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Administration and Co-operatives

The Co-operative Federation of Victoria Ltd is concerned with the appointment of Administrators under the Victorian Co-operatives Act 1996 and how this could undermine good solvency practice as articulated in the Insolvency Practitioners Association of Australia has a Code of Professional Practice for Insolvency Practitioners (May 2008). This is based on our experience with the Waverley Trading Co-operative Ltd when it was briefly put into administration between 21 August 2009 and 21 September 2009. We believe that the experience of the co-operative did not reflect and reinforce an appropriate standard of professional conduct and that the Victorian Co-operatives Act and the Registrar of Co-operatives was largely responsible for the regrettable consequence.

The Code of Professional Practice for Insolvency Practitioners is in three parts. Part A sets out the overarching principles. Part B contains detailed guidance and examples to assist in applying the principles. Part C contains templates and practice notes that should be adopted for use in practice.

The Code applies to all members of the IPA/ within the definition of Practitioners, the Code refers to, and treats, liquidators, administrators, and controlling/Part X/ trustees as broadly within the one category, primarily as fiduciaries responsible to creditors. The Code, therefore, is relevant to the professional conduct of administrators appointed under Division 4—Administration of co-operative—application of Corporations Act of the Co-operatives Act. Division 4 has been extracted and appended to this submission.

The Code includes the following provisions:

A Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed as an administration.(p 13)

A claim by a Practitioner for remuneration must provide sufficient, meaningful, open and clear disclosure to the approving body so as to allow that body to make an informed decision. (p 13)

A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval. (p 13)

It is important that creditors are entitled to expect that administration funds are not expended on work that was not properly performed and that all time spent for necessary work properly performed should be recorded and before claiming remuneration the Practitioner should identify work and time that should not be claimed. The Practitioner is expected to exercise professional and commercial judgment in considering whether work is to be performed. (p 43)

The Waverley Trading Co-operative

The Waverley Trading Co-operative Ltd was temporarily in administration for a short period last year in the absence of a board quorum with only two directors and not because of actual or potential insolvency.

The Waverley Trading Co-operative Ltd has operated for the past 48 years as the main supplier of school uniforms to pupils of a large number of schools and colleges in the eastern suburbs of Melbourne. In 2007-08 total revenue was \$323,318.

The Administrator was appointed by the Registrar of Co-operatives on the 21 August 2009 and this was withdrawn on the 21 September 2009 from which time the co-operative has continued to trade with its own board. The financial charge to the co-operative by the Administrator was \$ 93,000, This included \$9,000 for legal costs of an application to the Supreme Court for permission to not hold a second creditors meeting - despite the fact the Co-operatives Act does not require a second meeting. This expense would clearly fall within the Code as work that was not necessary and, therefore, should not be charged. (p 43)

In recent years, insolvency practitioners in Australia have received criticism from several sectors such as the courts, our corporate regulator – the Australian Securities and Investments Commission ('ASIC') and creditors over issues concerning their independence and remuneration. The experience of the Waverley Trading Co-operative has served to reinforce these criticisms. Given the co-operative's turnover, the fee charged by the Administrator and approved by the Registrar of Co-operatives is disproportionate.

The Administrator eventually recommended to the Registrar that the co-operative's Administration be revoked and that the co-operative continue to trade. This was because of the work of the Chairman of the Co-operative Federation of Victoria Ltd, Tony O'Shea, working with former directors, staff, suppliers and creditors to put together a new board with a new manager as an alternative to the co-operative being sold or liquidated. It is somewhat ironic that the Administrator who claimed \$93,000 from the business allowed others with co-operative experience, skills and commitment to work without remuneration to develop the basis for the co-operative to continue trading

When the co-operative was out of Administration, there were other problems created by the Administrator. Staff had continued to be employed but Workcover coverage of the workers had been cancelled. Directors and Officers Liability Insurance had also been cancelled.

Conclusion

It is our assessment that in the situation of the Waverley Trading Co-operative that the Registrar of Co-operatives was the determinant of the Administrator's remuneration and did not apply professional standard considerations to the Administrator appointed and, instead, just accepted the fees and costs claimed by the Administrator. In doing this the Registrar recklessly imposed an unfair and disproportionate cost burden on the co-operative which is now trading. Creditors were not appropriately informed about remuneration principles and practices for the Administrator e.g. the alternative options for fees and the rationale for the option chosen by the Administrator. The assumption seems to have been the Registrar was the "creditor." The Registrar did not require the Administrator to follow an appropriate professional standard as encapsulated the Code of Professional Practice for Insolvency Practitioners in either because the Co-operatives Act allows this or because the Registrar was negligent.

