have explained, the IPA is itself proposing to initiate joint regulatory meetings.

- *ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations.*

We make comments in our March 2013 submission to government on the ILRB 2013 as to whether ASIC's powers as proposed in the Bill are adequate.

- *the accountability framework to which ASIC is subject, and whether this needs to be strengthened.*

We have no particular comments on this.

- *ASIC's complaints management policies and practices.*

We mention that we support the IPA being given access to ASIC complaints details etc under the ILRB. The present laws do not allow ASIC to share information with IPA, nor IPA with ASIC.

- *the protections afforded by ASIC to corporate and private whistleblowers.*

We have no particular comments on this.

- *any related matters.*

ASIC's approach to insolvency practitioner regulation

We note that in a recent speech at the IPA conference on 16 October 2013,¹ ASIC Commissioner John Price referred to outcomes of its recent stakeholder survey. He noted that a comparatively low proportion of respondents rated ASIC positively for holding insolvency practitioners to account.

Mr Price further noted that ASIC ended its National Insolvent Trading Program in 2010, by which it sought to regulate director misconduct; instead, while he acknowledged that "some of the profession might feel that ASIC should continue that program", ASIC sees a need to focus "on the main risks in the market" being "increased liquidator surveillance".

Mr Price referred to the important role of liquidators – which it describes as one of being a 'gatekeeper'. Society and the law expects high standards of propriety and conduct, to ensure proper regulation of, in this case, the insolvency regime.² The law also accords significant regard and protection for liquidators in performing what are important public functions. ASIC also refers to external administrators as the "front-line investigators of insolvent corporations" who "contribute to maintaining the integrity of the marketplace and promoting investor and consumer confidence".³

Mr Price said that society should not just rely on ASIC to regulate the insolvency sector, but that professional bodies such as the IPA have a role to play as well, emphasising the efficiency of what he described as "self-regulation". He said that industry standards are critical in complementing regulation; "they provide guidance on how to comply with the law

¹ What matters to ASIC, the insolvency profession and the wider insolvency market, a speech by John Price, Commissioner, ASIC, 16 October 2013

² The Committee's 2010 Report also acknowledges this role: 11.65. AFSA makes similar comments about trustees and their role in personal insolvency.

³ RG 16



and even go beyond the law by setting standards, particularly in areas such as ethics". This is the approach taken by the IPA Code, which explains that its standards may be higher than that expected under the law; and the approach taken in IPA's education courses (which include an ethics component) and its member training.

Mr Price went on to say that "for self-regulation to be effective it needs to be enforceable. Industry associations like the IPA need to be able to set standards and monitor compliance with those standards. They must also be able to enforce them. If self-regulation does not work, you do see governments step in with law reform, and, of course, this can have unintended consequences". In that respect, we agree with ASIC that what might be termed co-regulation with ASIC (and AFSA) is both the current approach and one that is being developed.

The IPA has a misconduct regime, the details of which are contained in our recently revised Constitution and Regulations, and on which we report regularly. We have disciplined members and terminated memberships in recent times. In addition, in personal insolvency, we regularly sit on misconduct committees convened by the Inspector-General; this regime is proposed for corporate insolvency under the ILRB in which we expect IPA will also have a role. The ILRB also proposes, and we support, additional responsibility for professional bodies in relation to the regulation of the profession. Our detailed comments on this are contained in our March 2013 submission.

While the IPA notes the Commissioner's comments, we are not aware of similar concerns being shared by AFSA. AFSA regularly records improvement in standards of trustee conduct. Furthermore, complaints made to IPA about its practitioner members have remained steady. We publish regular statistics on our conduct regime in our IPA journal.

We do query the change in ASIC's regulatory focus from directors' insolvent trading misconduct to the conduct of liquidators. In any event, we point out that registered liquidators have legal obligations to report insolvent trading and other misconduct to ASIC. ASIC's recent Report 372⁴ reveals the extent of such reporting by liquidators.

In summary, with reference to the Committee's 2010 report, and this current 2013 inquiry, we emphasise that the IPA remains committed to its members working with ASIC and other relevant regulators in order to maintain the integrity of the regime.

Statistics

IPA is committed to promoting an efficient and effective insolvency regime. ASIC publishes data regularly on the number of external administrations. The Committee's 2010 report recommended collection of insolvency data be extended, in the context of a joint regulator: [17]. ASIC has improved its collection and publication of data but we consider more is needed.

ASIC's statutory functions in the ASIC Act include in s 1(2) to promote the confident and informed participation of investors and consumers in the financial system, and to 'ensure that information is available as soon as practicable for access by the public'.

ASIC receives and stores prescribed information under legislation, much of which is supplied by insolvency practitioners in their reports and lodgements with ASIC. Much information is collected but less is published.

By way of comparison, AFSA now publishes through its Statistician information on personal insolvency that allows the effectiveness and cost efficiency of the regime to be monitored, and this allows law and practice reform to be better informed. For example, we are able to know the extent of assets and liabilities in bankruptcy, the amounts recovered by trustees through income contributions and voidable transactions, and the costs (remuneration and expenses) of administering bankruptcies, and what dividend return creditors receive. Also,

⁴ Insolvency Statistics: external administrators' reports July 2012 to June 2013, issued October 2013.



as another example, the ATO devotes significant resources, explained on its website, to the gathering and dissemination of tax statistics; it makes 1% of its tax files available for research and analysis and its website explains how this support for research benefits the ATO and the public.⁵

The IPA has itself supported the use and analysis of existing ASIC data, and facilitated surveys of its members. Our Terry Taylor Scholarship report of 2011 involved an analysis of the report as to the affairs, and its effectiveness or otherwise in providing information to liquidators and gathering data on insolvency. Mr Price refers to ASIC's forthcoming project to revise its RATA. Our TTS project for 2013 involves the extraction from ASIC data on the outcomes of deeds of company arrangement. ASIC has however advised that it has no authority to waive its document production fees or otherwise assist in this valuable research.

In summary, ASIC's performance in this area could be improved. We consider that the ASIC Act gives ASIC sufficient authority to provide more statistics; AFSA relies on similar authority under the Bankruptcy Act.

Further assistance

As we explained earlier, we anticipate that matters in relation to insolvency may be raised in submissions, and by the Committee itself. We have in this submission not sought to anticipate what they might be. If the Committee requires input from us by way of a further submission, or at the hearings, we would be pleased to assist. Please contact me or the IPA's Legal Director Michael Murray as required.

ARITA

Finally, the Committee should note that our members recently voted to change the name of the Association to the Australian Restructuring Insolvency & Turnaround Association (ARITA). The name change reflects the broader scope of the work that our members are engaged in. We will officially launch our new name in January 2014 and until then continue to operate under the IPA name.

Thank you for the opportunity to make this submission.

Yours sincerely

Denise North
Chief Executive

⁵ www.ato.gov.au/About-ATO/Research-and-statistics/.