# SUBMISSION TO
# THE ECONOMICS COMMITTEE INQUIRY
# INTO LIQUIDATORS AND ADMINISTRATORS 2009
# (https://senate.aph.gov.au/submissions/pages/logon/aspx)

27 January 2010

Mr John Hawkins
Secretary, Inquiry into Liquidators and Administrators
Economics References Committee
Department of the Senate
PO Box 6100
Parliament House
ACT 2600

Dear Mr Hawkins,

I have been a Chartered Accountant since 1973, a Registered Trustee in Bankruptcy since 1982 and a Registered Liquidator since 1983 and I would like to make a submission to the Senate Inquiry in relation to insolvency law.

My experience of dealing with the Australian Securities and Investments Commission (ASIC) should be a matter of concern to the Inquiry in view of the extraordinary waste of public funds that occurred in my 8-year dispute with ASIC which was finalised on 11 December 2009. I believe there are principles that arise from my experience that warrant substantial changes to the Corporations Law governing liquidators and auditors.

The background to my case is long and involved. The essential matters are that I was a defendant in proceedings in the Supreme Court of NSW which arose from my appointment as administrator of Cresvale Securities Limited (Cresvale). In February 2001, his Honour Justice Austin delivered a judgment in the matter of *Cresvale Far East v Cresvale Securities* [2001] NSWSC 89 (the Cresvale Decision). In the Cresvale Decision findings were made which were arguably critical of my conduct as administrator of Cresvale. On the basis of the Cresvale Decision, and adopting the adverse findings in the Cresvale Decision, ASIC filed an application in the Companies Auditors and Liquidators Disciplinary Board (CALDB) alleging that I committed several breaches of my duties as administrator of Cresvale. The allegations were overturned in December 2002 by the NSW Court of Appeal which agreed with the decisions I had taken - in essence, I had tried to stop Cresvale going into liquidation in order to protect the jobs of employees as I believed Cresvale was a viable enterprise.

Since the Cresvale Decision was the only basis for ASIC's application in the CALDB at that time, and the Court of Appeal exonerated my conduct in the Cresvale matter, it would have been logical and appropriate for ASIC to have abandoned its application in the CALDB against me at that early stage (i.e. in December 2002). In my view, and I believe in the view of any other reasonable decision-maker, that should have been the end of the matter. Instead, random searches were made amongst my insolvency files to see what other issues could be raised.

For reasons that remain inexplicable, ASIC did not discontinue its application in the CALDB. Instead, ASIC amended its claim in the CALDB and abandoned the contentions which were based on the findings in the Cresvale Decision (this was the first of ASIC's many amendments to its claim).

ASIC then served on me a number of notices under section 30 of the *Australian Securities and Investments Commission Act 2001*, and on the basis of the documents I produced to ASIC, again amended its claim. ASIC subsequently amended its claim against me several more times in the CALDB, the Administrative Appeals Tribunal (AAT) and the Federal Court of Australia. In all, I have had to meet 48 contentions in various permutations over the past eight years. The conduct of the matter was self-evidently a roving inquiry seeking evidence of any conduct on my part which might justify the maintenance of ASIC's claim. Some might call it a 'fishing expedition'.

In September 2009 the Federal Court determined that only two of the original 48 contentions might be made out at law. His Honour Justice Lindgren made clear in two separate judgments that even if ASIC was successful on the two remaining contentions against me in the AAT, that might not ground a finding that I breached section 1292(2)(d) of the Corporations Law or warrant any penalty. At mediation, the legal representatives of ASIC appeared to accept that position. The President of the AAT had previously noted the extraordinary waste of public money by ASIC in carrying on with these proceedings and ordered mediation before the AAT would consider re-hearing the matter.

At the outset of this mediation on 11 December 2009, ASIC's Senior Counsel, Mr Greg McNally, advised that he had no instructions regarding settlement. At this point the Chairman of ASIC, Mr Tony D'Aloisio, became directly involved and ultimately ASIC agreed to a settlement whereby all of the 48 contentions ASIC had originally raised against me were dismissed, in return for my making a small qualified concession, itemised as Point 3 in the annexed Agreement To Resolve Proceedings.