What is particularly disturbing about a Registrar responsible for the administration of co-operatives is the failure to recognise that co-operatives are a different form of business enterprise and that the appointment of an Administrator needs to recognise this difference. The Code of Professional Practice for Insolvency Practitioners does recognise the importance of the complexity of administration situations in the following observations: "Insolvency involves the difficult intersection of accounting, business and law. Skills are needed to handle a complex situation which invariably happens quickly, with immediate impact on a range of parties beyond the insolvent. There is a great divergence in the types of commercial activities." (P 6 – 7) The difference between a co-operative and a company is another layer of complexity.

Co-operatives Act 1996

No. 84 of 1996

Version incorporating amendments as at 24 April 2008

Division 4—Administration of co-operative—application of Corporations Act

323 Application of Corporations Act to administration

A co-operative is declared to be an applied Corporations legislation matter for the purposes of Part 3 of the **Corporations (Ancillary Provisions) Act 2001** in relation to the provisions of Part 5.3A (Administration of a company's affairs with a view to executing a deed of company arrangement) and Division 3 of Part 5.9 (Provisions applying to various kinds of external administration) of the Corporations Act, subject to the following modifications—

(a) those provisions are to be read as if a co-operative were a company;

* * * * *

(c) a reference in those provisions to sections 128 and 129 of the Corporations Act is to be read as a reference to sections 43 to 45 and 47 of this Act;

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(e) a reference in those provisions to ASIC is to be read as a reference to the Registrar;
(f) any other modifications (within the meaning of Part 3 of the **Corporations (Ancillary Provisions) Act 2001**) that are prescribed by the regulations.

Note

See note under section 10(1).

Division 5—Appointment of administrator
324 Appointment

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(1) The Registrar may, by written notice, appoint an administrator to conduct the affairs of a cooperative.

(2) A notice of appointment must specify—

(a) the date of appointment; and

(b) the appointee's name; and

(c) the appointee's business address.

(3) If the appointee's name or business address changes, the appointee must immediately give written notice of the change to the Registrar.

(4) The Registrar must not appoint an administrator unless the necessary grounds for the taking of that action exist, as referred to in section 336.

325 Effect of appointment of administrator

(1) On the appointment of an administrator of a co-operative—

(a) the directors of the co-operative cease to hold office; and

(b) all contracts of employment with the co-operative are terminated; and

(c) all contracts for the provision of secretarial or administrative services for the co-operative are terminated; and

(d) the administrator may terminate any contract for providing other services to the co-operative.

(2) An administrator of a co-operative has the functions of the board of the co-operative, including the board's powers of delegation.

(3) A director of a co-operative must not be appointed or elected while the administrator is in office except as provided by this Division.

326 Revocation of appointment

- (1) An administrator holds office until the administrator's appointment is revoked.
 - (2) The Registrar may, by written notice, revoke the appointment of an administrator.
 - (3) When a liquidator of a co-operative is appointed, the appointment of any administrator of the co-operative is automatically revoked.
 - (4) Immediately on the revocation of an administrator's appointment, the administrator must prepare and submit a report to the Registrar showing how the administration was carried out, and for that purpose an administrator has access to the co-operative's records and documents.
 - (5) On providing the report and accounting fully in relation to the administration of the co-operative to the satisfaction of the Registrar, the administrator is released from any further duty to account in relation to the administration of the co-operative other than on account of fraud, dishonesty, negligence or wilful failure to comply with this Act or the regulations.
 - (6) Before revoking the appointment of an administrator of a co-operative, the Registrar must—
 - (a) appoint another administrator; or
 - (b) appoint a liquidator; or
 - (c) ensure that directors of the co-operative have been elected in accordance with the rules of the co-operative at a meeting convened by the administrator in accordance with those rules; or
 - (d) appoint directors of the co-operative.
 - (7) Directors elected or appointed under subsection (6)—
 - (a) take office on revocation of the administrator's appointment; and
 - (b) in the case of directors appointed under subsection (6), hold office until the next annual general meeting of the co-operative after the revocation of that appointment.
- 327 Expenses of administration**
- (1) The expenses of and incidental to the conduct of a co-operative's affairs by an administrator are payable from the co-operative's funds.
 - (2) The expenses of conducting a co-operative's affairs include—

- (a) if the administrator is not an employee of the public service, remuneration of the administrator at a rate approved by the Registrar; or
- (b) if the administrator is an employee of the public service, the amount that the Registrar certifies should be paid to it as repayment of the administrator's remuneration.
- (3) An amount certified under subsection (2)(b) may be recovered in a court of competent jurisdiction as a debt due to the Crown.
- (4) An administrator has, in relation to the expenses specified in subsection (1), the same priority on the winding-up of a co-operative as the liquidator of the co-operative has.

328 Liabilities arising from administration

- (1) If a co-operative incurs any loss because of any fraud, dishonesty, negligence or wilful failure to comply with this Act or the regulations or the rules of the co-operative by an administrator, the administrator is liable for the loss.
- (2) An administrator is not liable for any loss that is not a loss to which subsection (1) applies but must account for the loss in a report given under section 326.