



**ASIC**

Australian Securities & Investments Commission

# **Senate Inquiry into the Conduct of Insolvency Practitioners and ASIC's Involvement**

## **Submission by the Australian Securities and Investments Commission**

March 2010

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## A Executive summary

- 1 The Australian Securities and Investments Commission (ASIC) makes this submission to assist the Senate Economics Committee with its inquiry into the role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business (the Inquiry).

### ASIC's submission

- 2 This submission sets out:
  - (a) an overview of the insolvency market;
  - (b) a summary of the regulatory framework, including the key legal provisions and guidance issued by ASIC and other professional bodies;
  - (c) how ASIC works within the regulatory framework to effectively discharge its responsibility to oversee the insolvency regime as it relates to liquidators and administrators and corporate collapses by:
    - (i) administering the registration of liquidators;
    - (ii) influencing the behaviour of, and promoting appropriate standards of competency and integrity by registered liquidators;
    - (iii) monitoring compliance with the legal and regulatory framework in which registered liquidators operate; and
    - (iv) taking appropriate remedial or enforcement action where concerns are identified in relation to the conduct of an insolvency practitioner;
    - (v) monitoring compliance by company officers with their obligations in the case of corporate failure; and
    - (vi) taking appropriate remedial or enforcement action where concerns are identified in relation to the conduct of company officers; and
  - (d) ASIC's forward program for its oversight role.
- 3 ASIC's response to issues and criticisms raised in the public submissions made to the Inquiry. In Section E of this submission, we comment publicly on those criticisms and issues and in *confidential* Appendix E, we respond further. Material in Appendix E is provided on a *confidential basis* so as not to prejudice ASIC's ongoing investigations or breach ASIC's legal obligations under s127 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). ASIC will be pleased to assist the Inquiry further by responding to issues or recommendations raised during the submission and hearing phase of the Inquiry.

## The insolvency market

- 4 The Australian insolvency industry consists of 662<sup>1</sup> registered liquidators dealing with corporate insolvency. Of this population 62% are associated with firms of less than 10 liquidators, 14% with firms of 10 to 19 liquidators and 24% with firms of 20 or more liquidators.
- 5 The larger and more complex external administrations, including receivership appointments by financiers, are generally undertaken by the larger firms with national presence and resources and capacity to manage such administrations. Mid-sized firms generally undertake a combination of administrations including voluntary administrations and smaller receiverships initiated by secured creditors and company directors. The smaller firms and sole practitioners tend to focus more on voluntary administration appointments generally initiated by company directors.
- 6 The majority of firms operate in a single state (86%) and 78% of registered liquidators practise in the three eastern states, New South Wales, Victoria and Queensland.
- 7 ASIC regulates approximately 1.7 million companies. Over the 3.5 financial years to 31 December 2009 approximately 30,000 companies have entered external administration. Some 60% of those administrations were director driven creditor voluntary liquidations and voluntary administrations. ASIC's work in the insolvency sector includes its interaction with corporate failure and the conduct of company officers in that context.
- 8 Based on the statistical data collated from the statutory reports lodged by insolvency practitioners, most external administrations relate to small to medium proprietary limited companies. *Estimates* provided by practitioners in the statutory reports lodged in the 2006–07 financial year disclose:
  - (a) 82% of companies had less than 20 employees;
  - (b) 87% had less than \$100,000 in assets;
  - (c) 82% had unsecured creditors owed \$500,000 or less; and
  - (d) estimated dividends of less than 10 cents in the dollar to unsecured creditors would be likely in 96% of external administrations.<sup>2</sup>
- 9 Many factors contribute to the quantum of the dividend paid to unsecured creditors including:
  - (a) amount of assets available for recovery;
  - (b) costs of external administration including remuneration and outlays;
  - (c) payment of priority creditors, being secured creditors and employees.

<sup>1</sup> As at February 2010.

<sup>2</sup> See ASIC Report 132 *External Administrators: Schedule B statistics 1 July 2004 to 30 June 2007* (REP 132).

Under the current regulatory framework, for dividend purposes, unsecured creditors are the final creditors to be paid from an external administration, coming behind the priority creditors listed above.

- 10 An insolvency practitioner's remuneration for the work they perform (i.e. their fees) must be approved by the appropriate body/persons. The body/persons with authority to approve the level of fee depends on the type of external administration. Further details concerning the approval process for fees is provided in Table 5 at paragraph 135.
- 11 There is no fixed scale of remuneration for an external administrator. Fees are most commonly charged on hourly rates although they may be set by way of a quoted fixed fee. Full disclosure of the basis for calculation must be provided to the parties that approve the external administrators fees.
- 12 Further detail as to the scope and characteristics of the insolvency market is contained in Appendix B1.

## The regulatory framework

- 13 The *Corporations Act 2001* (Corporations Act), general law and professional standards all govern the conduct of liquidators and administrators. ASIC administers the insolvency provisions of the Corporations Act and individual industry bodies self-regulate their members for compliance with their codes and standards. The regulatory framework as relevant to liquidators and administrators largely focuses on registering who may practise in the industry, and undertaking disciplinary and deterrence processes in cases of serious misconduct.

## Liquidator registration

- 14 The Corporations Act provides that a liquidator must be registered with ASIC in order to practise in the industry and details the requirements for obtaining registration as a liquidator. The current regulatory framework does not provide for a licensing regime similar to that applicable to the financial services and more recently the credit regimes. The registration requirement aims to ensure that a person who wishes to practise as a liquidator has the appropriate education, experience and is a fit and proper person<sup>3</sup> to be registered as a liquidator.

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<sup>3</sup> Regulatory Guide 186 at RG 186.21 states that ASIC 'will only be satisfied that you are a fit and proper person to be registered as a liquidator if we are satisfied as to your honesty, integrity, good reputation and personal solvency. This is in addition to our being satisfied about your overall capability'.

- 15 Once a liquidator is registered a suspension or cancellation of registration can only occur in limited circumstances.<sup>4</sup>
- 16 Registered liquidators are subject to various ongoing obligations. For example, registered liquidators should comply with:
- (a) the obligations under the Corporations Act and any other relevant general law obligations
  - (b) ASIC regulatory guidance on the adequate and proper performance of their obligations and
  - (c) professional standards, practices and principles, including codes of conduct and statements of best practice of a relevant professional body or an insolvency industry body of which the registered liquidator is a member.

## Complaints and surveillance

- 17 ASIC receives some 650,000 calls and 13,500 written complaints and enquiries each year across ASIC's jurisdiction. As detailed in this submission, ASIC's complaint unit (Misconduct and Breach Reporting team) applies a confidential risk assessment criteria which aligns with ASIC's strategic priorities. This risk assessment criteria, process and alignment to strategic priorities, guides the most effective and efficient allocation of ASIC's finite resources, ensuring that ASIC gives appropriate priority to its fundamental role of promoting confident and informed participation by stakeholders in the financial system.
- 18 Complaints and enquiries in respect of insolvency practitioners over 3.5 years to December 2009 (1,647)<sup>5</sup> account for 3.6% of total complaints and enquiries. In 48% of the complaints regarding insolvency practitioners either no breach was identified or there was insufficient evidence to support the allegation, and in 9% action by ASIC was precluded.<sup>6</sup> A further 33% were resolved by providing assistance in regard to the enquiry or complaint. 86 or 6.5% of complaints involving insolvency practitioners were considered by ASIC to be sufficiently serious to refer to specialist ASIC teams—the Insolvency Practitioners and Liquidators (IPL) team or Deterrence team.

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<sup>4</sup> Examples of such circumstances are cancellation or suspension orders by the CALDB or court, if the practitioner becomes insolvent or disqualified from managing a corporation, or voluntarily surrenders registration or dies.

<sup>5</sup> See Appendix C1.

<sup>6</sup> Examples of when ASIC will finalise a complaint as 'action otherwise precluded' include where legal proceedings are already on foot between the parties and the legal issue will be tested in court, a matter has already been investigated, ASIC has commenced legal proceedings, the age of the matter or difficulty in obtaining evidence outweighs the regulatory value in pursuing further action.

- 19 In addition, over the period since July 2006, the IPL team<sup>7</sup> conducted 179 compliance and transaction reviews in relation independence, remuneration and investigation or reporting matters. These reviews were originated by complaint (44%), or from other sources (56%) including ASIC's own market intelligence. Of those complaints, 14 (8%) were referred to Deterrence for further action. Of those 14 referrals since 1 July 2006, 8 resulted in banning, suspension or surrender of registration, 1 was discontinued for jurisdictional reasons, with 5 matters pending outcome (details are provided in Table 11 at paragraph 256).
- 20 Representative sample of examples of complaints management and liquidator compliance activities undertaken and the outcomes achieved by ASIC is included in *confidential* Appendix E.

## Responses to issues raised in other submissions

- 21 Various comments have been made in submissions to this Inquiry in relation to ASIC's performance of its oversight responsibility, and aspects of the current regulatory framework. To assist the Inquiry in understanding ASIC's role, a summary of ASIC responses is attached in Section E and *confidential* Appendix E.
- 22 Criticism has been levelled at ASIC that it should have done more to prevent the actions of Mr Stuart Ariff. ASIC's responds to those criticisms in *confidential* Appendix E.
- 23 The material contained in Appendix E is proved to the Inquiry on a *confidential basis* because disclosure of the information set out in that appendix may prejudice our ongoing investigation in relation to a number of matters or breach ASIC's legal obligations under s127 of the ASIC Act.

## ASIC's oversight activities and forward program

- 24 To assist the Inquiry, attached at Appendix A is an outline of ASIC's structure and strategic priorities.
- 25 This submission focuses on ASIC's role as Australia's corporations and financial services regulator in administering the corporate insolvency regime as it relates to liquidators and administrators and corporate conduct in the context of business failure. What ASIC does and its forward program in fulfilling its responsibilities in that regard is summarised in Table 1 below. This summary is expanded in Sections C and D of this submission.

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<sup>7</sup> ASIC's Insolvency Practitioners and Liquidators (IPL) team has 30 staff with members of the team located in major capital cities. Members of this team have specialist insolvency knowledge and experience with some members of the team recruited from the insolvency industry.

**Table 1: ASIC's oversight activities and forward program**

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
<i>Insolvency practitioners</i>		
<b>Registration of insolvency practitioners</b>  Administering the registration of liquidators to ensure that applicants meet the minimum entry-level statutory criteria	<p>Insolvency practitioners are subject to a registration rather than licensing regulatory framework.</p> <ul style="list-style-type: none"> <li>• The statutory registration requirements are set out in s1282(2) which specifies certain educational qualifications and requirements. The key criteria is 'fit and proper' which is not defined in the Corporations Act. If the requirements of s1282 are met ASIC must register the applicant.</li> <li>• ASIC has issued Regulatory Guide 186 <i>External administration: Liquidator registration</i> (RG 186) and Information Sheet 34 <i>How to apply for registration as a liquidator</i> (INFO 34) to provide detailed guidance on how ASIC undertakes this role and the required content of an application to assess if the applicant meets the minimum level entry requirement. How ASIC assesses applications is set out in Appendix B4.</li> <li>• There are 2 types of registration—registered liquidator and official liquidator. There are 662<sup>8</sup> registered liquidators of which 492 are also official liquidators.</li> <li>• Of the 662 registered liquidators 62% are associated with firms of less than 10 liquidators, 14% with firms of 10 to 19 liquidators and 24% with firms of twenty or more liquidators.</li> <li>• A registered liquidator retains registration except in limited specific circumstances.<sup>9</sup></li> </ul>	<p><i>Review of Regulatory Guide 186—in progress</i></p> <ul style="list-style-type: none"> <li>• This review will result in the re-issue of RG186 to provide benchmarks and improved clarity on how ASIC will interpret the 'fit and proper' test when registering liquidators.</li> <li>• A number of submissions to the inquiry have recommended that ASIC implement a pre-registration interview and this will be considered as part of the review of RG186.</li> </ul> <p>This review is scheduled for completion in the fourth quarter of 2010.</p>

<sup>8</sup> As at February 2010.

<sup>9</sup> Such as cancellation or suspension orders by the CALDB or court, if the practitioner becomes insolvent or disqualified from managing a corporation, or voluntarily surrenders the registrations or dies.



Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
<b>Practitioner conduct guidance</b>  Encouraging compliance with the law by working to improve guidance to insolvency practitioners regarding ASIC's expectations within the legal and regulatory framework in which they operate	ASIC has issued 8 regulatory guides <sup>10</sup> to provide guidance to insolvency practitioners in complying with their obligations. These publications are additional to the professional conduct standards issued by other professional bodies, including the accounting bodies, the Accounting Professional and Ethical Standards Board and the Insolvency Practitioners Association (IPA). The standards set by those bodies are mandatory for their members.	<ul style="list-style-type: none"> <li>Review guidance on Independence and DIRRs<sup>11</sup> as part of the <i>Independence: Oversight and surveillance project</i> referred to below under 'Monitoring and Surveillance'.</li> <li>Review guidance on remuneration as part of the <i>Remuneration approval compliance and Surveillance project</i> referred to below under 'Monitoring and surveillance'.</li> </ul>
<b>Monitoring and surveillance</b>  Monitoring the compliance of insolvency practitioners with the regulatory regime, through monitoring and acting on complaints and undertaking reviews of registered liquidators and their conduct	<p><i>Practitioner reviews</i></p> <ul style="list-style-type: none"> <li>Reviews are carried out where conduct concerns are raised through complaints and other market intelligence.</li> <li>For the period July 2006 to December 2009, 179 such reviews were undertaken.</li> <li>Key issues identified included independence, remuneration and investigations and reporting to creditors with 14 matters referred to Deterrence. In 8 of those matters, the liquidators' registrations have been cancelled suspended or otherwise adversely impacted, 5 are ongoing investigations and 1 was discontinued.<sup>12</sup></li> </ul> <p><i>Section 439A review project</i></p> <ul style="list-style-type: none"> <li>2007 major project to review voluntary administrators' s439A reports to creditors. ASIC issued a report on its findings and identified 8 key areas for improvement relating to quality of investigations and reporting to creditors.</li> <li>Following ASIC's report, the IPA incorporated ASIC's findings into</li> </ul>	<p><i>Remuneration approval compliance and surveillance project— in progress</i></p> <ul style="list-style-type: none"> <li>Surveillance and investigative work to assess compliance with remuneration disclosure and approval processes and take enforcement action where necessary.</li> <li>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.</li> <li>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.</li> <li>Issue a regulatory guide to assist creditors by providing</li> </ul>

<sup>10</sup> For example, Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16), Regulatory Guide 82 *External administrators: Deeds of company arrangement involving a creditor's trust—A guide for registered liquidators appointed under Part 5.3A* (RG 82) and Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194)

<sup>11</sup> Declarations of Relevant Relationships and Indemnities.

<sup>12</sup> Due to jurisdictional issues.

Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<p>the IPA Code and developed specific training courses on the content and quality of s439A reports.</p> <p><i>DIRRI review project</i></p> <ul style="list-style-type: none"> <li>2009 project reviewing DIRRIs required to be issued by practitioners in some external administrations.<sup>13</sup> ASIC is currently finalising the results of this project and will issue a report to the profession on its findings in April 2010.</li> </ul> <p><i>Inactive practitioner project</i></p> <ul style="list-style-type: none"> <li>ASIC identified 163 registered liquidators who are inactive and communicated with those practitioners for either surrender of their registration or determination of continuing compliance with the registration requirements of RG 186.</li> <li>60% requested cancellation of their registration, 33% continued to comply with RG 186 and 7% were subject to ongoing scrutiny.</li> </ul> <p><i>Registered liquidator insurance project</i></p> <ul style="list-style-type: none"> <li>Following the 2007 insolvency law amendments professional indemnity and fidelity statutory requirements were introduced with compliance required from July 2008.</li> <li>ASIC issued RG 194 in June 2008 in response to these new provisions giving guidance to practitioners.<sup>14</sup></li> </ul> <p><i>Aged external administration project</i></p> <ul style="list-style-type: none"> <li>In November 2007 ASIC wrote to practitioners in regard to approximately 2500 external administrations in excess of 5 years old requiring explanation as to why these administrations had not been finalised.</li> </ul>	<p>information regarding the assessment of whether remuneration is reasonable based on factors introduced into the Corporations Act as part of the 2007 insolvency amendments. This will complement what is currently provided by the professional associations. Consultation paper is expected to be released by the fourth quarter of 2010.</p> <ul style="list-style-type: none"> <li>Consider alternative approaches (e.g. an industry panel to assist ASIC) for an independent and experienced assessment of whether a fee being claimed is 'reasonable' based on factors introduced into the Corporations Act as part of the 2007 insolvency amendments.</li> </ul> <p><i>Independence: Oversight and surveillance project</i></p> <ul style="list-style-type: none"> <li>Following the 2009 DIRRI review project ASIC is working with the IPA to improve the guidance on the independence reporting requirements in their Code. IPA have advised ASIC they will be updating the IPA Code.</li> <li>Issue a consultation paper and a draft regulation guide on independence and disclosure requirements to supplement what is currently provided by the professional associations. Consultation paper is expected to be released by the fourth quarter of 2010.</li> <li>Following the Government's recent law reform announcement, DIRRIs will be required to be filed with ASIC. Upon enactment of this legislation, this provision</li> </ul>

<sup>13</sup> Voluntary administrations and creditor voluntary liquidations.

<sup>14</sup> Required level of PI cover is detailed at RG 194.42 and fidelity cover at RG 194.82.

Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<ul style="list-style-type: none"> <li>72% of these aged administrations were either finalised in the short term or satisfactory explanations were received.<sup>15</sup></li> <li>The balance were subject to further review as part of an ongoing monitoring program of aged administrations.</li> <li>Communication has recently been issued to practitioners in regard to administrations aged over 4 years.</li> </ul>	<p>will facilitate increased monitoring by ASIC of declarations provided to creditors and allow early intervention by ASIC in matters where ASIC forms the view a practitioner's independence is comprised.</p> <p><i>Registered liquidator insurance project</i></p> <ul style="list-style-type: none"> <li>By December 2010 ASIC will have requested practitioners to provide confirmation of relevant insurance policies to test compliance by practitioners with the new provisions and ASIC's regulatory guide.</li> <li>In instances of non-compliance ASIC will proceed to cancel registration under s1290A.</li> </ul> <p><i>Aged external administration project</i></p> <ul style="list-style-type: none"> <li>ASIC will continue to monitor timely completion of administrations by practitioners.</li> </ul> <p><i>Increased surveillance</i></p> <ul style="list-style-type: none"> <li>An expansion of existing compliance and transactions surveillance visits in response to complaints and other intelligence received, and undertaking a scheduled surveillance plan of visits to insolvency practices to influence improved practice and industry behaviours.</li> <li>Practitioners have been identified based on a risk profile with 10 surveillances due to be completed by December 2010.</li> </ul>

<sup>15</sup> For example, litigation in progress, long-tail liabilities, ongoing ASIC or practitioner investigations.