My reasons for making this submission are as follows:

1. While it is a matter of record that I was a party to the Agreement To Resolve Proceedings, it is also true that ASIC has caused me to incur costs of more than $1.2 million over five years to defend myself in circumstances where the only concession ultimately achieved by ASIC related to the appropriateness of a payment of a penalty to ASIC in the sum of $120 for lodging documents after the due date, which is disputed. Whilst I was ultimately exonerated in the AAT I was unable to recover any of the legal costs incurred before the CALDB and the AAT. (See the annexed settlement agreement in which ASIC also confirms this legal position.)

2. ASIC's Senior Counsel conceded that the current regulatory regime operates to require a professional accountant to pay ASIC its costs if ASIC is successful in the CALDB, but the reverse is not automatically true if the accountant succeeds on appeal in the AAT in overturning (in whole or in part) the findings made by the CALDB. This is an extremely unfair regime which severely disadvantages individuals and undermines public faith in the regulator.

3. The entire regulatory framework and internal decision-making process by which ASIC pursued this matter needs to be reviewed. A reasonable person would be concerned with ASIC's internal decision to proceed with the prosecution in the manner it has in the circumstances set out above. I have throughout the course of this matter endeavoured to compromise with ASIC and, until recently (and then only after successfully defeating 46 of 48 contentions), those overtures were rejected.

4. Above all, I believe that professional accountants should have a right of direct appeal to the Federal Court from the CALDB, or at the very least be required to appear before only one body with delegated authority, such as the CALDB or the AAT, before they enter the Court system. After all, individual taxpayers may appeal directly to the Federal Court if they choose not to appeal via the AAT in any disputes they have with the Commissioner of Taxation. The present regime of first the CALDB, then the AAT and then the Federal Court is extremely unfair and costly to practitioners whose careers are destroyed, as happened to me, because of the time it takes to get before a judicial officer who, unlike the CALDB, is not predisposed to the ASIC perspective. The CALDB see their role as little more than an enforcement arm of ASIC. I can say this with confidence as the 18 charges upheld by the CALDB against me were all ultimately overturned.

5. I am also extremely concerned about the position of accountants who do not have the financial resources or time I have had available to me to fund such a protracted procedure. The legal advice one receives is that it is almost impossible to be successful before the CALDB and accordingly most practitioners appear to accept an enforceable undertaking negotiated with ASIC as a way of avoiding having to appear before the CALDB. Clearly this is not in the interests of the proper public administration of justice and in itself points to the need for substantial reform in this area.

6. Also of great concern is the lack of common sense implicit in the CALDB findings. They found in my case that no one had suffered any disadvantage, financial or otherwise, as a result of the decisions I had taken. Nevertheless, their approach was legalistic in the extreme. The effect of the CALDB decision in my case, as applied generally within the insolvency profession, is to substantially increase costs. Personally I am appalled at the costs incurred in many insolvency situations without any benefit to any party other than the insolvency practitioner. This does not appear to be a relevant consideration for the CALDB. All that is important to the CALDB is that all the forms are filled in correctly and all the procedures are undertaken mechanically without any reference to outcomes and the costs involved. The cost to the community of such legalism is enormous and the public is rightly extremely concerned with the legally sanctioned ransacking of insolvent companies where the only beneficiary is the insolvency practitioner. The mindset of ASIC/CALDB is clear when you look at the 48 charges raised against me. Not one charge was concerned with the costs I had incurred or the reasonableness of my actions as a liquidator or administrator.

7. My solicitors, Henry Davis York, who act for a number of insolvency practitioners, were unable to locate anybody who was willing to give expert evidence in my case

before the CALDB because they believed they would be victimised by ASIC if they gave evidence on my behalf.

I believe the fact that ASIC did not abandon its application against me after the Cresvale Decision was overturned and the persistence with which ASIC pursued my case was in part motivated by persons within ASIC who resented my actions in prompting more than 1,000 shareholders to write to ASIC in 2004 to complain about its demonstrable failure to prosecute the former Managing Director of an Australian listed public company, Vita Life Sciences Limited (of which I am Chairman), for defrauding that company of approximately $30 million. I was successful in a civil action against the Managing Director of that company in the High Court of Singapore at great financial cost to the company and personal cost to me. In those circumstances, I believe I was vindicated in my efforts to rally shareholders to request that the regulator, ASIC, prosecute a person who was found to have committed fraud involving Australian funds in an overseas common law jurisdiction.

I ask the Senate Committee to consider what any reasonable person would have done in my position. Clearly, I had little alternative other than to defend the allegations made against me by ASIC. As mentioned, in my view, it offends basic principles of natural justice and equity for ASIC to avoid making greater restitution of the enormous costs I have incurred to defend myself against charges ultimately found to be nugatory.