**Table 1 (cont.): ASIC's oversight activities and forward program**

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
<b>Deterrence activities</b>	<i>Insolvency practitioner misconduct</i>	<i>Enforcement powers</i>
Taking enforcement action where it appears there has been misconduct	<p>ASIC's enforcement powers are:</p> <ul style="list-style-type: none"> <li>• applications to the Companies Auditors and Liquidators Disciplinary Board (CALDB)</li> <li>• applications to court</li> <li>• enforceable undertakings.</li> </ul> <p>Enforcement outcomes since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 9 CALDB proceedings</li> <li>• 4 court proceedings (3 complete/1 in progress)</li> <li>• 3 enforceable undertakings.</li> </ul> <p><i>CALDB</i></p> <p>The CALDB sets out the manner in which applications made to it will be conducted in Manuals issued by CALDB.</p> <p>As CALDB hearings must be held in private<sup>16</sup> no public comment is able to be made to such proceedings pending conclusion.</p> <p>The CALDB may order cancellation or suspension and/or other undertakings but has no power to make a pecuniary award.</p> <p>The 9 CALDB outcomes<sup>17</sup> since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 1 order of cancellation</li> <li>• 6 orders of periods of suspension ranging from 3 months to 2 years</li> <li>• 1 order of no new appointments for 3 months</li> <li>• 1 order of reprimand.</li> </ul>	<p>ASIC's current enforcement powers to refer matters to CALDB or court or to enter into enforceable undertakings will continue to be utilised.</p> <p><i>Section 1291</i></p> <p>The restriction of this provision to official liquidators only does not allow ASIC to address directly the conduct of a registered liquidator, which represents 75% of insolvency appointments.<sup>18</sup></p> <p>Where the alleged misconduct concerns a practitioner's conduct as a registered liquidator, ASIC's enforcement powers are referral to CALDB, court proceedings or enforceable undertakings.</p> <p>Official liquidators are court-appointed, and are officers of the court with responsibilities to the court for those external administrations.</p>

<sup>16</sup> Unless otherwise ordered in limited circumstances.

<sup>17</sup> Except for the cancellation order, other CALDB orders included orders as to costs and other undertakings such as independent peer reviews and additional professional development.

<sup>18</sup> These appointments are principally creditors' voluntary liquidations and voluntary administrations.

Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<p><i>Court proceedings</i></p> <p>Court proceedings are taken in cases of serious misconduct and where an application for restitution is considered appropriate, or where a matter is considered urgent such as concerns regarding independence and associated disclosure.</p> <p>Outcomes from 4 court proceedings since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 1 ban for 10 years and compensation orders</li> <li>• 1 life ban and compensation orders</li> <li>• 1 appointment of special purpose administrator to address independence concerns regarding an incumbent administrator</li> <li>• 1 matter currently before the court regarding interpretation of statutory provisions relating to the maintenance of external administration bank accounts.</li> </ul> <p><i>Enforceable undertakings</i></p> <p>ASIC will consider enforceable undertakings with practitioners in certain circumstances and where an appropriate and effective regulatory outcome can be achieved.</p> <p>Outcomes from 3 enforceable undertakings since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 2 surrendering registration</li> <li>• 1 providing for no new appointments for 4 months and independent practice review.</li> </ul> <p><i>Section 1291</i></p> <p>ASIC's powers to deal directly with a liquidator's registration is limited to s1291 which is relevant to official liquidators only. Under this provision ASIC may suspend or cancel the registration of an official liquidator or require an official liquidator to give an undertaking to refrain from engaging in specific conduct. Some 75% of insolvency appointments require registered liquidator status only. There is no similar provision in regard to registered liquidators.</p>	

Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
<b>Maintaining market knowledge</b>	<p>ASIC undertakes 3 levels of insolvency related external liaison:</p> <ul style="list-style-type: none"> <li>• at a national level with relevant stakeholders and practitioner groups (regional liaison)</li> <li>• at the international level with appropriate international insolvency organisations, and</li> <li>• at a stakeholder (practitioner) level as appropriate.</li> </ul> <p>The key outcomes achieved by this liaison framework include:</p> <ul style="list-style-type: none"> <li>• current awareness of issues and developments in the insolvency sector</li> <li>• communication of regulatory expectations to relevant industry stakeholders</li> <li>• contribution to domestic and international developments regarding policy and regulation.</li> </ul>	ASIC's external liaison work at the stakeholder, national and international levels previously detailed will be continued with particular focus on influencing improved industry conduct standards.
<b>Company officers</b>		
<b>Monitoring compliance</b>	<i>National insolvent trading program</i>	This program is continuing and a report will be issued in June 2010.
Monitoring compliance and conduct by company officers in relation to their obligations and behaviour where corporate failure occurs	<p>This program seeks to identify companies which may be potentially trading while insolvent and to encourage company directors to address their company's financial position and take appropriate action.</p> <p>Companies are identified from various sources including:</p> <ul style="list-style-type: none"> <li>• complaints from creditors and employees</li> <li>• credit agency reports</li> <li>• statutory lodgements with ASIC such as s311 notifications</li> <li>• market intelligence from external and internal sources</li> <li>• internal intelligence.</li> </ul> <p>During the period 2005–06 to December 2009 ASIC visited 1609 companies under this program.</p>	

**Table 1 (cont.): ASIC's oversight activities and forward program**

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<p>As result of a visit many companies accessed appropriate professional advice which facilitated in some cases restructuring or refinancing and improved management practices.</p> <p>Some 15% of those visits identified companies where indicators of insolvency were sufficiently substantive for most of the companies to be placed in external administration by directors.</p>	
<b>Enforcement</b>  Administer the Assetless Administration Fund to assist and identify misconduct where corporate failure occurs	<p>ASIC administers 2 programs which address two key complaint categories insolvent trading and failure to lodge documents and reports.</p> <p><i>Liquidator Assistance Program (LAP)</i></p> <ul style="list-style-type: none"> <li>When a company enters into external administration, the company's directors have an obligation to provide the external administrator with the company's books and records and a Report as to Affairs (RATA). This information is important for the identification of assets and creditors, and to assess a company's financial position.</li> <li>If directors fail to comply with this obligation, an external administrator may apply to ASIC for action under the LAP to achieve compliance.</li> <li>ASIC's initial response is a warning letter to directors which achieves compliance in 55% of cases.</li> <li>If compliance is not achieved, ASIC initiates a prosecution. Since July 2006 ASIC has prosecuted 1955 officers in respect of 2317 contraventions.</li> </ul> <p><i>Assetless Administration Fund (AA Fund)</i></p> <ul style="list-style-type: none"> <li>This fund was established by government in 2006 to allow the financing of investigations and reports by liquidators in external administrations with minimal/no assets.</li> <li>Funding is provided for supplementary s533 reports following</li> </ul>	<p><i>Liquidator Assistance Program and AA Fund</i></p> <ul style="list-style-type: none"> <li>Between February and May 2010 ASIC is conducting a national awareness campaign to provide further information to insolvency practitioners about its' Liquidator Assistance Program and the Assetless Administration Fund. This is a continuation of similar programs conducted previously.</li> <li>This will promote compliance by company officers when their company enters external administration, and also with improved identification of corporate misconduct through the statutory reports submitted by insolvency practitioners.</li> <li>In January 2010 a dedicated Compliance and Deterrence team was brought together to give further focus to improving the compliance and summary prosecution work under the Liquidator Assistance Program, and the disqualification of directors involved in repeated corporate failures.</li> </ul>

Table 1 (cont.): ASIC's oversight activities and forward program

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<p>receipt of an initial report identifying potential offences of interest to ASIC, and an application for AA funding.</p> <ul style="list-style-type: none"> <li>• Supplementary reports are for matters where substantive misconduct is suspected.</li> <li>• Of the 243 director bannings undertaken since July 2006, 147 have been AA funded.</li> <li>• The fund also assists ASIC better identify potential corporate misconduct in companies under external administration which require a supplementary statutory report to assist further assessment and investigation.</li> </ul> <p><i>Director bannings</i></p> <ul style="list-style-type: none"> <li>• ASIC undertakes disqualification of directors who have been officers of 2 or more failed companies. Directorship of multiple corporate failures may be indicative of potential phoenix activity.</li> <li>• Since July 2006 a total of 243 directors have been banned, a further 61 banning briefs are under consideration by ASIC delegates and 52 banning briefs are being currently being prepared.</li> <li>• ASIC has increased its consideration of the role of professional advisers in relation to facilitation of phoenix activity and may take action against such advisers where appropriate (e.g. <i>ASIC v Somerville &amp; Ors (No 2)</i> [2009] NSWSC 998).</li> </ul>	
<b>Complaints management</b>		
<p><b>Improving complaints management</b></p> <p>By increasing risk-based assessment processes and identification of risks and trends</p>	<p><i>Online portal IT upgrade</i></p> <ul style="list-style-type: none"> <li>• An upgrade of the online portal including the online complaints facility on the ASIC website was commenced in September 2009. The upgrade provided improved enquiry and complaint service for the public through an online portal and reformatted eComplaint questionnaires.</li> </ul>	<p><i>Online portal IT upgrade</i></p> <ul style="list-style-type: none"> <li>• Upgrade and implementation continuing.</li> </ul> <p><i>Keyword capture</i></p> <ul style="list-style-type: none"> <li>• Refinement and improvement of complaint categorisation is continuing.</li> </ul>



**Table 1 (cont.): ASIC's oversight activities and forward program**

ASIC's oversight responsibility	What has ASIC been doing	ASIC's forward program
	<p><i>Keyword capture</i></p> <ul style="list-style-type: none"> <li>In early<sup>19</sup> 2009 a new keyword categorisation system for calls and complaints was commenced to allow improved identification of risks and trends and market intelligence</li> </ul>	
<p><b>Improving communications</b></p> <p>To provide clearer information on how ASIC has handled their complaint</p>	<p><i>Project Transparency</i></p> <ul style="list-style-type: none"> <li>This project seeks to improve how we communicate with complainants and better explain how ASIC has handled their complaint.</li> </ul> <p><i>Guidance publications</i></p> <ul style="list-style-type: none"> <li>A new brochure 'How ASIC deals with your complaints' was released in December 2009 providing clearer information on ASIC's role and complaints handling process.</li> <li>Call Centre staff are trained to direct callers to relevant information on ASIC's website and other relevant material.</li> <li>Callers receive brochures from the Call Centre.</li> </ul>	<p><i>Project Transparency</i></p> <ul style="list-style-type: none"> <li>Continuation of 'Project Transparency' including the review of precedent correspondence to complainants and improved brochure material to assist and guide complainants.</li> </ul> <p><i>Guidance publications</i></p> <ul style="list-style-type: none"> <li>Continuing improvement of brochure material to assist and guide complainants.</li> </ul>
<p><b>Guidance and education</b></p> <p>Educating, informing and assisting stakeholders to ensure that they are properly informed about insolvency laws and processes and their rights and obligations</p>	<p><i>Stakeholder guidance</i></p> <ul style="list-style-type: none"> <li>Insolvency impacts a diverse group of stakeholders: employees, secured and unsecured creditors and directors and shareholders. Some of these stakeholders have minimal if any experience with corporate insolvency and their rights and obligations.</li> <li>ASIC has issued 12 information sheets providing general guidance to assist unsecured creditors, employee creditors, directors and shareholders.</li> <li>ASIC devotes considerable resources particularly to providing information and assisting complainants with their concerns, which includes an element of educating complainants about the external administration process.</li> </ul>	<ul style="list-style-type: none"> <li>Continued improved guidance to stakeholders through updated information sheets.</li> <li>See 'Improving communications' above.</li> </ul>

<sup>19</sup> January 2009 for complaints and March 2009 for calls.

## B The insolvency environment and regulatory framework

### Key points

There are 662 registered liquidators in Australia—62% of them are part of insolvency firms with less than 10 registered liquidators.

The current regulatory framework for registered liquidators is a 'registration regime' as opposed to a 'licensing regime'.

The majority of companies entering external administration:

- are director-driven appointments, creditor voluntary liquidations and voluntary administrations; and
- have less than 20 employees, \$100,000 in assets and \$500,000 of unsecured creditors.

### The insolvency market

- 26 The Australian insolvency industry consists of 662<sup>20</sup> registered liquidators dealing with corporate insolvency. Of this population 62% are associated with firms of less than 10 liquidators, 14% with firms of 10 to 19 liquidators and 24% with firms of twenty or more liquidators.
- 27 The larger and more complex external administrations, including private receivership appointments by financiers, are generally undertaken by the larger firms with national structure and resources and capacity to manage such administrations. Mid-sized firms generally undertake a combination of administrations, including voluntary administrations and smaller receiverships involving appointments initiated by secured creditors and company directors. The smaller firms and sole practitioners tend to focus more on voluntary liquidation and administration appointments generally initiated by company directors.
- 28 There are between 7,500 and 10,000 companies entering external administration annually,<sup>21</sup> the majority of which are companies with less than 20 employees, up to \$100,000 in assets and up to \$500,000 of unsecured creditors.<sup>22</sup>
- 29 Further detail as to the scope and characteristics of the insolvency market, are contained in Appendix B1.

<sup>20</sup> As at February 2010.

<sup>21</sup> See Table 2 at paragraph 52.

<sup>22</sup> See Table B1.1 in Appendix B1.

## What is the economic philosophy underlying the regulatory framework?

- 30 The economic philosophy underlying the Australian regulatory regime is that markets drive efficiency and that markets operate most efficiently when there is a minimum of regulatory intervention. This philosophy can loosely be called 'efficient markets theory'.
- 31 Efficient markets theory has been the foundation of Australian financial system regulatory policy since at least the Australian Financial System Inquiry of 1981 (Campbell Inquiry). Its influence continued through to the Wallis Inquiry in 1997.
- 32 As such, the regime is designed to promote market integrity and stakeholder protection through conduct and disclosure regulation.
- 33 To assist the Inquiry understand Australia's corporate insolvency framework within the international context, attached at Appendix B2 are:
- (a) high-level general summaries<sup>23</sup> of key elements of the regulatory frameworks in the United States of America, United Kingdom (England and Wales), Canada, New Zealand, Japan and Germany (at Tables B2.1 and B2.2);
  - (b) ASIC's response to the PJC recommendations arising from the 2004 review of the insolvency laws (at Table B2.3); and
  - (c) a timeline of Australian insolvency law reform from 2004 to 2010 (at Table B2.4).
- 34 Policy and legislative developments of the Australian insolvency regulatory framework are a matter for government. It is noted that two consultation papers have recently been published by Treasury.<sup>24</sup>
- 35 ASIC undertakes significant insolvency-related liaison, both domestically and internationally, and at government, regulatory and market levels. Details of this liaison work are provided in Section C under the heading 'Maintaining market knowledge'.

## How does this economic philosophy shape the regulatory framework?

- 36 In line with the overall regulatory philosophy, the insolvency regulatory framework is based around those actions/activities that take place leading up to and after corporate failure, director conduct in that context and the

<sup>23</sup> Based on publicly available sources as detailed in each of the relevant tables.

<sup>24</sup> *Insolvent trading: A safe harbour for reorganisation attempts outside of external administration* (January 2010) and *Proposals Paper Action against fraudulent phoenix activity* (13 November 2009).

registration and conduct of those individuals who administer failed companies.

37 Detail about the operation of the regulatory framework are discussed in this section as follows:

- (a) prior to collapse of company—corporate conduct:
  - (i) audited financial reports and directors declarations of solvency;
  - (ii) auditor notifications pursuant to s311 of Corporations Act;
  - (iii) complaints and calls about behaviour that indicates potential financial distress;
  - (iv) insolvency related advice prior to a formal insolvency appointment;
- (b) at the time/after collapse of company:
  - (i) types of insolvency administrations;
  - (ii) complaints and calls about behaviour that indicates non-compliance by officers with their obligations;
- (c) industry participants—insolvency practitioners:
  - (i) registration framework;
  - (ii) obligations;
  - (iii) disciplinary and deterrence framework.

### Corporate conduct

38 Within the insolvency context, the key corporate conduct issues relate principally to directors' duties<sup>25</sup> and the duty to prevent insolvent trading.<sup>26</sup>

39 ASIC receives information relating to companies that may be experiencing financial distress, and may potentially be considered to be in 'pre-collapse', from the following main sources:

- (a) audited financial reports and directors' declarations as to solvency;
- (b) auditor notifications under s311;
- (c) complaints and calls about behaviour that indicate financial distress (e.g. allegations of insolvent trading, breaches of directors' duties and other corporate misconduct); and
- (d) ASIC's national insolvent trading program.

<sup>25</sup> Sections 180–184, Corporations Act.

<sup>26</sup> Section 588G, Corporations Act.

**Audited financial report and directors' declaration as to solvency**

- 40 An audited financial report and directors' report including the directors' declaration as to solvency must be prepared by all disclosing entities, public companies, large proprietary companies and registered schemes each financial year: s292(1). Small proprietary companies only have to prepare these reports in certain circumstances (e.g. where they are directed to do so by shareholders or ASIC): s293 and 294.<sup>27</sup>
- 41 The audited financial report provides ASIC with relevant historical information about a company's financial position and the directors' report must include, among other things, a declaration by the directors whether, in their opinion, there are reasonable grounds to believe that the company, registered scheme or disclosing entity will be able to pay its debts as and when they become due and payable. ASIC has provided guidance in Regulatory Guide 22 *Directors' statement as to solvency* (RG 22) in relation to what directors must consider when making the solvency declaration.
- 42 Separately, directors of a company must also pass a solvency resolution within two months after each annual review date for the company: s347A(1). This requirement does not apply to directors of a company that has lodged an audited financial report within the period of 12 months before the review date, as detailed above. If a negative solvency resolution is passed, or the company is unable to pass a solvency resolution, the company is required to notify ASIC within seven days: see Forms 485A, 485B.

**Monitoring of financial reports**

- 43 As part of ASIC's ongoing commitment to building confidence in the integrity of Australia's capital markets, ASIC regularly reviews the annual audited financial reports for a selection of listed and unlisted companies. To ensure that users of financial reports are fully informed, ASIC requires that entities make appropriate disclosure (by way of further disclosure to the market or by way of changes to their financial statements).
- 44 One of the key areas for review is the 'Going concern' assumption, being the ability for the company to continue operating for at least the upcoming 12-month period.
- 45 This work is undertaken by ASIC's Accountants and Auditors team. Concerns as to the solvency of companies are then considered and actioned by the relevant specialist stakeholder teams, such as Corporations, Emerging Mining and Resources, and Insolvency Practitioners and Liquidators.

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<sup>27</sup> There is some flexibility in the direction made by shareholders to small proprietary companies in relation to the preparation of financial or directors' reports and, where a financial report is prepared at the direction of shareholders, the small proprietary company is not required to lodge the report with ASIC.

**Auditor notifications under s311**

- 46 An auditor of a company has an obligation under s311 to advise ASIC in writing where they have reasonable grounds to suspect that a contravention of the Corporations Act has taken place by the company, and where the contravention is either significant, or where commenting on the contravention in the auditor's report (or by bringing it to the attention of the directors) will not sufficiently resolve the contravention. Concerns by an auditor about a company's ability to continue as a going concern are one of the possible contraventions requiring lodgement of a s311 notification to ASIC.
- 47 Section 311 notifications are assessed in the preliminary stage by a dedicated team of analysts. Notifications involving suspected solvency or going concern issues are referred to a specialist team within ASIC for further review and action. For the six months to December 2009, ASIC received 185 notifications, noting that on average ASIC receives approximately 230 notifications each financial year.