I am not an aggressive person whose style would naturally cause offence to officers of ASIC. In order to make out their 48 charges, ASIC went through a great number of my files searching for evidence of any professional misconduct. The misdemeanours eventually alleged by ASIC included trivial matters such as minor bank charges of approximately $20 being allegedly wrongly allocated between the six monthly reports that a insolvency practitioner lodges with ASIC. As the CALDB found, there were no complaints from third parties about my work.

The legal framework that ASIC has been instrumental in putting in place is patently skewed in its favour. Further, it shows no interest in the substantive issues of value to creditors or protection of the community's interests.

Clearly ASIC's approach results in a patently unfair outcome for a person in my situation. ASIC has destroyed my professional insolvency practice and damaged my good name with the adverse publicity its public relations team generated during the proceedings.

Yours faithfully

(Mr) Vanda Gould MCom, FCA, FCPA
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**Attachment**

Agreement to Resolve Proceedings - 11/12/09

**ADMINISTRATIVE APPEALS TRIBUNAL** )
)
**GENERAL ADMINISTRATIVE DIVISION** )

**No 2004/1675**

**Re** **VANDA RUSSELL GOULD**

**Applicant**

**And** **COMPANY AUDITORS & LIQUIDATORS DISCIPLINARY BOARD**

**First Respondent**

**And** **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

**Second Respondent**

## AGREEMENT TO RESOLVE PROCEEDING

The Applicant and the Second Respondent agree to resolve all disputes arising from proceedings 18/NSW01 in the Companies and Liquidators Disciplinary Board on the following terms:

1. The decision of the First Respondent in proceedings 18/NSW01 ("the Prior Proceedings") in the Companies Auditors and Liquidators Disciplinary Board (**CALDB**), consisiting of the determination dated 26 August 2004 (**Determination**) and the Orders made by the First Respondent on 21 December 2004 (**Orders**) be set aside.

2. The Tribunal notes that the parties have agreed:

   2.1 to Order 1 on the basis that in light of the effluxion of time, the history of the proceedings and the nature of the remaining Contentions 2.11 and 6.5 it is now the case that there is no longer any warrant in the Tribunal making any orders against the Applicant in the existing review proceedings.

3. The Tribunal notes that the Applicant:

   3.1 acknowledges that in respect of contention 6.5 he should not have paid fees for late lodgement of forms to ASIC in the sum of $120 out of the assets of Popwing Pty Limited (In Liquidation) but rather out of his own, personal funds.

3.2 at all times understood and believed that the ASIC forms in the liquidation were posted and lodged to ASIC within the required time. The Applicant disputed the fees charged by ASIC when they were imposed, however, he decided at the time that the costs of challenging ASIC's rejection of his position far outweighed the amount in question;

3.3 at all times genuinely held the view that it was reasonable that the fees for late lodgement charged by ASIC should come from the liquidation because the circumstances in which the late fees were charged were not caused by his or his staff's error.

4. The Tribunal notes that ASIC:

4.1 Agrees not to continue to prosecute Contentions 2.11 and 6.5 as set out in the Second Respondent's Statement of Facts and Contentions dated 15 March 2005;

4.2 Agrees not to continue to pursue any order against the Applicant in the Tribunal;

4.3 Agrees not to enforce the costs order in its favour made by the CALDB on 21 December 2004;

4.4 Maintains that Mr Gould is not entitled to recover any of his costs arising from the earlier proceedings in the CALDB in this Tribunal or through any other legal process arising from the Tribunal's setting aside of the CALDB Determination and Orders.

5. The Tribunal notes that the parties:

5.1 Agree that ASIC will pay the Applicant's costs of $52,480.58 (inclusive of GST) as agreed in respect of Federal Court of Australia Proceedings, No. NSD 1590/08 and NSD 1778/08, which amount has been calculated by offsetting ASIC's costs in Federal Court of Australia Proceedings No NSD2184/05 and High Court of Australia, Proceedings No. S195 of 2006 in the agreed amount of $20,776.70;

5.2 Acknowledge that clause 5.1 is in full an final satisfaction of all costs orders made in those proceedings.

Dated: 11 December 2009

George A. Boland

Australian Securities and Investments Commission
By its proper officer, George Boland, Solicitor

Vanda Gould