**Complaints and calls about behaviour that indicates financial distress**

- 48 By far the most common source of pre-collapse information ASIC receives is from calls and complaints from the public. The types of complaint and call information that may indicate financial distress, or that a company seems about to collapse, are many and varied, but would usually be in the form of allegations of insolvent trading, breaches of directors' duties and other forms of market misconduct.
- 49 To assist in explaining ASIC's role prior to and following the collapse of a business, an explanation of our complaints handling and referral processes is contained in Section C.

**National insolvent trading program**

- 50 This is a program conducted by ASIC to identify companies in, or potentially in, financial distress and encourage directors through on site visits to recognise and address their company's financial position. Further details on this program are provided at paragraph 213.

**Types of insolvency administrations**

- 51 A company is insolvent if it is unable to pay its debts as and when they fall due for payment.<sup>28</sup> There are three principal corporate insolvency procedures

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<sup>28</sup> Section 95A(1) of the Corporations Act provides that '[A] person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.' Section 95A(2) states that '[A] person who is not solvent is insolvent.'

which apply where a company is, or is likely to become, insolvent.<sup>29</sup> These procedures are voluntary administration, liquidation, and appointment of controllers (which includes receivers, and receivers and managers).

52 The statistics for insolvency external administrations from the 2006–07 financial year to December 2009 are shown in Table 2 below.

**Table 2: Companies entering external administration by type<sup>30</sup>**

Type of external administration	2006–07	2007–08	2008–09	Jul–Dec 2009	Total
Provisional wind-up	51	32	40	7	130
Court wind-up <sup>31</sup>	2,653	2,472	2,915	1,223	9,263
Creditors wind-up	1,975	2,732	3,682	1,914	10,303
Voluntary administration <sup>32</sup>	2,360	2,064	2,123	759	7,306
Receiver/Receiver and manager	309	400	829	409	1,947
Controller/Managing controller	137	206	415	266	1,024
Scheme administrator appointed	0	0	0	0	0
Foreign/RAB <sup>33</sup> wind-up	2	1	1	0	4
<b>Total</b>	<b>7,487</b>	<b>7,907</b>	<b>10,005</b>	<b>4,578</b>	<b>29,977</b>

Source: ASIC insolvency statistics—Companies entering external administration

### Voluntary administration

53 Voluntary administration is an external administration of the company by an external administrator known as a ‘voluntary administrator’. A voluntary administrator may be appointed by the directors of a company if they decide their company is insolvent or likely to become insolvent<sup>34</sup> or by a secured creditor with a charge on the whole or substantially the whole of a company’s property.<sup>35</sup> Less commonly, a voluntary administrator may be appointed by a liquidator or provisional liquidator.<sup>36</sup>

<sup>29</sup> Members’ voluntary liquidation is relevant only to solvent companies and has therefore not been considered in this submission.

<sup>30</sup> Members’ voluntary liquidations are not included as the companies are not insolvent.

<sup>31</sup> Will not include companies previously identified as being in provisional liquidation.

<sup>32</sup> These companies will not be included again once the creditors resolve to appoint a liquidator, or a deed of company arrangement is proposed.

<sup>33</sup> Registrable Australian body.

<sup>34</sup> Section 436A, Corporations Act.

<sup>35</sup> Section 436C, Corporations Act.

<sup>36</sup> Section 436B, Corporations Act.

- 54 The object of a voluntary administration is for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence or if this is not possible, results in a better return for the company's creditors and members than would result from an immediate winding up of the company.
- 55 Key duties of the role of the voluntary administrator are to investigate the company's affairs, to report to creditors regarding the company's financial affairs and investigation findings, and recommend to creditors whether it would be in the interests of creditors for the company to execute a deed of company arrangement; be wound up, or for the administration to end and the company be returned to the directors. The future of the company is determined through voting by creditors.

### **Liquidation**

- 56 Liquidation is the orderly winding up of a company's affairs. It involves cessation or sale of its operations, realisation of the company's assets, distribution of realisation proceeds among its creditors and distribution of any surplus among its shareholders. There are two types of liquidations relevant to insolvent companies: court-ordered liquidations and creditors' voluntary liquidations. A court ordered liquidation starts as a result of a court order, made after an application (usually by a creditor of the company) to the court. A creditors' voluntary liquidation results from a resolution of creditors in a voluntary administration to place the company in liquidation,<sup>37</sup> or by a resolution of shareholders, which is followed by a meeting of creditors in a creditors' voluntary liquidation.<sup>38</sup>
- 57 Provisional liquidation is made by the court following the filing of an application to preserve an entity and its assets until the winding up application has been heard.

### **Controllers**

- 58 A controller is defined in the Corporations Act as including a receiver, receiver and manager, or any person who enters into possession or control of the corporation's property for the purposes of enforcing a charge.<sup>39</sup> A managing controller is a receiver and manager or any other controller who has entered into possession or control but additionally has the task of managing the corporation. There are circumstances where a controller will not be a receiver, such as financiers who enter into possession of a specific

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<sup>37</sup> Section 439C, Corporations Act.

<sup>38</sup> Section 497, Corporations Act.

<sup>39</sup> Section 9, Corporations Act.



asset over which they hold security. Controllers in such circumstances are not required to be registered liquidators.

59 Most commonly, a company enters into receivership when a receiver is appointed by a secured creditor which holds security over some or all of the company's assets. A receiver's primary role is to collect and sell a sufficient quantum of the company's charged assets to repay the debt owed to the secured creditor. The receivers have powers as conferred by the instrument of appointment and set out in the Corporations Act. The receiver is liable for debts incurred in the receivership but not for debts incurred by the company prior to the receiver's appointment. A receiver will have the right to be reimbursed from the company's assets for debts incurred in the receivership. A receiver has no statutory obligation to report to unsecured creditors of the company as at the date of appointment but at law does have a duty of care to unsecured creditors.

60 There are also court-appointed receivers whose obligations are to the court and whose powers are set down by court order.

### **Insolvency-related advice prior to formal insolvency appointment**

61 The Corporations Act imposes a duty on directors to prevent insolvent trading.<sup>40</sup> On 24 November 2009 ASIC released a consultation paper outlining proposed guidance to directors on their duty to prevent insolvent trading.<sup>41</sup> ASIC is currently considering the submissions received on that consultation paper. ASIC has also issued an information sheet that includes guidance to directors regarding insolvent trading.<sup>42</sup>

62 On 19 January 2010 the Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, announced a package of reforms to corporate insolvency laws and also released a discussion paper on the operation of Australia's insolvent trading laws in the context of attempts at business rescue outside of external administration.<sup>43</sup> The law reform proposals are in relation to:

- (a) reducing costs and complexity of insolvency administrations;
- (b) improving communications with creditors;
- (c) reducing the potential for abuse of corporate insolvency law; and
- (d) amending the Corporations Act to reverse the decision in *Sons of Gwalia Limited (subject to Deed of Company Arrangement) v Margaretic* [2007] HCA 1.

<sup>40</sup> Section 588G, Corporations Act.

<sup>41</sup> See Consultation Paper 124 *Duty to prevent insolvent trading: Guide for directors* (CP 124).

<sup>42</sup> See Information Sheet 42 *Insolvency: A guide for directors* (INFO 42).

<sup>43</sup> The submission period for the discussion paper closed on 2 March 2010.

- 63 Where directors find their company unable, or potentially unable, to pay its debts as and when they fall due, they may seek advice from a range of advisers, including insolvency practitioners.

### **Regulation**

- 64 When insolvency practitioners provide advice prior to a formal insolvency appointment, they are not doing so in their capacity as a registered liquidator. ASIC does not have regulatory powers over insolvency practitioners in relation to engagements which do not involve a formal insolvency appointment under the Corporations Act. ASIC does not regulate lawyers and other persons who also provide pre-appointment insolvency advice.<sup>44</sup>

### **Pre-appointment advisory roles**

- 65 Examples of pre-appointment advice and roles that might be taken by insolvency practitioners are provided below.

#### **Advice to the company**

- 66 An insolvency practitioner engaged by a company may provide advice ranging from brief pre-appointment advice regarding the processes involved with a formal insolvency appointment to detailed assessment of a company's financial position and advice as to options for directors to consider, through to comprehensive advice and assistance with a restructuring of the company's business.

#### **Advice to financiers (or other creditors)**

- 67 Insolvency practitioners are often engaged by a company's financiers to provide advice and reports to the financier. Such engagements may be relatively short, or in complex matters, the engagement may be for an extended period and incorporate restructuring work in circumstances where the financier is prepared to provide the company ongoing financial support.

#### **Advice to directors**

- 68 Insolvency practitioners might also provide advice to directors, including advice on their responsibilities regarding insolvency issues and the obligation on directors to prevent insolvent trading.

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<sup>44</sup> Subsequent to a corporate collapse, investigations may cause ASIC to form a view that pre-appointment advice contributed to a breach of directors duties. In such matters, ASIC may initiate proceedings as it did *ASIC v Somerville & Ors (No 2)* [2009] NSWSC 998.

### Disclosure obligations

- 69 Where an insolvency practitioner engages in pre-appointment activity, conflict of interest issues must be considered by the practitioner before accepting a formal insolvency appointment to a company. The more detailed the pre-appointment role, the more likely that there will be a conflict of interest which may preclude the insolvency practitioner from taking a subsequent appointment to that company.
- 70 If the practitioner does take a subsequent insolvency appointment to the company, the practitioner is required<sup>45</sup> to disclose to creditors the details of their pre-appointment involvement with the company. The IPA's Code of Professional Practice also sets out disclosure requirements.
- 71 As part of its surveillance activities and particularly where specific concerns are raised, ASIC reviews disclosure declarations—that is, Declarations of Relevant Relationships and Indemnities (DIRRIs)—issued by administrators and liquidators to creditors when a formal insolvency appointment is made. When considered appropriate, ASIC will and has required further disclosure in relation to details of relationships and pre-appointment advice, and as contemplated under the Corporations Act will require a supplementary DIRRI be made by the liquidator or administrator. The Government recently announced that law will be enacted to require DIRRIs to be lodged with ASIC when they are sent to creditors, which will further assist ASIC in its supervisory role in the review of independence.
- 72 ASIC may make application to the court for the removal of an insolvency practitioner in cases where ASIC forms the view that the practitioner's independence is compromised. However, our experience has been that when approached by ASIC with its concerns, practitioners usually issue a revised DIRRI. Occasionally a practitioner may make an application to the court to address any independence concerns in regard to their appointment.<sup>46</sup> In such instances, ASIC may seek or be asked by the court to appear *amicus curiae* in order to assist the court.

### Insolvency Practitioners Association of Australia (IPA) Code of Professional Practice (IPA Code)

- 73 The IPA issues guidance to its members and the industry on the impact of pre-appointment insolvency advice on independence and the obligation for appropriate disclosure to creditors.

<sup>45</sup> Sections 436DA and 506A, Corporations Act.

<sup>46</sup> For example, BMA Gold Limited (administrators appointed)—Supreme Court of Queensland No 1373 of 2007 and No 1374 of 2007. Following ASIC advising of its concerns regarding independence, the practitioner made an application to court and a special purpose administrator was appointed by the court to address concerns about the independence of the incumbent administrator.

- 74 In summary the IPA's guidance through the IPA Code is that pre-appointment advice will generally not be a risk to independence, providing the advice given by the practitioner is restricted to:
- (a) the solvency of the company;
  - (b) consequences of insolvency;
  - (c) alternative courses of action in the case of insolvency; and
  - (d) the advice is to the company.
- 75 Should the insolvency practitioner breach the IPA Code, the IPA may instigate action against its members. Through commentary in relevant case law, the court has recognised the standard set by the professional code, hence non-adherence to those standards could be taken into account by ASIC in assessing possible contraventions of the Corporations Act.
- 76 Where the practitioner accepts an insolvency appointment after acting as an investigating accountant (either for a creditor of the company or the company itself), the IPA Code states<sup>47</sup> that the following details about the prior role as investigating accountant must be disclosed in the DIRRI:
- (a) who appointed the insolvency practitioner;
  - (b) to whom the practitioner reported;
  - (c) the timeframe of the report; and
  - (d) the fee paid.

### **Insolvency practitioners: Registration framework**

- 77 The current framework for the regulation of insolvency practitioners is by way of registration rather than licensing:
- (a) only liquidators who are registered under the Corporations Act are permitted to accept certain appointments under Chapter 5 of the Act;<sup>48</sup>
  - (b) only natural persons may apply to be registered as a liquidator (s1279(1)).
- 78 To assist the Inquiry, below are three key differences between a licensing regime as opposed to a registration regime, as is applicable to registered liquidators:
- (a) A licensing regime enables conditions to be placed on the conduct obligations of the licensee (i.e. if this is applied to registered liquidators,

<sup>47</sup> Paragraph 6.8.1(c), IPA Code.

<sup>48</sup> Sections 411(7)(d), 418(1)(d), 532(1) and (4); and 448B of the Corporations Act. Only registered liquidators may be appointed as a receiver, receiver and manager, voluntary administrator, administrator of deed of company arrangement, or liquidator of a creditors' voluntary liquidation.

it would be the ability to place licence conditions as to the conduct of registered liquidators).

- (b) A licensing regime requires not only an internal dispute resolution procedure, but also membership of an external dispute resolution scheme.
- (c) A licensing regime imposes obligations on the licensee to report breaches of their licence obligations.

Details of the obligations on holders of Australian financial services (AFS) licences are contained in Division 3, Part 7.6 of the Corporations Act (s912A–912F).

### Registered liquidators

- 79 ASIC is the authority charged with registering liquidators. ASIC must grant registration if an applicant satisfies the requirements set out in s1282(2). These requirements relate to the qualifications and experience of the person which, in the opinion of ASIC, ensure that the person is capable of performing the duties of a liquidator and is otherwise a fit and proper person to be registered as a liquidator. The requirements of s1282 and how ASIC considers those requirements are outlined at Appendix B4.
- 80 If an applicant satisfies the criteria, ASIC must register the applicant and if the criteria are not met, it must refuse the application.<sup>49</sup>
- 81 Experience that satisfies the capability criteria is published in ASIC Regulatory Guide 186 *External administration: Liquidator registration* (RG 186). ASIC has also published Information Sheet 34 *How to apply for registration as a liquidator* (INFO 34), which describes in detail the registration process and the material that is required to be lodged to support the application. See Appendix B4 for links to these documents.
- 82 ASIC must not register as a liquidator a person who is disqualified from managing corporations under Part 2D.6 of the Corporations Act and may refuse to register a person who is not resident in Australia.
- 83 Before ASIC refuses an application it must offer a hearing to the applicant: s1282(10). An appeal of ASIC's decision would be to the Administrative Appeals Tribunal.
- 84 Of the 662 registered liquidators,<sup>50</sup> 85 do not currently hold insolvency appointments. Registered liquidator applications are shown in Table 3 below.

<sup>49</sup> Section 1282, Corporations Act.

<sup>50</sup> As at February 2010.

**Table 3: Registered liquidators' applications since 2006–07<sup>51</sup>**

Financial year	Registered liquidator applications	Official liquidator applications
2006–07	20	24
2007–08	32	29
2008–09	25	34
2009–2010 YTD	10	15
<b>Total</b>	<b>87</b>	<b>102</b>

**Official liquidators**

- 85 ASIC may register any person who is a registered liquidator as an official liquidator: s1283.
- 86 The key difference between registered liquidators and official liquidators is that only those who are registered with the additional designation of 'official liquidator' are entitled to act as court appointed liquidators: s532(1A) and 532(8).
- 87 RG 186 outlines ASIC's approach for those people seeking registration as an official liquidator. Information Sheet 59 *Registration of official liquidators* (INFO 59) describes in detail the registration process and the material that is required to be lodged to support the application. See Appendix B4 for links to these documents.
- 88 Should ASIC decide not to grant registration to a person seeking to register as an official liquidator, the applicant can seek review of ASIC's decision by the Administrative Appeals Tribunal.
- 89 Applicants must acknowledge that, when appointed by the court as an official liquidator, they are an officer of the court and have responsibilities to the court in connection with that external administration.
- 90 Applicants must also provide ASIC with an undertaking that they will not refuse to accept a court appointment solely due to insufficient assets within the entity being wound up.
- 91 There are 492 official liquidators.<sup>52</sup> Official liquidator applications are shown at Table 3 above.

<sup>51</sup> An insolvency practitioner may be both a registered liquidator and an official liquidator subject to their level of experience and depth of resources.

<sup>52</sup> As at February 2010.

**Insurance/security bond**

- 92 Prior to 1 July 2008, upon registration a liquidator was required to lodge with ASIC, and thereafter maintain, a security for due performance of his or her duties as a liquidator in accordance with ASIC Superseded Policy Statement 33 *Security deposits* (SPS 33). Legislative amendments in 2007<sup>53</sup> require a liquidator to maintain adequate and appropriate professional indemnity and fidelity insurance, for claims that may be made against the liquidator in connection with external administrations: s1284.
- 93 Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194), issued in June 2008, sets out ASIC's requirements in relation to the appropriate insurance cover. See Appendix B4 for a link to this document.
- 94 Currently registered liquidators are required to lodge an annual statement confirming they hold insurance as required by RG 194.
- 95 The required level of professional indemnity cover is detailed in RG 194.42 and for fidelity cover at RG 194.82.
- 96 Generally, professional indemnity cover would be considered adequate where:
- (a) the sum insured for each claim, and for all claims in aggregate, is not less than the lowest of:
    - (i) \$20 million; or
    - (ii) 10 times the highest gross fee billed by the registered liquidator in a single year for a particular insolvency engagement;
  - (b) the policy's excess for each and every claim is set at a sufficient low level for the registered liquidator's business to be able to confidently sustain it as an uninsured loss, taking into account the financial resources of the registered liquidator and their firm.
- 97 ASIC's regulatory guide does not indicate the level of the cover that might be considered adequate for fidelity insurance. We would expect registered liquidators should take a prudent, conservative approach when determining an adequate level of insurance to cover the risk of fraud or dishonesty claims that may arise during the period of the cover. This involves assessing the likely number, nature, scope, complexity, asset values and risk profile of the kinds of businesses to which the registered liquidator is normally appointed as an external administrator. Additionally, the assessment should consider the number of employees they have, the quality of the registered liquidator's firm's compliance systems and internal controls, as well as the fidelity

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<sup>53</sup> *Corporations Amendment (Insolvency) Act 2007*.

history of the firm and the financial resources of the registered liquidator and their firm to meet a claim for fraud or dishonesty.

### **Maintenance of registers**

- 98 ASIC is required to maintain a register of liquidators,<sup>54</sup> which records specific information including name, date of registration, principal place of business, practice/trading name and any suspension or orders by the Company Auditors and Liquidators Disciplinary Board (CALDB) under s1292(9).
- 99 Registered liquidators must inform ASIC of any changes in matters recorded on the register or if they become disqualified from managing corporations: s1287.
- 100 All registered liquidators must lodge with ASIC a statement on an annual basis: s1288.
- 101 Orders involving the cancellation and suspension of liquidators, reprimands and undertakings are recorded on the register of liquidators. Copies of those orders are included on ASIC's database.
- 102 In the case of cancellation of registration, ASIC is required to remove from the register the name and any other particulars relating to that person.<sup>55</sup> A member of the public searching the register will therefore not have ready access to historical information in relation to that person.

### **Post registration**

- 103 To remain registered as a liquidator, the liquidator has an ongoing obligation to:
- (a) perform adequately and properly the duties and functions of a registered liquidator;
  - (b) remain a fit and proper person to be registered;
  - (c) not become disqualified from managing corporations under Part 2D;
  - (d) remain resident in Australia;
  - (e) maintain security/insurance that complies with s1284;
  - (f) lodge an annual statement as required by s1288.
- 104 ASIC may cancel a liquidator's registration if the liquidator:
- (a) becomes insolvent under administration;
  - (b) becomes disqualified from managing corporations under Part 2D.6; or

<sup>54</sup> Section 1286(1), Corporations Act.

<sup>55</sup> Section 1286(3), Corporations Act.



- (c) contravenes s1284(1) by failure to maintain adequate and appropriate professional indemnity insurance and fidelity insurance.<sup>56</sup>

105 The CALDB may cancel or suspend a registration for breaches of specific and general obligations (s1292(2))<sup>57</sup> and must cancel a registration in the event of disqualification under Part 2D.6 or mental infirmity (s1292(7)).

106 ASIC may cancel or suspend a liquidator's status as an official liquidator<sup>58</sup> or require an undertaking from that official liquidator to refrain from engaging in specified conduct except on specified conditions: see paragraph 168.

107 Otherwise a liquidator retains registration until he or she voluntarily surrenders that registration (with ASIC consent under s1290) or the liquidator dies: s1282(8).

### **Obligations of insolvency practitioners**

108 Insolvency practitioners have various duties. These obligations arise from:

- (a) general law;
- (b) the Corporations Act; and
- (c) guidance issued by ASIC and/or any professional body of which the practitioner is a member (e.g. the IPA or one of the peak accounting bodies).<sup>59</sup>

#### **General law duties**

109 At general law, liquidators owe duties to the company and its creditors and contributories/shareholders. These duties arise from courts having seen the role played by liquidators as being similar to that of a fiduciary.

110 The more significant 'fiduciary' duties to which liquidators are subject include a duty:

- (a) to act honestly and to exercise powers bona fide and for the purposes for which they were conferred;<sup>60</sup>
- (b) to act with a reasonable degree of skill and care;<sup>61</sup>
- (c) to avoid a conflict of duty and interest;<sup>62</sup>
- (d) not to profit (otherwise than as permitted by law);<sup>63</sup>

<sup>56</sup> Section 1290A, Corporations Act.

<sup>57</sup> See under 'Companies Auditors and Liquidators Disciplinary Board (CALDB)' starting at paragraph 152.

<sup>58</sup> Section 1291, Corporations Act.

<sup>59</sup> Institute of Chartered Accountants in Australia, CPA Australia Ltd, National Institute of Accountants.

<sup>60</sup> *Burnells Pty Ltd (in liq)* (1979) 4 ACLR 213; *Re Ah Toy* (1986) 10 FCR 356.

<sup>61</sup> *Re Windsor Steam Coal Co* (1901) Ltd [1929] 1 Ch 151 at 165.

<sup>62</sup> *Maguire v Makaronis* (1997) 188 CLR 449.

<sup>63</sup> *Re ACN 003 671 387 Pty Ltd (in liq)* (2004) 42 ACSR 296; 22 ACLC 901; [2002] NSWSC 578 at 35.

- (e) not to contract with the company;<sup>64</sup>
- (f) to act impartially;<sup>65</sup> and
- (g) to exercise discretion.<sup>66</sup>

111 While examination of these fiduciary duties has mainly occurred in the context of liquidators, it is reasonable to expect that courts<sup>67</sup> will readily impose such general law duties upon other insolvency practitioners.<sup>68</sup>

112 Depending on the circumstances, if an insolvency practitioner breaches any of these duties, a claim may be brought against him or her by the company, its creditors and/or its contributories for recovery of losses sustained as a result of the breach.

113 If however the relevant insolvency practitioner does not hold insurance or the policy held does not respond (e.g. where fraud has been committed by the insolvency practitioner), recovery of any losses would depend on the practitioner's individual financial resources and ability to satisfy the relevant claim and/or losses.

#### **Corporations Act duties**

114 The Corporations Act imposes various duties upon insolvency practitioners in connection with the external administration of companies.

115 Examples of some of the more significant duties imposed on liquidators by the Corporations Act are to:

- (a) investigate and report on the company's affairs;
- (b) keep books and accounts;
- (c) collect assets to which the company is entitled;
- (d) preserve and properly realise the assets of the company;
- (e) discharge liabilities;
- (f) disclaim onerous property (i.e. property that is unsaleable or not readily saleable because it binds the possessor to the performance of any onerous act or to the payment of a sum of money under s568(1)(c) of the Corporations Act);
- (g) distribute surplus funds;
- (h) bring about deregistration of the company; and
- (i) lodge various statutory reports with ASIC.

<sup>64</sup> Ibid at 35–36.

<sup>65</sup> *Re Contract Corp (Gooch's Case)* (1871) LR 7 Ch App 207 at 211.

<sup>66</sup> *Re Day & Dent Constructions Pty Ltd (in liq)* (1984) 32 NTR 13.

<sup>67</sup> *The Legal Standard of Loyalty and Professional Guidelines*, Justice RP Austin, 2006 National Conference of IPAA

<sup>68</sup> A voluntary administrator stands in a fiduciary capacity with the company under administration: *Re Krejci as Liquidator of Eaton Electrical Services Pty Ltd* (2006) 58 ACSR 403.

116 Similar reporting and conduct requirements are imposed by the Corporations Act on other insolvency practitioners such as voluntary administrators.<sup>69</sup>

117 Compliance with many of these statutory duties (particularly those relating to reporting) assists relevant stakeholders, such as creditors and ASIC, to gain the information they need to protect their rights or, in the case of ASIC, to fulfil its function as a regulator.

#### **Duties as an 'officer'**

118 Liquidators, administrators, receivers, and receivers and managers are deemed to be an 'officer' of the relevant corporation,<sup>70</sup> and as such are subject to the general duties of directors, other officers and employees of corporations as contained in s180–183 of the Corporations Act, namely:

- (a) the duty to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of the corporation, in the corporation's circumstances, and occupied the office held by, and had the same responsibilities within the corporation as, the officer (s180);
- (b) the duty to act in good faith in the best interests of the corporation and for a proper purpose (s181);
- (c) the duty not to make improper use of his or her position to gain an advantage (s182); and
- (d) the duty not to make improper use of information to gain an advantage (s183).

#### **ASIC's regulatory guidance**

119 ASIC has issued a number of regulatory guides and information sheets that assist insolvency practitioners with their obligations and provide stakeholders with clarity as to the liquidator's obligations. The guidance for external administrators is listed in Table 4 below, while information sheets for stakeholders are listed in Table 13 at paragraph 259.

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<sup>69</sup> See, for example, s438A of the Corporations Act, which requires an administrator to investigate the affairs and consider possible courses of action.

<sup>70</sup> When so acting pursuant to the definition of 'officer' in s9 of the Corporations Act.

**Table 4: ASIC regulatory guides (RGs) and consultation papers (CPs) relating to registered liquidators**

RG no.	Title	Release date
<a href="#">RG 106</a>	<i>Controller' duties and bank accounts</i>	May 1996
<a href="#">RG 81</a>	<i>Destruction of books</i>	March 2000
<a href="#">RG 174</a>	<i>Externally administered companies: Financial reporting and AGMs</i>	June 2003
<a href="#">RG 82</a>	<i>External administrators: Deeds of company arrangement involving a creditor's trust—A guide for registered liquidators appointed under Part 5.3A</i>	May 2005
<a href="#">RG 186</a>	<i>External administration: Liquidator registration</i>	September 2005
<a href="#">RG 194</a>	<i>Insurance requirements for registered liquidators</i>	June 2008
<a href="#">RG 16</a>	<i>External administrators: Reporting and lodging</i>	July 2008
<a href="#">RG 109</a>	<i>Assetless administration fund: Funding criteria and guidelines</i>	November 2009
<a href="#">CP 124</a>	<i>Duty to prevent insolvent trading: Guide for directors (including draft regulatory guide)</i>	24 November 2009 (consultation period closed on 22 January 2010)

### Professional conduct standards

- 120 Insolvency practitioners are subject to professional conduct standards issued by the insolvency industry body and professional bodies of which the insolvency practitioner is a member. These mandatory professional conduct standards are:
- (a) *APS 7 Statement of Insolvency Standards*, issued by the National Councils of the Institute of Chartered Accountants in Australia (ICAA) and the Australian Society of Certified Practising Accountants, now CPA Australia Ltd (CPA);<sup>71</sup>
  - (b) *APES 330 Insolvency Services effective 1 April 2010* (replacing APS 7), issued by the Accounting Professional and Ethical Standards Board Limited; and
  - (c) IPA's Code of Professional Practice, issued by IPA.<sup>72</sup>
- 121 These professional conduct standards are considered at paragraphs 97 to 105.
- 122 Where appropriate, ASIC contributes to work by industry bodies to develop professional standards to influence appropriate conduct standards and

<sup>71</sup> Referred to as NIA, ICAA and CPA respectively.

<sup>72</sup> This Code of Professional Practice superseded statements and other guides previously issued by the IPA.

benchmarks. For example, ASIC contributed to the IPA's development of its Code of Professional Practice and APES 330.

- 123 ASIC considers compliance with these professional standards, practices and principles as part of its monitoring of insolvency practitioners' compliance with their conduct obligations.

#### *APS 7*

- 124 APS 7 was issued in March 1998 by the National Councils of the Institute of Chartered Accountants in Australia and the Australian Society of Certified Practising Accountants. APS 7 covers the application of the Fundamental Principles of Professional Conduct as contained in the Code of Professional Conduct.

- 125 APS 7 articulates the basic principles governing the professional responsibilities which a member must exercise in the course of insolvency practice.

- 126 APS 7 is being replaced by APES 330.

#### *APES 330*

- 127 APES 330 was issued by the Accounting Professional and Ethical Standards Board Limited (ABESB) on 22 September 2009 and replaces APS 7 as from 1 April 2010.<sup>73</sup> APES 330 (like APS 7) sets out mandatory requirements and guidance for persons who perform insolvency services covering:

- (a) fundamental responsibilities including compliance with the Code of Professional Conduct, relevant law, acting in the public interest, ensuring that the member has the capacity and access to necessary resources to perform the administration in an effective and efficient manner; maintaining professional competence and due care, not misusing confidential information, complying with the marketing requirements of the Code;
- (b) professional independence;
- (c) professional engagement matters;
- (d) dealings with property and other assets;
- (e) obligations when acting as an expert witness;
- (f) obligations with respect to charging professional fees and expenses; and
- (g) documentation and quality control.

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<sup>73</sup> Early adoption of the standard was permitted under paragraph 1.1 of APES 330.

*Scope of application*

- 128 The standard is a mandatory requirement for members of a professional body that has adopted APES 330 including the NIA, CPA and the ICAA.

**IPA's Code of Professional Practice (IPA Code)**

- 129 The Insolvency Practitioners Association (IPA) has developed and published a Code of Professional Practice (IPA Code) for their members. The IPA Code sets out a number of principles informing the conduct, remuneration and practice management of its members.

*Scope of application*

- 130 The IPA Code is mandatory for members of the IPA. The sections of the Code dealing with independence and remuneration were effective from 31 December 2007, with a transition period which expired on 1 April 2008. The balance of the Code was effective from 21 May 2008.
- 131 The IPA Code applies to its members and uses a three level hierarchy of wording to describe the requirements: 'Must' are mandatory requirements; 'Should' are recommended behaviours; and 'May' are permissive statements'. IPA principles governing the conduct of insolvency practitioners are set out in Appendix B5.

**Remuneration and disbursements**

- 132 The Corporations Act prescribes how the remuneration of an external administrator is approved and the circumstances in which the court can be asked to review the remuneration claimed. Guidance is also provided by the relevant professional bodies and information sheets on remuneration approval to assist creditors are available from ASIC and IPA.
- 133 The key elements of the regulatory framework dealing with an insolvency practitioner's remuneration are the requirements that:
- (a) remuneration must be approved by the approving party (see Table 5 below);
  - (b) the insolvency practitioner must provide sufficient information to enable the approving party to assess whether the remuneration is reasonable; and
  - (c) if the remuneration is referred to the court for review, the court must have regard to whether the remuneration is reasonable taking into account any or all of a number of matters prescribed in the Corporations Act.
- 134 The legislative framework for the remuneration of insolvency practitioners and the role of ASIC is considered below.

### Approval process

- 135 An insolvency practitioner's remuneration for the work they perform must be approved by the appropriate body/persons. The body/persons with authority to approve the level of the fee depends on the type of external administration. Table 5 below summarises those entitled to approve remuneration in various insolvency administrations.

**Table 5: Who may approve fees<sup>74</sup>**

Type of external administration	Creditors Committee	Creditors	Court
Administrator in a voluntary administration	✓ <sup>(1)</sup>	✓	✓
Administrator of a deed of company arrangements	✓ <sup>(1)</sup>	✓	✓
Creditors' voluntary liquidator	✓ <sup>(1)</sup>	✓ <sup>(5)</sup>	✗ <sup>(3)</sup>
Court appointed liquidator	✓ <sup>(1)</sup>	✓ <sup>(4)(5)</sup>	✓ <sup>(2)</sup>

(1) If there is one.

(2) If there is no approval by the committee or the creditors.

(3) Unless an application is made for a fee review.

(4) If there is no creditors' committee or the committee fails to approve the fees.

(5) If insufficient creditors turn up to the meeting called by the liquidator to approve fees, the liquidator is entitled to be paid up to a maximum of \$5,000, or more if specified in the Corporations Regulations 2001.

### Administrator in a voluntary administration or under a DOCA

- 136 The administrator of a company under administration or under a deed of company arrangement (DOCA), is entitled to receive such remuneration as is determined:
- (a) by agreement between the administrator and the committee of creditors (if any);
  - (b) by resolution of the company's creditors; or
  - (c) if there is no such agreement or resolution—by the court.<sup>75</sup>

- 137 The court may review an administrator's remuneration even if there has been no meeting of the committee of creditors<sup>76</sup> or of the company's creditors, and confirm, increase or reduce it.

### Court-appointed liquidators

- 138 A liquidator appointed by the court is entitled to receive such remuneration by way of a percentage or otherwise as is determined:

<sup>74</sup> The relevant legislative provisions in respect of each type of EXAD are detailed in the following paragraphs.

<sup>75</sup> Sections 449E(1) and 449E(1A), Corporations Act.

<sup>76</sup> Section 449E(2), Corporations Act.

- (a) if there is a committee of inspection—by agreement with the committee; or
- (b) if there is no committee of inspection, or the liquidator and the committee of inspection fail to agree:
  - (i) by resolution of the creditors; or
  - (ii) if no such resolution is passed—by the court.<sup>77</sup>

### **Liquidator in a voluntary winding up**

- 139 In the case of a creditors' voluntary winding up, the liquidator's remuneration is set by the committee of inspection or if there is no committee of inspection, by a resolution of the creditors.<sup>78</sup> There are no specific powers empowering the court to fix remuneration in respect of a voluntary liquidation; however, the courts have held that if the statutory means of fixing remuneration is unworkable, the court can determine remuneration pursuant to s511(1)(a) of the Corporations Act, which provides that the liquidator can apply to the court to determine any question arising in the winding up of a company.<sup>79</sup>

### **Practitioner's report on proposed fees**

- 140 To assist creditors to determine the reasonableness of an insolvency practitioner's remuneration, the *Corporations Amendment (Insolvency) Act 2007* (the 2007 Reforms) 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.<sup>80</sup>

### **Remuneration calculation**

- 141 There is no fixed scale of remuneration for an external administrator. Fees are most commonly charged on hourly rates although they may otherwise be calculated, such as a quoted fixed fee.
- 142 The IPA Code states that the particular method and any specific terms concerning remuneration are a matter for consideration by the approving parties (see Table 5 above), upon full disclosure of the arrangement by the external administrator.

<sup>77</sup> Section 473(3), Corporations Act.

<sup>78</sup> Section 499(3), Corporations Act.

<sup>79</sup> *Re Walker* (2005) 23 ACLC 1,276.

<sup>80</sup> Sections 449E(5), 449E(6), 449E(7), 473(11), 473(12), 499(6) and 499(7), Corporations Act.



### The role of ASIC

- 143 ASIC's role in the approval process is limited to monitoring the compliance by insolvency practitioners with procedural requirements. In certain circumstances ASIC has the power to refer a remuneration claim to the court for review.
- 144 ASIC believes that it is critical that creditors understand their rights in the approval process and has therefore issued Information Sheet 85 *Approving fees: A guide for creditors* (INFO 85). INFO 85 also provides practical guidance and information for creditors regarding the approval of an insolvency practitioner's fees and outlines the rights that creditors have in the approval process including the right to lodge a complaint with ASIC. For example, INFO 85 advises creditors to consider setting a maximum monetary limit on the amount that an insolvency practitioner may receive for work that is yet to be carried out.
- 145 If a creditor has any queries or complaints regarding an insolvency practitioner, they may contact ASIC's Infoline or lodge a complaint with ASIC.

### Review of external administrators' remuneration

- 146 The 2007 Reforms introduced amendments to the Corporations Act<sup>81</sup> to provide for the court to have regard to a number of matters in determining whether the remuneration is 'reasonable', including the complexity of the work performed, the quality of the work performed, the extent to which the external administrator is required to deal with extraordinary issues and the extent to which the work was reasonably necessary.
- 147 Since the commencement of the 2007 Reforms on 31 December 2007, ASIC has standing to apply to the court for a review of an administrator's remuneration.<sup>82</sup> It also has standing to apply to the court to review the remuneration of a court-appointed liquidator<sup>83</sup> where the remuneration has been approved by the committee of inspection but has no standing to apply to the court to review the remuneration of a liquidator in respect of a creditors' voluntary winding up.
- 148 The Corporations Act outlines the circumstances under which a creditor can apply to court for a review of an insolvency practitioner's remuneration.<sup>84</sup>

<sup>81</sup> Sections 449E(4), 473(10) and 504(2), Corporations Act.

<sup>82</sup> Sections 449E(2), Corporations Act.

<sup>83</sup> Section 473(5), Corporations Act.

<sup>84</sup> Sections 449E(2), 473(5) and 504(1), Corporations Act.

### Disbursements

- 149 An insolvency practitioner is entitled to be reimbursed for necessary and properly incurred expenses.<sup>85</sup> Such expenses might include, for example:
- (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;
  - (e) stationery, photocopying, telephone and postage costs.
- 150 Disbursements do not form part of an insolvency practitioner's remuneration and do not require creditor approval before being drawn. However, insolvency practitioners must account to creditors for disbursements. They also stand in a fiduciary relationship with the creditors and therefore must ensure that disbursements are reasonable and necessary.<sup>86</sup>

### Disciplinary and deterrence framework

- 151 ASIC's powers in respect of alleged misconduct by insolvency practitioners are:
- (a) administrative proceedings by referral to CALDB;
  - (b) conduct proceedings by referral to CALDB;
  - (c) court proceedings;
  - (d) enforceable undertakings;
  - (e) power to cancel or suspend or require a person to refrain from certain conduct (this provision applies to official liquidators only: s1291).

### Company Auditors and Liquidators Disciplinary Board (CALDB)

- 152 The CALDB was established in 1990 under the ASIC Act. Its panels consist of members of the legal and accounting professions and business members appointed by the Commonwealth Treasurer. The CALDB's sole function is to hear and determine applications made to it by ASIC or APRA.
- 153 The CALDB is an independent statutory body given functions and powers under the ASIC Act. The CALDB's disciplinary responsibilities under the ASIC Act are intended to provide an incentive to registered auditors and liquidators to maintain high professional standards. The CALDB also has a public protective and educative role by virtue of its jurisdiction to cancel or suspend the registration of an auditor or of a liquidator.

<sup>85</sup> For example, s443A and 443D of the Corporations Act in relation to the administrator of a company under administration

<sup>86</sup> *Re Stockford Ltd (subject to deed of company arrangement)*; *Korda and Anor (as joint and several deed administrators)* 2004 52 ACSR 279 at para 51.

- 154 The CALDB issues manuals and other guidelines which set out the practice and procedures the Board adopts in preparing and conducting hearings in both conduct and administrative matters.<sup>87</sup>
- 155 ASIC may make an *administrative* application to the CALDB for:
- (a) cancellation or suspension of registration under s1292(2)(a) where a liquidator has:
    - (i) contravened s1288;<sup>88</sup> or
    - (ii) ceased to be resident in Australia; or
  - (b) cancellation of registration under s1292(7) where the registered liquidator is a person disqualified from managing corporations under Part D.6 of the Corporations Act (and refuses to voluntarily surrender registration).
- 156 In cases of alleged insolvency practitioner misconduct, ASIC may make a *conduct* application to the CALDB which may deal with a person where the Board is satisfied:<sup>89</sup>
- that the person has failed ... to carry out or perform adequately and properly:
    - (i) the duties of a liquidator; or
    - (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
  - or is otherwise not a fit and proper person to remain registered as a liquidator; ...
- 157 The CALDB, when satisfied of a registered liquidator's failure to adequately and properly perform their duties or functions, is empowered to order the cancellation or suspension for a specified period of the registration of the liquidator or to admonish or reprimand the person, and/or require the person to give certain undertakings.<sup>90</sup>
- 158 The CALDB is not empowered to make orders as to restitution, compensation or any pecuniary award.
- 159 The CALDB is able to make orders as to costs and publicity.<sup>91</sup>
- 160 CALDB proceedings must be held in private<sup>92</sup> unless a person other than ASIC or APRA who is entitled to be given an opportunity to appear at the hearing requests the hearing be heard in public. ASIC is not aware of any CALDB hearings in the last 10 years being held in public.

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<sup>87</sup> Available under the 'Procedures' tab on the CALDB website ([www.caldb.gov.au](http://www.caldb.gov.au)).

<sup>88</sup> Failure to lodge an annual return (effective 18 October 2008).

<sup>89</sup> Section 1292(2)(d), Corporations Act.

<sup>90</sup> Sections 1292(2) and 1292(9), Corporations Act.

<sup>91</sup> Following the 2007 Reforms, CALDB's power to publicise was introduced effective from 31 December 2007.

<sup>92</sup> Section 216(2), ASIC Act.

- 161 ASIC is therefore unable to publicly refer to a filing of proceedings with CALDB, as it would do in civil or criminal proceedings. No public comment is able to be made until the conclusion of the CALDB proceedings, and unless the CALDB has made orders (including as to publicity) against the practitioner. Further, if the practitioner appeals the CALDB decision,<sup>93</sup> orders may be made staying the operation and publication of the CALDB orders pending the conclusion of the review or appeal process.<sup>94</sup> In such circumstances, the practitioner is able to continue in practice pending the appeal process and the public remains unaware that ASIC has taken disciplinary action against the practitioner and that the CALDB has made adverse orders against him/her.
- 162 A recent Full Federal Court decision,<sup>95</sup> following an application brought by ASIC, gave further guidance on the issues to be considered by the AAT and courts in applications where confidentiality orders are sought.
- 163 To initiate proceedings in the CALDB, ASIC as applicant is required to file a Statement of Facts and Contentions (SOFAC). The CALDB Manual states:<sup>96</sup>
- A SOFAC is required by the Board to assist in clarifying issues. The statement should be served on the Respondent at the same time as it is filed with the Board. Six copies are required to be filed with the Board. The SOFAC should clearly and concisely set out all of the facts on which the Applicant relies, the contentions and arguments drawn from those facts and any issues of law or legal interpretation to be put at the Hearing of the Application. It should also include as annexures, all of the documentary evidence supporting the facts and contentions.
- 164 ASIC is therefore required to gather, prepare and collate all evidence in respect of its case in order to initiate proceedings with the CALDB. This differs from the initiation of civil proceedings in the courts as civil proceedings are commonly commenced by the Statement of Claim (or other originating process) which recites the allegations made by the plaintiff and the facts on which they rely to support those allegations. A plaintiff in civil proceedings is not required to produce evidence on which it will rely at the commencement of proceedings. Instead, the disclosure of that evidence through discovery and interrogatories is an interlocutory step in the proceedings which only occurs after the pleadings have closed (i.e. once the defendant or respondent has filed its defence, further and better particulars have been provided and any replies have been exchanged).

<sup>93</sup> A decision by CALDB may be appealed to the Administrative Appeals Tribunal (AAT) or to the Federal Court.

<sup>94</sup> Of the nine insolvency practitioner disciplinary decisions handed down by the CALDB since 2006, six have been appealed by the practitioners, and in four of those appeals, orders were made staying the CALDB decision and maintaining the confidentiality of the CALDB decision pending the appeal process.

<sup>95</sup> *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC

<sup>96</sup> Paragraph 3.2, CALDB's *Manual of Practice and Procedure (Conduct)* March 2009 Edition

## Court proceedings

- 165 In circumstances where ASIC forms the view that a liquidator's misconduct is serious and/or where there are reasonable grounds on which to seek orders for compensation/restitution, ASIC may instigate court proceedings under s536, 447E or 423 of the Corporations Act. ASIC undertook court proceedings in relation to Mr Robert Edge<sup>97</sup> and Mr Stuart Ariff.<sup>98</sup> These were matters in which the orders sought (successfully) by ASIC included restitution as well as protective orders in respect of registration.

## Enforceable undertakings

- 166 ASIC may enter into an enforceable undertaking with an insolvency practitioner, instead of seeking a civil order from a court or taking action in the CALDB in certain circumstances, subject to various matters which may include:
- (a) the practitioner's willingness to acknowledge ASIC's concerns regarding his/her conduct;<sup>99</sup>
  - (b) the practitioner's agreement to undertakings which ASIC believes are appropriate for its concerns;
  - (c) ASIC being of the view that the practitioner will comply with the terms of the undertaking; and
  - (d) ASIC being of the view that the undertaking is likely to achieve sustained improvement in a practitioner's conduct and/or practice systems or achieve an orderly exit of the practitioner from the industry.
- 167 ASIC's Regulatory Guide 100 *Enforceable undertakings* (RG 100) details ASIC's approach to accepting enforceable undertakings and the matters ASIC takes into account in determining whether an enforceable undertaking is a more effective regulatory outcome.

## Official liquidators: s1291

- 168 Section 1291 provides that ASIC 'may ....cancel, or suspend for a specified period, the registration as an *official liquidator*...[emphasis added]', and 'require a person registered as an official liquidator to give an undertaking to refrain from engaging in specified conduct except on specified conditions'.
- 169 ASIC has no statutory power similar to that in s1291 to impose conditions on the registration of a registered liquidator.

<sup>97</sup> ASIC Media Releases 07-146 and 07-180

<sup>98</sup> ASIC Media Releases 08-180 and 09-150AD

<sup>99</sup> Including period of suspension or surrender of registration

- 170 In cases where ASIC's concerns relate to the conduct of an insolvency practitioner in their capacity as a registered liquidator (e.g. when appointed as a voluntary administrator), ASIC's remedies are as outlined previously (i.e. referral to CALDB, court proceedings, or an enforceable undertaking).
- 171 As stated, the restriction of s1291 to official liquidators only does not allow ASIC to address directly the conduct of a registered liquidator. Such administrations represent 75% of insolvency appointments.<sup>100</sup>
- 172 Official liquidators are court-appointed, and are officers of the court with responsibilities to the court for those external administrations.
- 173 For the period 2006–07 financial year to 31 December 2009, approximately 75% of insolvency appointments required registration only as a registered liquidator and not as an official liquidator: see Appendix B3.
- 174 Since July 2004, liquidator conduct matters in respect of which ASIC has taken enforcement action, have involved conduct principally as a registered liquidator rather than as an official liquidator.

## How does this economic philosophy shape ASIC's role?

- 175 In the insolvency regime, ASIC is a registration, oversight and enforcement body. The regime is largely self executing: registered and official liquidators and company officers are expected to comply with the conduct and disclosure obligations in the law. ASIC oversees compliance with these obligations, and then takes appropriate action when there is non-compliance. ASIC's power to take action ahead of non-compliance is limited.

### ASIC structure

- 176 In 2008 ASIC completed a strategic review of its operations. The aim of the strategic review was to create an ASIC that:
- (a) better understands the markets it regulates;
  - (b) is more forward looking in examining issues and systemic risks;
  - (c) is much clearer in outlining to the market why it has chosen to intervene and the behavioural changes it is seeking; and
  - (d) has a clearer set of priorities.
- 177 One of the major outcomes of the strategic review was that ASIC restructured to better fulfil its role as a conduct and disclosure regulator. The four directorates (Enforcement, Compliance, Regulation and Consumer

<sup>100</sup> These appointments are principally creditors' voluntary liquidations and voluntary administrations.

Protection) were replaced with two units: the Financial Economy comprising outwardly focused stakeholder teams and Deterrence teams, and the Real Economy: see Appendix A for an outline of ASIC structure and strategic priorities.

- 178 The appointment of three additional Commissioners has provided specialist skills bases within the Commission. In particular, Commissioner Michael Dwyer's appointment has brought significant specialist insolvency related skills.
- 179 Commissioner Dwyer was appointed in December 2008 and has direct oversight of the stakeholder teams which include those areas involving insolvency. Commissioner Dwyer has extensive experience as a chartered accountant and an insolvency practitioner, including a term as National President of the Insolvency Practitioners' Association of Australia. He has also been a partner of international accounting firms for over 20 years specialising in insolvency and holding leadership positions in those firms.
- 180 There are currently 14 stakeholder teams and 8 deterrence teams located in the Financial Economy part of ASIC's structure. The aim of the Financial Economy teams is to increase confidence and integrity in Australia's capital and financial markets and better protect stakeholders. The Financial Economy teams are outwardly focused, that is, their work focuses on ASIC's stakeholders. This focus means that ASIC is better placed to drive behavioural change and to better understand the external stakeholders it regulates.
- 181 Each stakeholder team operates under a national structure and undertakes a variety of activities to influence behaviour of participants in the financial economy and bring about positive changes for stakeholders, including:
- (a) monitoring compliance with the law (including actioning referrals of complaints from the Real Economy) and promoting behavioural change by conducting surveillances;
  - (b) intervening in cases where serious non-compliance is identified, particularly where there may be harm to stakeholders or the integrity of Australia's financial markets;
  - (c) working with industry and other stakeholders to promote higher standards of business conduct and guide them to deliver self-regulatory initiatives;
  - (d) developing policy and industry guidance;
  - (e) assisting the industry to understand their legal obligations and the regulators expectations;
  - (f) delivering information and education products and services; and
  - (g) developing stakeholder protection campaigns and compliance projects.

- 182 Stakeholder teams will identify specific areas of focus each year and they continuously review their priorities to address new issues and emerging risks.
- 183 The Financial Economy stakeholder teams most relevant to this Inquiry's terms of reference are:
- (a) Insolvency Practitioners and Liquidators;
  - (b) Corporations and Emerging Mining and Resources;
  - (c) Accountants and Auditors; and
  - (d) Investment Managers.
- 184 Enforcement action on insolvency related matters is undertaken by the Financial Economy Deterrence teams, particularly two Corporate Governance Deterrence teams. Section C details the work undertaken by these teams.
- 185 The Real Economy is responsible for handling all public contact with ASIC, including the corporate register, registration and licensing, calls, complaints, breach notifications and high volume prosecutions, disqualifications and compliance actions.
- 186 The Real Economy team most relevant to this Inquiry's terms of reference is the Misconduct and Breach Reporting team, which is responsible for ASIC's complaints handling and breach referral process. Section C details the work undertaken by this team.

### **ASIC activities**

- 187 Further details of ASIC activities are detailed in Section C of this submission.



## C ASIC's activities (what we are doing now)

### Key points

Table 6 below sets out key aspects of ASIC's activities relevant to our insolvency related work.

Further detail on these activities is provided in the rest of this section, categorised under the complaints handling and referral process, complaints/general enquiries regarding insolvency practitioners, and activities involving ASIC's Insolvency Practitioners and Liquidators (IPL) team and Corporations team.

**Table 6: Summary of ASIC's activities**

ASIC's oversight responsibility	What has ASIC been doing
<i>Insolvency practitioners</i>	
<b>Registration of insolvency practitioners</b>  Administering the registration of liquidators to ensure that applicants meet the minimum entry-level statutory criteria	Insolvency practitioners are subject to a registration rather than licensing regulatory framework. <ul style="list-style-type: none"> <li>• The statutory registration requirements are set out in s1282(2) which specifies certain educational qualifications and requirements. The key criteria is 'fit and proper' which is not defined in the Corporations Act. If the requirements of s1282 are met ASIC must register the applicant.</li> <li>• ASIC has issued Regulatory Guide 186 <i>External administration: Liquidator registration</i> (RG 186) and Information Sheet 34 <i>How to apply for registration as a liquidator</i> (INFO 34) to provide detailed guidance on how ASIC undertakes this role and the required content of an application to assess if the applicant meets the minimum level entry requirement. How ASIC assesses applications is set out in Appendix B4.</li> <li>• There are 2 types of registration—registered liquidator and official liquidator. There are 662<sup>101</sup> registered liquidators of which 492 are also official liquidators.</li> <li>• Of the 662 registered liquidators 62% are associated with firms of less than 10 liquidators, 14% with firms of 10 to 19 liquidators and 24% with firms of twenty or more liquidators.</li> <li>• A registered liquidator retains registration except in limited specific circumstances.<sup>102</sup></li> </ul>

<sup>101</sup> As at February 2010

<sup>102</sup> Such as cancellation or suspension orders by the CALDB or court, if the practitioner becomes insolvent or disqualified from managing a corporation, or voluntarily surrenders the registrations or dies.

ASIC's oversight responsibility	What has ASIC been doing
<p><b>Practitioner conduct guidance</b></p> <p>Encouraging compliance with the law by working to improve guidance to insolvency practitioners regarding ASIC's expectations within the legal and regulatory framework in which they operate</p>	<p>ASIC has issued 8 regulatory guides<sup>103</sup> to provide guidance to insolvency practitioners in complying with their obligations. These publications are additional to the professional conduct standards issued by other professional bodies, including the accounting bodies, the Accounting Professional and Ethical Standards Board and the Insolvency Practitioners Association (IPA). The standards set by those bodies are mandatory for their members.</p>
<p><b>Monitoring and surveillance</b></p> <p>Monitoring the compliance of insolvency practitioners with the regulatory regime, through monitoring and acting on complaints and undertaking reviews of registered liquidators and their conduct</p>	<p><i>Practitioner reviews</i></p> <ul style="list-style-type: none"> <li>• Reviews are carried out where conduct concerns are raised through complaints and other market intelligence.</li> <li>• For the period July 2006 to December 2009, 179 such reviews were undertaken.</li> <li>• Key issues identified included independence, remuneration and investigations and reporting to creditors with 14 matters referred to Deterrence. In 8 of those matters, the liquidators' registrations have been cancelled suspended or otherwise adversely impacted, 5 are ongoing investigations and 1 was discontinued.<sup>104</sup></li> </ul> <p><i>Section 439A review project</i></p> <ul style="list-style-type: none"> <li>• 2007 major project to review voluntary administrators' s439A reports to creditors. ASIC issued a report on its findings and identified 8 key areas for improvement relating to quality of investigations and reporting to creditors.</li> <li>• Following ASIC's report, the IPA incorporated ASIC's findings into the IPA Code and developed specific training courses on the content and quality of s439A reports.</li> </ul> <p><i>DIRRI review project</i></p> <ul style="list-style-type: none"> <li>• 2009 project reviewing DIRRIs required to be issued by practitioners in some external administrations.<sup>105</sup> ASIC is currently finalising the results of this project and will issue a report to the profession on its findings in April 2010.</li> </ul> <p><i>Inactive practitioner project</i></p> <ul style="list-style-type: none"> <li>• ASIC identified 163 registered liquidators who are inactive and communicated with those practitioners for either surrender of their registration or determination of continuing compliance with the registration requirements of RG 186.</li> <li>• 60% requested cancellation of their registration, 33% continued to comply with RG 186 and 7% were subject to ongoing scrutiny.</li> </ul> <p><i>Registered liquidator insurance project</i></p> <ul style="list-style-type: none"> <li>• Following the 2007 insolvency law amendments professional indemnity and fidelity statutory requirements were introduced with compliance required from July 2008.</li> </ul>

<sup>103</sup> For example, Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16), Regulatory Guide 82 *External administrators: Deeds of company arrangement involving a creditor's trust—A guide for registered liquidators appointed under Part 5.3A* (RG 82) and Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194)

<sup>104</sup> Due to jurisdictional issues.

<sup>105</sup> Voluntary administrations and creditor voluntary liquidations.

ASIC's oversight responsibility	What has ASIC been doing
<b>Deterrence activities</b>  Taking enforcement action where it appears there has been misconduct	<ul style="list-style-type: none"> <li>• ASIC issued RG 194 in June 2008 in response to these new provisions giving guidance to practitioners.<sup>106</sup></li> </ul> <p><i>Aged external administration project</i></p> <ul style="list-style-type: none"> <li>• In November 2007 ASIC wrote to practitioners in regard to approximately 2500 external administrations in excess of 5 years old requiring explanation as to why these administrations had not been finalised.</li> <li>• 72% of these aged administrations were either finalised in the short term or satisfactory explanations were received.<sup>107</sup></li> <li>• The balance were subject to further review as part of an ongoing monitoring program of aged administrations.</li> <li>• Communication has recently been issued to practitioners in regard to administrations aged over 4 years.</li> </ul> <p><i>Insolvency practitioner misconduct</i></p> <p>ASIC's enforcement powers are:</p> <ul style="list-style-type: none"> <li>• applications to the Companies Auditors and Liquidators Disciplinary Board (CALDB)</li> <li>• applications to court</li> <li>• enforceable undertakings.</li> </ul> <p>Enforcement outcomes since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 9 CALDB proceedings</li> <li>• 4 court proceedings (3 complete/1 in progress)</li> <li>• 3 enforceable undertakings.</li> </ul> <p><i>CALDB</i></p> <p>The CALDB sets out the manner in which applications made to it will be conducted in Manuals issued by CALDB.</p> <p>As CALDB hearings must be held in private<sup>108</sup> no public comment is able to be made to such proceedings pending conclusion.</p> <p>The CALDB may order cancellation or suspension and/or other undertakings but has no power to make a pecuniary award.</p> <p>The 9 CALDB outcomes<sup>109</sup> since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 1 order of cancellation</li> <li>• 6 orders of periods of suspension ranging from 3 months to 2 years</li> <li>• 1 order of no new appointments for 3 months</li> <li>• 1 order of reprimand.</li> </ul> <p><i>Court proceedings</i></p> <p>Court proceedings are taken in cases of serious misconduct and where an application for restitution is considered appropriate, or where a</p>

<sup>106</sup> Required level of PI cover is detailed at RG 194.42 and fidelity cover at RG 194.82.

<sup>107</sup> For example, litigation in progress, long-tail liabilities, ongoing ASIC or practitioner investigations.

<sup>108</sup> Unless otherwise ordered in limited circumstances.

<sup>109</sup> Except for the cancellation order, other CALDB orders included orders as to costs and other undertakings such as independent peer reviews and additional professional development.

ASIC's oversight responsibility	What has ASIC been doing
	<p>matter is considered urgent such as concerns regarding independence and associated disclosure.</p> <p>Outcomes from 4 court proceedings since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 1 ban for 10 years and compensation orders</li> <li>• 1 life ban and compensation orders</li> <li>• 1 appointment of special purpose administrator to address independence concerns regarding an incumbent administrator</li> <li>• 1 matter currently before the court regarding interpretation of statutory provisions relating to the maintenance of external administration bank accounts.</li> </ul> <p><i>Enforceable undertakings</i></p> <p>ASIC will consider enforceable undertakings with practitioners in certain circumstances and where an appropriate and effective regulatory outcome can be achieved.</p> <p>Outcomes from 3 enforceable undertakings since July 2006 are:</p> <ul style="list-style-type: none"> <li>• 2 surrendering registration</li> <li>• 1 providing for no new appointments for 4 months and independent practice review.</li> </ul> <p><i>Section 1291</i></p> <p>ASIC's powers to deal directly with a liquidator's registration is limited to s1291 which is relevant to official liquidators only. Under this provision ASIC may suspend or cancel the registration of an official liquidator or require an official liquidator to give an undertaking to refrain from engaging in specific conduct. Some 75% of insolvency appointments require registered liquidator status only. There is no similar provision in regard to registered liquidators.</p>
<b>Maintaining market knowledge</b>	<p>ASIC undertakes 3 levels of insolvency related external liaison:</p> <ul style="list-style-type: none"> <li>• at a national level with relevant stakeholders and practitioner groups (regional liaison)</li> <li>• at the international level with appropriate international insolvency organisations, and</li> <li>• at a stakeholder (practitioner) level as appropriate.</li> </ul> <p>The key outcomes achieved by this liaison framework include:</p> <ul style="list-style-type: none"> <li>• current awareness of issues and developments in the insolvency sector</li> <li>• communication of regulatory expectations to relevant industry stakeholders</li> <li>• contribution to domestic and international developments regarding policy and regulation.</li> </ul>
<b>Company officers</b>	
<p><b>Monitoring compliance</b></p> <p>Monitoring compliance and conduct by company officers in relation to their obligations and behaviour where corporate failure occurs</p>	<p><i>National insolvent trading program</i></p> <p>This program seeks to identify companies which may be potentially trading while insolvent and to encourage company directors to address their company's financial position and take appropriate action.</p> <p>Companies are identified from various sources including:</p>

ASIC's oversight responsibility	What has ASIC been doing
	<ul style="list-style-type: none"> <li>• complaints from creditors and employees</li> <li>• credit agency reports</li> <li>• statutory lodgements with ASIC such as s311 notifications</li> <li>• market intelligence from external and internal sources</li> <li>• internal intelligence.</li> </ul> <p>During the period 2005–06 to December 2009 ASIC visited 1609 companies under this program.</p> <p>As result of a visit many companies accessed appropriate professional advice which facilitated in some cases restructuring or refinancing and improved management practices.</p> <p>Some 15% of those visits identified companies where indicators of insolvency were sufficiently substantive for most of the companies to be placed in external administration by directors.</p>
<b>Enforcement</b>  Administer the Assetless Administration Fund to assist and identify misconduct where corporate failure occurs	<p>ASIC administers 2 programs which address two key complaint categories insolvent trading and failure to lodge documents and reports.</p> <p><i>Liquidator Assistance Program (LAP)</i></p> <ul style="list-style-type: none"> <li>• When a company enters into external administration, the company's directors have an obligation to provide the external administrator with the company's books and records and a Report as to Affairs (RATA). This information is important for the identification of assets and creditors, and to assess a company's financial position.</li> <li>• If directors fail to comply with this obligation, an external administrator may apply to ASIC for action under the LAP to achieve compliance.</li> <li>• ASIC's initial response is a warning letter to directors which achieves compliance in 55% of cases.</li> <li>• If compliance is not achieved, ASIC initiates a prosecution. Since July 2006 ASIC has prosecuted 1955 officers in respect of 2317 contraventions.</li> </ul> <p><i>Assetless Administration Fund (AA Fund)</i></p> <ul style="list-style-type: none"> <li>• This fund was established by government in 2006 to allow the financing of investigations and reports by liquidators in external administrations with minimal/no assets.</li> <li>• Funding is provided for supplementary s533 reports following receipt of an initial report identifying potential offences of interest to ASIC, and an application for AA funding.</li> <li>• Supplementary reports are for matters where substantive misconduct is suspected.</li> <li>• Of the 243 director bannings undertaken since July 2006, 147 have been AA funded.</li> <li>• The fund also assists ASIC better identify potential corporate misconduct in companies under external administration which require a supplementary statutory report to assist further assessment and investigation.</li> </ul> <p><i>Director bannings</i></p> <ul style="list-style-type: none"> <li>• ASIC undertakes disqualification of directors who have been officers of 2 or more failed companies. Directorship of multiple corporate failures may be indicative of potential phoenix activity.</li> </ul>

ASIC's oversight responsibility	What has ASIC been doing
	<ul style="list-style-type: none"> <li>• Since July 2006 a total of 243 directors have been banned, a further 61 banning briefs are under consideration by ASIC delegates and 52 banning briefs are being currently being prepared.</li> <li>• ASIC has increased its consideration of the role of professional advisers in relation to facilitation of phoenix activity and may take action against such advisers where appropriate (e.g. <i>ASIC v Somerville &amp; Ors (No 2)</i> [2009] NSWSC 998).</li> </ul>
<b>Complaints management</b>	
<b>Improving complaints management</b>  By increasing risk-based assessment processes and identification of risks and trends	<p data-bbox="639 629 900 658"><i>Online portal IT upgrade</i></p> <ul style="list-style-type: none"> <li>• An upgrade of the online portal including the online complaints facility on the ASIC website was commenced in September 2009. The upgrade provided improved enquiry and complaint service for the public through an online portal and reformatted eComplaint questionnaires.</li> </ul> <p data-bbox="639 842 820 871"><i>Keyword capture</i></p> <ul style="list-style-type: none"> <li>• In early<sup>110</sup> 2009 a new keyword categorisation system for calls and complaints was commenced to allow improved identification of risks and trends and market intelligence</li> </ul>
<b>Improving communications</b>  To provide clearer information on how ASIC has handled their complaint	<p data-bbox="639 1010 868 1039"><i>Project Transparency</i></p> <ul style="list-style-type: none"> <li>• This project seeks to improve how we communicate with complainants and better explain how ASIC has handled their complaint.</li> </ul> <p data-bbox="639 1162 879 1191"><i>Guidance publications</i></p> <ul style="list-style-type: none"> <li>• A new brochure 'How ASIC deals with your complaint' was released in December 2009 providing clearer information on ASIC's role and complaints handling process.</li> <li>• Call Centre staff are trained to direct callers to relevant information on ASIC's website and other relevant material.</li> <li>• Callers receive brochures from the Call Centre.</li> </ul>
<b>Guidance and education</b>  Educating, informing and assisting stakeholders to ensure that they are properly informed about insolvency laws and processes and their rights and obligations	<p data-bbox="639 1442 874 1471"><i>Stakeholder guidance</i></p> <ul style="list-style-type: none"> <li>• Insolvency impacts a diverse group of stakeholders: employees, secured and unsecured creditors and directors and shareholders. Some of these stakeholders have minimal if any experience with corporate insolvency and their rights and obligations.</li> <li>• ASIC has issued 12 information sheets providing general guidance to assist unsecured creditors, employee creditors, directors and shareholders.</li> <li>• ASIC devotes considerable resources particularly to providing information and assisting complainants with their concerns, which includes an element of educating complainants about the external administration process.</li> </ul>

<sup>110</sup> January 2009 for complaints and March 2009 for calls.

## Complaints handling and referral process

- 188 ASIC receives approximately 650,000 calls and 13,500 written complaints and enquiries each year relating to issues across ASIC's broad jurisdiction.
- 189 Complaints from the public are an extremely important element of ASIC's intelligence and information gathering process, along with our direct industry and market liaison.
- 190 ASIC receives complaints from multiple sources, including:
- (a) the public, including investors, consumers, creditors, trade unions, members and directors of companies;
  - (b) industry participants, including external administrators, accountants, auditors, lawyers, competitors, financial services licensees and representatives, and their professional advisers;
  - (c) representations from Members of Parliament on behalf of their constituents, submissions from Legal Aid and Consumer Credit Centres, and stakeholder action groups will often lodge complaints with us;
  - (d) referrals of intelligence from other government and law enforcement agencies at the Commonwealth and State and Territory levels;
  - (e) our own internal ASIC officers, from the monitoring of media.
- 191 All complaints received by ASIC are individually recorded and assessed by a national team, Misconduct and Breach Reporting, which specialises in the initial assessment of all matters to ensure proper, efficient and consistent process. The Misconduct and Breach Reporting team comprises approximately 120 officers, with a presence in each State and Territory across Australia. The team includes lawyers, accountants, analysts, investigators and prosecutors, and is overseen by a Senior Executive Management team.
- 192 ASIC formally assesses every complaint to determine whether there may have been a breach of the law which ASIC administers. As part of this process, ASIC will check its comprehensive databases and search facilities for intelligence about the subject of the complaint, and to determine whether previous similar complaints have been made which indicate a potentially systemic concern. ASIC will also, with the consent of the complainant, contact the subject of the complaint to try to resolve the complainant's concerns or obtain further relevant information.
- 193 ASIC makes all reasonable enquiries to ascertain whether an allegation is likely to be substantiated. In cases where a suspected breach within ASIC's jurisdiction is identified, ASIC will assess its decision regarding further action against 4 general criteria:



- (a) What action can be taken?
- (b) Is the evidence likely to be sufficient?
- (c) How urgent and serious is the complaint and would action support ASIC's strategic priorities?
- (d) If we succeed, will people behave differently in the future?

- 194 Regardless of whether a matter is within ASIC's jurisdiction, in all cases ASIC will attempt to provide information and assistance to assist complainants to resolve the issue they have raised. ASIC takes its role to assist and educate public complainants seriously, and we track and publish outcomes on an annual basis.
- 195 Matters considered to be high risk according to ASIC's confidential case selection criteria are automatically escalated for Senior Executive review of the assessment and recommendations as to action and implementation.
- 196 Matters approved for further action are referred to relevant specialist Stakeholder team(s) or Deterrence teams, according to the subject of the complaint and whether an inspection, surveillance or formal investigation is recommended. The relevant Stakeholder/Deterrence Senior Executive(s) consider and assess the priority and resourcing of these matters in line with ASIC's current priorities.
- 197 Following the strategic review, there is individual Senior Executive accountability for these decisions on referred matters and an open reporting process to ensure transparency to the Commission and within the senior executive leader group.
- 198 All complaints and breach notifications received by ASIC are registered in ASIC's internal and confidential national complaints management database. We aim to register all matters within 1 business day of receipt. All complaints are acknowledged<sup>111</sup> by way of an acknowledgement letter and accompanying brochure explaining how ASIC deals with complaints<sup>112</sup>. This acknowledgement letter is usually sent to the complainant on the day of registration of their complaint, but we aim to do this within 2 days of receipt. ASIC is committed to finalise 70% of complaints received within 28 days of receipt. This commitment (as expressed in ASIC's Service Charter<sup>113</sup>) reflects that ASIC may sometimes take longer to consider a complaint (e.g. where the matter is complex or if ASIC determines that further evidence should be obtained prior to assessing the allegations of misconduct).

<sup>111</sup> Insofar as the complainant provides contact details—some complaints are anonymous.

<sup>112</sup> See Appendix D of this submission for a link to the brochure on ASIC's website.

<sup>113</sup> A copy of ASIC's Service Charter is available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC\\_service\\_charter.pdf/\\$file/ASIC\\_service\\_charter.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_service_charter.pdf/$file/ASIC_service_charter.pdf).



- 199 If ASIC decides not to take action on a complaint, the matter is recorded for intelligence purposes, and will be automatically reviewed should a further report be received about the subject(s) of the initial complaint. In this way ASIC has developed improved intelligence capability and is able to identify and report internally on emerging trends and issues.
- 200 The most common categories of complaints received during the 2008–09 financial year are shown in Table 7 below.

**Table 7: Most common complaint issues raised with ASIC during 2008–09**

Rank	Complaint issues
1	Failure to lodge documents/reports, including: <ul style="list-style-type: none"> <li>• failure to provide books and records or a Report as To Affairs (RATA) to an external administrator;</li> <li>• failure to lodge change of address details with ASIC; and</li> <li>• failure to lodge financial reports with ASIC.</li> </ul>
2	Fraud/negligence by company officers
3	Insolvent trading
4	Licence or registration breach, including: <ul style="list-style-type: none"> <li>• providing financial services without an AFS licence; and</li> <li>• operating an unregistered managed investment scheme.</li> </ul>
5	Misleading or illegal advice, including: <ul style="list-style-type: none"> <li>• concerns about possible scams;</li> <li>• investment/wealth creation seminars; and</li> <li>• unsolicited offers; early access to superannuation.</li> </ul>

## Complaints/general enquiries regarding insolvency practitioners

### Overview

- 201 In the period 1 July 2006 to 31 December 2009, ASIC assessed a total of approximately 45,000 complaints and general enquiries. Of those, 1,647 were received in relation to insolvency practitioners, representing approximately 3.5% of both total complaints and general enquiries, and total insolvency appointments during the period. These statistics are shown in Table C1.1 in Appendix C.
- 202 During this period, the total numbers of complaints and enquiries recorded by ASIC, including the category of complaints and enquiries recorded about insolvency practitioners, peaked in the 2008–09 financial year, reflecting an

increased number of insolvency appointments and companies entering external administration during and following the global financial crisis.

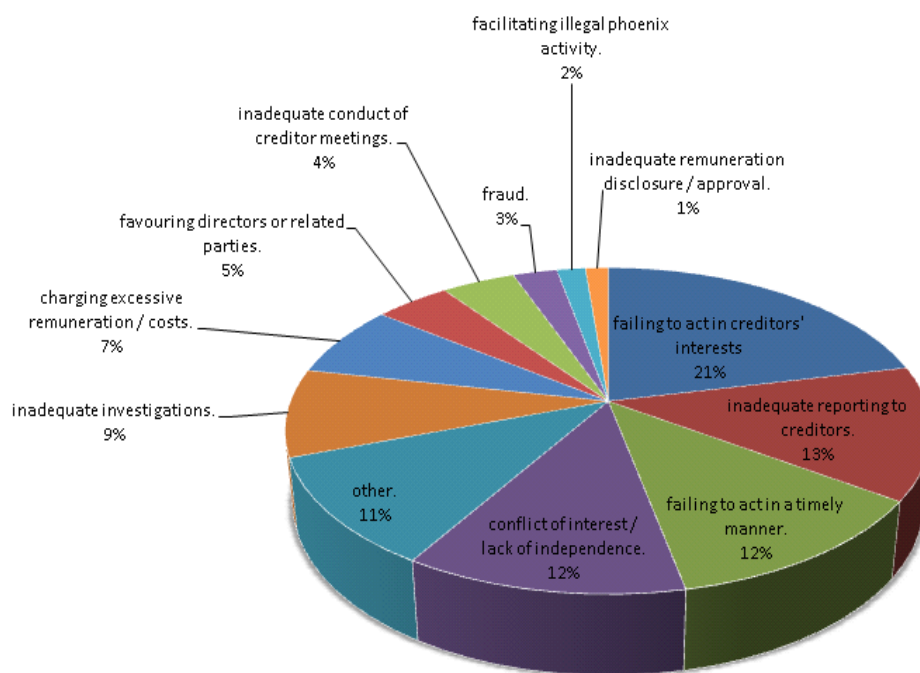
203 The 1,647 complaints and enquiries about insolvency practitioners named 415 registered liquidators out of a total population of 836<sup>114</sup> liquidators for the relevant period. Of these, 205 registered liquidators received 3 or less complaints or enquiries, and 100 registered liquidators recorded 1 complaint or enquiry in the 3.5 year period.

### Key complaint categories

204 The principal areas of conduct raised in complaints about insolvency practitioners include:

- (a) failing to act in creditors interests, inadequate reporting to creditors and failing to act in a timely manner (46%);
- (b) conflict of interest and favouring director or related parties (17%);
- (c) inadequate investigations (9%);
- (d) remuneration including excessive and poor disclosure of remuneration (8%);
- (e) allegations of fraud (3%); and
- (f) phoenix facilitation (2%).

**Figure 1: Insolvency practitioner misconduct categories (FY 2006–2010)**



<sup>114</sup> The total number of registered liquidators for the period from 1 July 2006 to 31 December 2009.

The vast majority of insolvency practitioner complaints (note that these are allegations of which a small proportion is substantiated) related to procedural issues or less serious contraventions of the Corporations Act. Relatively few complaints relate to the most serious contraventions such as fraud and phoenix facilitation.

### Outcomes of assessment of complaints and general enquiries about insolvency practitioners

- 205 Of the total 1,329<sup>115</sup> individual matters assessed in the period 1 July 2006 to 31 December 2009, a third were resolved by providing information to a complainant or answering their enquiry (450 matters, or 33.7%). In close to half of the matters, no breach of the legislation administered by ASIC was identified, or there was insufficient evidence identified to support the allegation of breach (644 matters or 48.5%).
- 206 A total of 78 matters (5.9%), assessed as raising significant 'conduct' allegations and likely to be supported by evidence, were referred to specialist teams for further action, and 8 matters (0.6%) were referred by the Misconduct and Breach Reporting team directly to deterrence for formal investigation. A further 11 matters (0.8%) were referred to existing investigations or surveillances. These outcomes are shown in Table 8 below. *Confidential* Appendix E provides a representative example of each of these categories of complaint.

**Table 8: Outcomes of complaints/inquiries against insolvency practitioners for the 2006–07 financial year to December 2009**

Outcomes summary (subject to referral to specialists)	No	%
Provided assistance to resolve the complaint or enquiry	450	33.7%
Insufficient evidence was identified to support the alleged breach	409	30.8%
No breach of the Corporations Act identified	235	17.7%
Referred to a specialist team within ASIC for further review	78	5.9%
Referred for investigation	8	0.6%
Referred to assist existing investigation; or other surveillance	11	0.8%
Action otherwise precluded <sup>116</sup>	115	8.8%
Assessment in progress	23	1.7%
	1,329	100.0%

<sup>115</sup> Excluding duplicates as explained in the footnote to Table C1.1 in Appendix C.

<sup>116</sup> A matter will generally be finalised as within jurisdiction, action otherwise precluded in cases where, for example, ASIC has already commenced an investigation or legal proceedings in relation to the matter or subject; legal proceedings launched by other parties will address the issue; factors such as the age of the matter, excessive resources or costs are prohibitive and outweigh any public benefit that may be achieved if the matter was further pursued.

## Insolvency Practitioners and Liquidators work

### Complaints referrals

- 207 This section focuses on the activities undertaken by ASIC's specialist insolvency team, the Insolvency Practitioners and Liquidators (IPL) team regarding complaint referral management,<sup>117</sup> surveillance reviews and work relating to specific programs and projects, stakeholder engagement, and policy and law reform.

### Monitoring/supervision

#### Program work

##### *Practitioner surveillance*

- 208 ASIC's IPL team undertakes both compliance and transaction reviews in regard to insolvency conduct matters referred to it by the complaints unit and also those matters identified through other market intelligence. These reviews are explained below:

- (a) *Compliance reviews* assess compliance by an insolvency practitioner with their legal and professional duties in the conduct of external administrations generally. These reviews require the insolvency practitioner to produce documents that record the conduct for several of their external administrations. For compliance reviews, ASIC's insolvency specialists attend the practitioner's place of business for several days and interviews are usually held with the practitioner's relevant employees. Hence they are resource and time intensive.
- (b) *Transaction reviews* assess compliance by a registered liquidator with their legal and professional duties in respect to a particular aspect of their conduct in a particular external administration. In circumstances where documents already held by ASIC are not sufficient to resolve a concern, an Insolvency practitioner is usually required to produce documents and explain the circumstances of the matter. For example, ASIC may be of the view the practitioner has a relationship which is not disclosed in the DIRRI. After contact from ASIC the practitioner issues a replacement DIRRI including further information on the relationship to creditors. These are less resource intensive than compliance reviews.

- 209 Since July 2006 the IPL team has undertaken a total of 163 transaction assessments/reviews and 16 practice compliance reviews—179 matters in total, including the 78 complaint referrals from the Misconduct and Breach Reporting team. These are shown in Table 9 below.

<sup>117</sup> Such as the 78 matters referred from the Misconduct and Breach Reporting team.

**Table 9: Practitioner compliance and transaction reviews—July 2006 to December 2009**

	No.	Key conduct issues <sup>118</sup>			
		Independence	Remuneration	Investigation/ reporting	Other
<b>Compliance reviews</b>	16	10	8	11	9
<b>Transaction reviews</b>	163	56	32	51	73
<b>Total</b>	<b>179</b>	<b>66</b>	<b>40</b>	<b>62</b>	<b>82<sup>119</sup></b>

210 A summary of the compliance and transaction review outcomes for the period from 1 July 2006 to 31 December 2009 and the principal conduct issues involved in those reviews are summarised in Table C2.1 in Appendix C (this table includes an explanation of each of the outcomes described in Table C2.2 in Appendix C).

211 Details of the outcomes of the 14 matters referred to the Corporate Governance Deterrence teams are provided in Table 11 at paragraph 256.

212 Additionally, at in *confidential* Appendix E are examples of the IPL team's liquidator compliance outcomes.

*National insolvent trading program*

213 This program identifies companies which are in financial distress or nearing insolvency and encourages directors through on site visits to recognise the warning signs and to act earlier if their company is nearing or in financial distress.

214 Directors are encouraged to take appropriate proactive action such as seeking professional advice and making sure they are adequately informed of the financial position of their company.

215 Further details of the program and how reviews are conducted are contained in Appendix C2.

216 During the period from 2005–06 financial year to 31 December 2009, ASIC visited 1,609 companies under this program. Examples of the proactive steps taken by directors following an ASIC review include:

- (a) seeking advice from an accountant and/or lawyer or insolvency practitioner regarding the company's circumstances and acting on that advice;

<sup>118</sup> Most activities undertaken have involved more than one type of conduct issue.

<sup>119</sup> This represents an aggregation of diverse matters such as late lodgements, concerns regarding DOCAs, asset values, proof of debt adjudication, timeliness, meeting procedures, inappropriate litigation funding, enquiry not responded to, misleading conduct, phoenix facilitation, secured creditor/charge dispute, lien over funds and liabilities not paid.

- (b) focusing on their obligations to avoid insolvent trading in their companies;
- (c) being made aware of their duties and responsibilities and the implications of continued trading in the knowledge of insolvency;
- (d) preparing of up to date financial accounts and cash flows to obtain a better understanding of their company's financial position; and
- (e) successfully restructuring their company with the assistance of professional advisers including refinancing of a key debt, capital raising, asset sales, or entering into repayment arrangements with the ATO/other major creditors to alleviate pressure on cash flow.

217 In approximately 15% of company visits, indicators of insolvency were sufficiently significant for directors to either appoint a voluntary administrator or ASIC to take action to wind up the companies.

### **Project work**

218 IPL has undertaken the following projects to review how insolvency practitioners comply with their duties and functions and to influence improved industry standards and compliance.

#### *Voluntary administration reporting project*

219 During 2007 IPL undertook a major project to review in detail voluntary administrators' s439A reports to creditors. The focus was to assess the adequacy and quality of investigations conducted by insolvency practitioners and their reporting to creditors where creditors were asked to consider and vote on whether to accept a proposal for a deed of company arrangement (DOCA).

220 In June 2008, ASIC's Report 129 *Review of s439A reports for voluntary administrations* (REP 129) was released detailing the results of the review.

221 This report concluded that for the majority of reports, administrators either did not:

- (a) undertake an adequate investigation of the entities affairs; or
- (b) fully report to creditors on the results of that investigation.

222 ASIC suggested 8 areas for improvement in relation to the preparation of s439A reports to creditors, being:

- (a) reporting on company history and reasons for failure;
- (b) analysis of financial results;
- (c) validation of related party claims;
- (d) future trading assumptions;

- (e) reporting on potential recoveries in liquidation;
- (f) comparison of returns;
- (g) extending the convening period;
- (h) clear reporting.

ASIC undertook to work with industry to ensure improved understanding and compliance in the preparation of s439A reports.

- 223 As a consequence of ASIC's project, the IPA incorporated ASIC's findings into the IPA Code and developed a specific training course on the content and quality of s439A reporting for the profession.

*Declaration of Relevant Relationships and Indemnities (DIRRI) project*

- 224 During 2009, IPL undertook a Project reviewing 239 insolvency appointments commenced between 1 July 2008 and 31 January 2009 involving 77 insolvency firms. The focus was on compliance by registered liquidators with the statutory requirements to disclose various relationships and indemnities in the declarations provided in voluntary administrations and creditors' voluntary windings up. The project also considered whether the disclosure made was adequate to enable creditors to make an informed assessment concerning the independence of the registered liquidator.
- 225 The results of this project are currently being finalised. The review results indicate that there have been divergent interpretations by insolvency practitioners of what disclosure is required by the law. The findings of this review will be reported to the profession.
- 226 ASIC will work with the IPA to improve the guidance on the independence reporting requirements and provide further information to stakeholders so that they are adequately informed. IPA has advised ASIC that they will be updating their IPA Code.
- 227 In the meantime, we continue to monitor compliance by external administrators with their disclosure requirements
- 228 In circumstances where ASIC consider a practitioner's independence is compromised ASIC may make application to the court. However, it is ASIC's experience that when approached with our concerns, practitioners will usually issue a revised DIRRI. On occasion a practitioner may make an application to court to address any independence concerns relating to their appointment. ASIC is sometimes requested by the court to appear at such applications.

*Inactive registered liquidators project*

229 As at 1 March 2007, ASIC identified 163 registered liquidators who had not been appointed as external administrators in the preceding 3 years ('inactive liquidators'). ASIC communicated with those inactive liquidators and asked them to request ASIC to cancel their registration or alternatively provide evidence of their compliance with RG 186.

230 At the conclusion of the project on 30 June 2008:

- (a) 60% (97) of inactive liquidators had requested their licence be cancelled;
- (b) 33% (55) wished to remain registered and other than not actively taking appointments, satisfied the requirements of RG 186.

231 The remaining 7% (11) inactive liquidators were subjected to ongoing scrutiny.

*Aged EXAD project*

232 As at November 2007, there were 2,504 external administrations that were more than 5 years old ('aged external administrations'). This represented 8.5% of all open external administrations and involved 332 registered liquidators.

233 ASIC wrote to each registered liquidator of an aged external administration and asked for particulars of any factors that may have prevented or delayed the completion of the external administration—97% of practitioners responded reasonably promptly.

234 Table 10 below summarises the outcome of our review based on the responses received from practitioners.

**Table 10: Aged external administrations**

Outcome of our review	No. of administrations
No further action by ASIC at this time	1160
Closed during project	649
Corrections to database / ASIC assistance required	92
Monitoring / additional information required	603
<b>Total</b>	<b>2504</b>

235 No further action by ASIC was warranted for 46% (1160) of the aged external administrations. In these cases, the reasons for the administration



being aged were adequately explained in the response or in subsequent clarifications. Some examples of reasons included (in summary form) were: litigation in progress; long-tail liability issues; deed of company arrangement in progress; and ongoing investigations/ASIC investigations.

236 Of the aged external administrations, 26% (649) were finalised within a few months of our project starting.

237 We undertook further scrutiny of 24% (603) of aged external administrations, mostly related to monitoring of lodgements and finalisation of matters in the 2009 financial year. In some cases, our scrutiny extended to other open external administrations of these practitioners. This work is continuing and letters were recently issued to practitioners for matters aged over 4 years.

### **Maintaining market knowledge**

238 ASIC undertakes 3 levels of insolvency related external liaison:

- (a) liaison at a stakeholder (practitioner) level;
- (b) liaison at a national level with relevant stakeholders and practitioner groups (regional liaison); and
- (c) liaison at the international level with appropriate international insolvency organisations.

### **National and regional liaison**

239 IPL is responsible for maintaining ASIC's liaison with insolvency practitioners and other national stakeholders, and a continuing awareness of current issues and developing trends in the insolvency industry. This work includes:

- (a) undertaking work and consultation on policy and technical issues that are current in the insolvency industry;
- (b) coordinating regional liaison with the insolvency profession on a biannual basis via regional liaison meetings held at ASIC's offices in all major capital cities of Australia;
- (c) publication of a periodic newsletter for insolvency practitioners;
- (d) preparation of articles for insolvency journals; and
- (e) maintaining liaison with other stakeholders such as peak accounting bodies, IPA, relevant government agencies and government departments.

## International liaison

### *International Association of Insolvency Regulators*

240 The International Association of Insolvency Regulators (IAIR) is an international body of 26 government insolvency regulators from jurisdictions around the world that aims to promote liaison and cooperation and provides a forum for discussion among insolvency regulators. ASIC is a member.

241 IAIR recognises that effective and efficient procedures for dealing with financial failure are essential for maintaining confidence in financial markets thereby underpinning investment and economic growth and supporting business and stakeholder credit. The Association contributes to a wider understanding of insolvency issues, procedures and practices and the development of approaches that reflect the different legal, socio-economic, historical, cultural and institutional frameworks of the countries from which the members come.

242 ASIC's commitment to IAIR involves attending the annual general meeting, presenting on the Australian insolvency system, contributing to international surveys on insolvency systems and assisting other jurisdictions in the development of improved insolvency systems globally.

### *Forum for Asian Insolvency Reform*

243 The Forum for Asian Insolvency Reform (FAIR) was established by the OECD in cooperation with the Asia-Pacific Economic Cooperation forum (APEC) and the Asian Development Bank (ADB), with assistance from the governments of Japan and Australia. FAIR gathers key policy makers, members of the judiciary, academics, insolvency practitioners and other private sector participants who meet on an annual basis. ASIC periodically attend key meetings.

244 FAIR's main objectives are to:

- (a) further develop and sustain policy dialogue on insolvency reform among Asian policy makers and senior private sector participants;
- (b) monitor and review progress in the implementation of reforms in each economy in the region;
- (c) identify the main topics of interest to regional policy makers and practitioners; and
- (d) help to identify country specific technical assistance needs, which could then be addressed by bilateral donors or multilateral institutions.

245 ASIC's continuing involvement in international forums on insolvency law is an important part of its contribution to improved international cooperation and efficient capital markets.

## Contributing to insolvency related policy and law reform

- 246 Following the release of the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake* on 30 June 2004 (PJC Report) and the Government's response, IPL has had an important role in developing and implementing policy initiatives addressing the recommendations made in the PJC Report, and working with the insolvency profession, accounting and standard setting bodies to address most of the recommendations.
- 247 ASIC has implemented the recommendations made in the PJC Report which were relevant to ASIC. A summary of ASIC's work in this regard is provided at Table B2.3 in Appendix B.
- 248 In addition, ASIC provided comments on the 2007 Corporations Law amendments in response to the Draft Bill issued by government.
- 249 An overview of ASIC's initiatives in regard to insolvency related policy and law reform is provided at Table C2.3 in Appendix C.

## Deterrence activities

- 250 Prior to ASIC's strategic review, ASIC's deterrence activities were carried out by the Enforcement Directorate. As a result of the strategic review, ASIC now has 8 deterrence teams, each with a specific area of focus. The investigation and taking of enforcement action in relation to misconduct by insolvency practitioners and breaches of the law arising from corporate insolvencies, is primarily undertaken as part of the activities of two of these deterrence teams.
- 251 When concerns are identified in relation to the conduct of an insolvency practitioner, these deterrence teams are responsible for:
- (a) investigating the suspected misconduct, and
  - (b) if misconduct can be substantiated, taking enforcement action as appropriate, including:
    - (i) applying to the CALDB for disciplinary action including cancellation or suspension of an insolvency practitioner's registration;
    - (ii) entering into an enforceable undertaking with an insolvency practitioner in circumstances where there will be an effective regulatory outcome;<sup>120</sup> and
    - (iii) taking civil action in the courts in appropriate matters.

<sup>120</sup> ASIC has published guidance on how and when it will use enforceable undertakings: see Regulatory Guide 100 *Enforceable undertakings* (RG 100).

- 252 Similarly these deterrence teams also investigate breaches of the law arising from corporate insolvencies and where appropriate take enforcement such as:
- (a) taking civil action through the courts;
  - (b) entering into enforceable undertakings; and
  - (c) referring briefs to the Commonwealth Director of Public Prosecutions (CDPP).
- 253 Broadly, the remedies available to ASIC can be categorised as follows:
- (a) *Conduct proceedings in the CALDB.* ASIC may commence disciplinary proceedings against insolvency practitioners seeking orders that a person's registration as a liquidator be cancelled or suspended.
  - (b) *Civil action in the courts.* ASIC has a range of civil remedies available to it. ASIC can take civil action on its own or in addition to criminal action. The following types of civil remedies are available to ASIC:
    - (i) *Civil penalties.* Civil penalties may be imposed for serious contraventions of specific provisions (e.g. breach of directors duties).
    - (ii) *Compensatory action.* For example, ASIC may seek orders that the insolvency practitioner make good any losses sustained by the company and its creditors.
    - (iii) *Injunctive relief.* ASIC may seek injunctions to restrain a person or entity engaging in specific conduct, or to compel compliance with the law to prevent further detriment from occurring.
    - (iv) *Cancellation of the registration of a liquidator.* ASIC may seek orders in the courts that a person's registration as a liquidator and official liquidator be cancelled or suspended for a specified period.
  - (c) *Enforceable undertakings.* ASIC may enter into an enforceable undertaking with a person.
  - (d) *Criminal action.* A number of criminal offence provisions are contained in the legislation administered by ASIC. Except for specified circumstances, ASIC must refer criminal action to the CDPP.
- 254 When a court , CALDB order or an enforceable undertaking outcome against a practitioner involves suspension or cancellation and requires ongoing steps ASIC follows up with a range of monitoring activities which may include:
- (a) overseeing transfer of liquidator files and follow up completion of the external administrations transferred;
  - (b) discussions with replacement liquidators/deed administrators staff in relation to queries concerning the current administrations;

- (c) assisting and organising the recovery of books and records for the replacement liquidators/deed administrators if required.

- 255 When a court, CALDB order or an enforceable undertaking outcome involves further orders such as additional professional development and independent peer review, ASIC also follows up with a range of supervision and monitoring activities which may include:
- (a) approval of the independent registered liquidator to review and report to ASIC in relation to the sanctioned liquidator's future appointments;
  - (b) review the independent report(s) and ensure the recommendations are implemented by the sanctioned liquidator;
  - (c) where appropriate obtain confirmation from the sanctioned liquidator of the repayment of monies to creditors of the liquidation, within any agreed terms of an order.

#### **Deterrence outcomes**

- 256 The outcomes of the 14 matters referred from IPL to Deterrence since 1 July 2006 are provided in Table 11 below.

**Table 11: Outcomes of referrals to Deterrence team since 1 July 2006**

Type of proceeding	No.	Outcome
<b>Disciplinary proceedings</b>	1	CALDB ordered 18 month suspension period, costs and other undertakings [Mr McVeigh—media release 10-22AD]
<b>Court proceedings</b>	1	Following ASIC advising of its concerns regarding independence, the insolvency practitioner made an application to the court and a special purpose administrator was appointed by the court to address concerns about the independence of the incumbent administrator
	1	Life ban and compensation [Mr Ariff—media releases 07-324 and 09-150AD]
	1	Court application by practitioner seeking interpretation of statutory provisions relating to maintenance of bank accounts [ matter currently in progress]
<b>Enforceable undertakings</b>	2	Surrender of registration [Mr Travers—media release AD08-04 [Mr Civil—media release 07-137]
	1	No new appointments for 4 months and independent practice review [Mr Martin—media release AD09-08]

Type of proceeding	No.	Outcome
<b>Voluntary surrender of registration</b>	1	Surrendered registration following advice of disciplinary proceedings
<b>Discontinued/Insufficient evidence</b>	1	Jurisdictional issues
<b>Ongoing investigations</b>	5	
<b>Total</b>	<b>14</b>	

257 In addition, since July 2006, there have been 9 other disciplinary outcomes relating to insolvency practitioner misconduct from investigations commenced before 1 July 2006, which are provided in Table 12 below.

**Table 12: Additional deterrence outcomes subsequent to 1 July 2006<sup>121</sup>**

Type of proceeding	No.	Outcome
<b>Disciplinary proceedings (CALDB)</b>	1	2-year suspension, costs and other undertakings [Mr McDonald—media release 09-240AD]
	1	12-month suspension, costs and other undertakings [Mr Dean-Wilcocks—media release 06-405]
	1	9-month suspension, costs and other undertakings [Mr Albarran—media release 08-080]
	1	Cancellation—upheld on appeal [Mr Sleiman—media release 06-341]
	2	3-month suspension, costs and other undertakings [Mr Andersen—media release 06-427] [Other matter is subject to confidentiality orders]
	1	No new appointments for 3 months, costs and other undertakings [Mr Lucas—media release 06-383]
	1	Reprimand and other undertakings [Mr Murphy—media release 07-199]
<b>Court proceedings</b>	1	Banned for 10 years and compensation orders [Mr Edge—media releases 07-146 and 07-180]
<b>Total</b>	<b>9</b>	

<sup>121</sup> Proceedings commenced prior to July 2006.

## Education and communication

### Insolvency statistics

- 258 ASIC publishes on its website monthly statistics on both the number of companies entering external administration for the first time and the number of insolvency appointments recorded in that period.

### Information sheets

- 259 Table 13 below lists ASIC's information sheets relating to external administrations and stakeholders. These information sheets are available on ASIC's website.

**Table 13: ASIC's information sheets relating to external administrations**

No.	Title	Release date
<a href="#">INFO 41</a>	<i>Insolvency: A glossary of terms</i>	December 2008
<a href="#">INFO 75</a>	<i>Voluntary administration: A guide for employees</i>	December 2008
<a href="#">INFO 46</a>	<i>Liquidation: A guide for employees</i>	December 2008
<a href="#">INFO 55</a>	<i>Receivership: A guide for employees</i>	December 2008
<a href="#">INFO 74</a>	<i>Voluntary administration: A guide for creditors</i>	December 2008
<a href="#">INFO 45</a>	<i>Liquidation: A guide for creditors</i>	December 2008
<a href="#">INFO 54</a>	<i>Receivership: A guide for creditors</i>	December 2008
<a href="#">INFO 43</a>	<i>Insolvency: A guide for shareholders</i>	December 2008
<a href="#">INFO 42</a>	<i>Insolvency: A guide for directors</i>	December 2008
<a href="#">INFO 84</a>	<i>Independence of external administrators: A guide for creditors</i>	December 2008
<a href="#">INFO 85</a>	<i>Approving fees: A guide for creditors</i> <sup>122</sup>	December 2008

### Regulatory guides

- 260 A regulatory guide:
- (a) explains when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act);
  - (b) explains how ASIC interprets the law;
  - (c) describes the principles underlying ASIC's approach; and

<sup>122</sup> Original information sheet was issued in 2005 and has been subsequently updated.

- (d) gives practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

For a list of regulatory guidance for registered liquidators, see Table 4 at paragraph 119.

#### **Online insolvency portal**

- 261 During 2009 ASIC launched a new online portal specifically designed to meet the needs of stakeholders likely to be affected by corporate insolvency. Stakeholder groups can access information at [www.asic.gov.au/insolvency](http://www.asic.gov.au/insolvency) to help make decisions when dealing with insolvency administrations.

## **Corporations work**

### **Registration of companies**

- 262 ASIC regulates approximately 1.7 million registered companies categorised as shown in Table 14 below.

**Table 14: Registered companies**

Type of company	No. of registrations
Proprietary limited companies	1,712,419
Unlisted public companies	18,928
Listed public companies	1,848
Foreign companies	3,178
<b>Total</b>	<b>1,736,373</b>

### **Monitoring and surveillance**

- 263 Details in respect of ASIC's monitoring work of corporate financial statements, declarations of solvency and s311 notifications is provided in Section B of this submission.
- 264 The key corporate complaint category relevant to the context of this inquiry is insolvent trading which is specifically addressed below.



**Complaints alleging insolvent trading**

- 265 For the calendar year 2009, ASIC received approximately 1,980 complaints raising the allegation of insolvent trading against a company(s). These allegations related to approximately 3,157 entities.
- 266 ASIC analyses every complaint we receive alleging insolvent trading, in the context of all known intelligence or other financial distress warning signals recorded by ASIC, and selects the matters of highest priority in the public interest to take action. The outcomes of that process (grouped by entity type) are shown in Table 15 below.

**Table 15: Insolvent trading complaint outcomes by entity type<sup>123</sup>**

Outcome	Proprietary company (%)	Unlisted public company (%)	Listed public company (%)
Provided assistance to resolve the complaint or enquiry	32.4	15.6	2.5
Insufficient evidence was identified to support the alleged breach	38.2	32.2	40.0
No breach of the Corporations Act identified	2.4	6.7	2.5
Referred to a specialist team within ASIC for further review	9.4	8.9	20.0
Referred for investigation	2.1	1.1	–
Referred to assist existing investigation; or other surveillance	2.5	22.2	22.5
Action otherwise precluded	9.4	12.1	–
Assessment in progress	3.6	1.1	12.5
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

**ASIC compliance activities—Post corporate collapse**

- 267 Once a corporate entity has entered external administration ASIC employs a different range of regulatory tools to facilitate the external administration and where necessary take regulatory action. These regulatory tools include:
- (a) the Liquidator Assistance Program; and
  - (b) the Assetless Administration Fund.

<sup>123</sup> Excluding merged activities raising duplicate complaints about the same entity

### Liquidator Assistance Program

- 268 Where an external administrator has been appointed to a company the Corporations Act<sup>124</sup> requires that directors of the company must provide the external administrator with books and records and a report as to the affairs of the company.<sup>125</sup>
- 269 This information is important to assist the external administrator in identifying the company's assets<sup>126</sup> and liabilities and taking the appropriate action to preserve and protect assets and deal with the claims of various classes of creditors.
- 270 Where a company officer fails to comply with their responsibilities, the external administrator may refer the matter to ASIC's Liquidator Assistance Program (LAP).
- 271 In such matters, ASIC will first seek compliance with RATA and books and records obligations by contacting the director usually via a warning letter. In direct response to requests for assistance by insolvency practitioners, ASIC sent warning letters to company directors seeking compliance with the law in lodging documents or providing information<sup>127</sup> as shown in Table 16 below. Compliance with a warning letter from ASIC occurred in 55% of cases during the 2008–09 financial year.

**Table 16: Warning letters for Liquidator Assistance Program**

	2006–07	2007–08	2008–09	Total
<b>Warning letters issued to company officers</b>	900	1135	1465	3500

- 272 Where compliance is not achieved following a warning letter, ASIC takes court action seeking compliance with the obligation to provide RATAs and/or books and records. Penalties imposed by the court may include fines of up to \$5,500 or imprisonment for breach of certain obligations by an officer.<sup>128</sup>
- 273 The prosecution outcomes related to ASIC's Liquidator Assistance Program are shown in Table 17 below.

<sup>124</sup> For example, in the case of liquidators, s475, 530A, 530B, Corporations Act.

<sup>125</sup> Commonly known as a RATA.

<sup>126</sup> Company officers seeking to avoid their debts and retain the assets of the company in order to register a new corporate entity and 'reopen' or 'phoenix' the business may fail to submit a RATA or fail to fully disclose the assets of the company in their RATA.

<sup>127</sup> As noted in Table 16 above, failure to lodge documents (which includes RATA and books and records among other documents) is the most common complaint lodged with ASIC.

<sup>128</sup> If an officer fails to comply with court orders to fulfil their responsibilities within the required time, they may commit a continuing offence and may be liable to further prosecution. A continuing offence can attract an additional fine of up to \$55 per day until the relevant obligation is complied with.

**Table 17: Prosecution outcomes for Liquidator Assistance Program**

	2006–07	2007–08	2008–09	Total
<b>Prosecutions (officers charged)</b>	558	683	670	1911
<b>Contraventions</b>	798	801	718	2317
<b>Other penalties</b>	42	77	93	212
<b>Fines and costs</b>	\$989,605	\$986,542	\$802,813	\$2,778,960

### **Assetless Administration Fund**

274 The Assetless Administration Fund (AA Fund) was established by the Australian Government in February 2006 and is administered by ASIC. It finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where there is a reasonable prospect of enforcement action resulting from the investigation and report.

275 The AA Fund allows ASIC to receive timely reports from insolvency practitioners on potential misconduct, assisting ASIC to address insolvent trading and other insolvency related misconduct in the most efficient manner.

276 Funding such investigations and reporting may indirectly benefit creditors and employees by identifying assets and possible voidable transactions, the recovery of which may result in increased returns to these groups or allow them to determine whether to fund their own actions for recovery.<sup>129</sup>

### **Statutory reports**

277 External administrators are required to submit statutory reports to ASIC if they suspect that company officers have been guilty of an offence or, in the case of liquidators, if the return to unsecured creditors may be less than 50 cents in the dollar, and may also submit supplementary reports in more substantive matters. ASIC may also request supplementary reports from liquidators in selected matters.

278 Following a review, ASIC reissued Regulatory Guide 16 *External administrators—Reporting and lodging* (RG 16) in July 2008. Initial statutory reports now request more specific detail from external administrators about alleged offences and the documentary evidence that may exist to support their allegations, helping ASIC to better target matters

<sup>129</sup> For example, following funding from ASIC the liquidator of a Victorian external administration pursued a civil action against the director for insolvent trading, which resulted in a recovery of \$1.175m for the benefit of creditors of \$5.5 million.

warranting further inquiry and the subsequent requests for supplementary reports.

279 The improved quality of information provided by practitioners has led to a greater proportion of supplementary reports being referred for compliance, investigation or surveillance or to assist an existing investigation or surveillance and fewer reports being received which fail to identify any offences.

280 Details in regard to these reports and the outcomes are provided in Table 18 below.

**Table 18: Statutory reports and ASIC review**

	2009–10 (to Dec 2009)	2008–09	2007–08	2006–07
<b>Total reports received</b>	<b>4630</b>	<b>8986</b>	<b>8579</b>	<b>8335</b>
Reports assessed alleging misconduct or suspicious activity	3372	6228	6886	6862
<b><i>Initial reports</i><sup>130</sup></b>				
Reports assessed alleging suspicious activity	3017	5656	5835	5717
Supplementary reports requested	11%	11%	17%	17%
Analysed, assessed and recorded	89%	89%	83%	83%
<b><i>Supplementary reports</i><sup>131</sup></b>				
Supplementary reports assessed alleging misconduct	355	572	1051	1145
Referred for compliance, investigation or surveillance	23%	20%	10%	16%
Referred to assist existing investigation or surveillance	4%	4%	7%	% Not captured
Analysed, assessed and recorded	72%	75%	79%	81%
Identified no offences	1%	1%	4%	3%

281 The top 5 issues raised with ASIC in supplementary reports finalised in financial year 2008–09 are detailed in Table 19 below.

<sup>130</sup> Initial reports are electronic reports lodged under Schedule B of RG 16. Generally, ASIC will determine whether to request a supplementary report on the basis of an initial report.

<sup>131</sup> Supplementary reports are typically detailed free-format reports, which detail the results of the external administrator's inquiries and the evidence to support the alleged offences. Generally, ASIC can determine whether to commence a formal investigation on the basis of a supplementary report.

**Table 19: Top 5 concerns raised in supplementary reports for 2008–09**

Rank	Issue <sup>132</sup>	% of total reports finalised
1	Fraud/negligence by company officers	35%
2	Insolvent trading	28%
3	Director candidate for disqualification, or acting while disqualified	10%
4	Failure to lodge documents/reports	8%
5	Poor administration systems including a failure to keep written financial records	8%

### Deterrence

282 In the corporate insolvency context, ASIC's deterrence activities are generally undertaken by 2 teams:

- (a) Misconduct and Breach Reporting team; and
- (b) Deterrence teams, and in particular, the Corporate Governance Deterrence teams.

### Misconduct and breach reporting team

283 This team undertakes the work in relation to:

- (a) the Liquidator Assistance Program; and
- (b) disqualification of person who have been officers of 2 or more failed companies.<sup>133</sup>

284 Statistics for this work are provided in Appendix C3.

### Corporate governance deterrence teams

285 The deterrence teams undertake the more serious and complex matters<sup>134</sup> relating to company officer misconduct in circumstances of corporate failure.

<sup>132</sup> A single complaint may raise more than one type of alleged misconduct.

<sup>133</sup> Section 206F, Corporations Act. ASIC may, in its discretion, disqualify a person from managing corporations for up to 5 years if within the last 7 years the person has been an officer of 2 or more corporations and within a certain period, each of the corporations was wound up and a liquidator lodged a statutory report under s533(1) to ASIC about the corporations' inability to pay their debts.

<sup>134</sup> More recent examples are proceedings commenced against former officers of MFS Group and Opes Prime.

## Education

- 286      An important part of ASIC's role is receiving and assessing reports of misconduct concerning individuals, companies and financial service entities we regulate, from market participants and members of the public.
- 287      The 'How ASIC deals with your complaint' brochure is included with each acknowledgement letter sent to complainants: see Appendix D. This brochure provides investors and consumers clear guidance on what we do, how we assess a complaint, what to expect and links to our consumer and investor information website FIDO. Its aim is to provide clearer guidance to investors and consumers and further information about where to complain if an investor or consumer remains dissatisfied with an ASIC decision.
- 288      ASIC's call centre staff will send brochures to enquirers as requested. The call centre staff are trained to direct callers to appropriate information on ASIC's main website as well as ASIC's consumer website, FIDO. Callers will be directed to relevant media releases, specific information about particular matters and more general information, including the ASIC and IPA Information Sheets relating to insolvency. Where the information is available, callers will also be given details of the relevant insolvency practitioner and directed to information on their websites.

## D ASIC's forward program (what we are doing to improve what we do now)

### Key points

ASIC is committed to continually seeking to improve its performance. The 2007 Strategic Review ensured ASIC became more effective in performing its oversight and enforcement roles. The key outcomes of the strategic review were:

- expansion and additional skills at the Commission level;
- an expanded senior executive team, a significant proportion recruited from the market balanced by long term regulatory experience; and
- a restructure to ensure ASIC officers are closer to their stakeholders.

This has enabled ASIC to respond more effectively and quickly to issues including those arising out of the global financial crisis.

Table 20 below sets out key aspects of ASIC's forward plan relevant to our insolvency related work.

Further detail on ASIC's forward program is provided in the rest of this section, categorised as activities undertaken by ASIC's Misconduct and Breach Reporting team, Insolvency Practitioners and Liquidators team, and Deterrence teams.

**Table 20: Summary of ASIC's forward program**

ASIC's oversight responsibility	ASIC's forward program
<i>Insolvency practitioners</i>	
<b>Registration of insolvency practitioners</b>  Administering the registration of liquidators to ensure that applicants meet the minimum entry-level statutory criteria	<i>Review of Regulatory Guide 186—in progress</i> <ul style="list-style-type: none"> <li>• This review will result in the re-issue of RG186 to provide benchmarks and improved clarity on how ASIC will interpret the 'fit and proper' test when registering liquidators.</li> <li>• A number of submissions to the inquiry have recommended that ASIC implement a pre-registration interview and this will be considered as part of the review of RG186.</li> </ul> This review is scheduled for completion in the fourth quarter of 2010.
<b>Practitioner conduct guidance</b>  Encouraging compliance with the law by working to improve guidance to insolvency practitioners regarding ASIC's expectations within the legal and regulatory framework in which they operate	<ul style="list-style-type: none"> <li>• Review guidance on independence and DIRRIs<sup>135</sup> as part of the <i>Independence: Oversight and surveillance project</i> referred to below under 'Monitoring and surveillance'.</li> <li>• Review guidance on remuneration as part of the <i>Remuneration approval compliance and Surveillance project</i> referred to below under 'Monitoring and surveillance'.</li> </ul>

<sup>135</sup> Declarations of Relevant Relationships and Indemnities.

ASIC's oversight responsibility	ASIC's forward program
<p><b>Monitoring and surveillance</b></p> <p>Monitoring the compliance of insolvency practitioners with the regulatory regime, through monitoring and acting on complaints and undertaking reviews of registered liquidators and their conduct</p>	<p><i>Remuneration approval compliance and surveillance project— in progress</i></p> <ul style="list-style-type: none"> <li>• Surveillance and investigative work to assess compliance with remuneration disclosure and approval processes and take enforcement action where necessary.</li> <li>• 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.</li> <li>• 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.</li> <li>• Issue a regulatory guide to assist creditors by providing information regarding the assessment of whether remuneration is reasonable based on factors introduced into the Corporations Act as part of the 2007 insolvency amendments. This will complement what is currently provided by the professional associations. Consultation paper is expected to be released by the fourth quarter of 2010.</li> <li>• Consider alternative approaches (e.g. an industry panel to assist ASIC) for an independent and experienced assessment of whether a fee being claimed is 'reasonable' based on factors introduced into the Corporations Act as part of the 2007 insolvency amendments.</li> </ul> <p><i>Independence: Oversight and surveillance project</i></p> <ul style="list-style-type: none"> <li>• Following the 2009 DIRRI review project ASIC is working with the IPA to improve the guidance on the independence reporting requirements in their Code. IPA have advised ASIC they will be updating the IPA Code.</li> <li>• Issue a consultation paper and a draft regulation guide on independence and disclosure requirements to supplement what is currently provided by the professional associations. Consultation paper is expected to be released by the fourth quarter of 2010.</li> <li>• Following the Government's recent law reform announcement, DIRRIs will be required to be filed with ASIC. Upon enactment of this legislation, this provision will facilitate increased monitoring by ASIC of declarations provided to creditors and allow early intervention by ASIC in matters where ASIC forms the view a practitioner's independence is comprised.</li> </ul> <p><i>Registered liquidator insurance project</i></p> <ul style="list-style-type: none"> <li>• By December 2010 ASIC will have requested practitioners to provide confirmation of relevant insurance policies to test compliance by practitioners with the new provisions and ASIC's regulatory guide.</li> <li>• In instances of non-compliance ASIC will proceed to cancel registration under s1290A.</li> </ul> <p><i>Aged external administration project</i></p> <ul style="list-style-type: none"> <li>• ASIC will continue to monitor timely completion of administrations by practitioners.</li> </ul>



ASIC's oversight responsibility	ASIC's forward program
<b>Enforcement activities</b> Taking enforcement action where it appears there has been misconduct	<p><i>Increased surveillance</i></p> <ul style="list-style-type: none"> <li>• An expansion of existing compliance and transactions surveillance visits in response to complaints and other intelligence received, and undertaking a scheduled surveillance plan of visits to insolvency practices to influence improved practice and industry behaviours.</li> <li>• Practitioners have been identified based on a risk profile with 10 surveillances due to be completed by December 2010.</li> </ul>
	<p><i>Enforcement powers</i></p> <p>ASIC's current enforcement powers to refer matters to CALDB or court or to enter into enforceable undertakings will continue to be utilised.</p> <p><i>Section 1291</i></p> <p>The restriction of this provision to official liquidators only does not allow ASIC to address directly the conduct of a registered liquidator, which represents 75% of insolvency appointments.<sup>136</sup></p> <p>Where the alleged misconduct concerns a practitioner's conduct as a registered liquidator, ASIC's enforcement powers are referral to CALDB, court proceedings or enforceable undertakings.</p> <p>Official liquidators are court appointed and officers of the court with responsibilities to the court for those external administrations.</p>
<b>Maintaining market knowledge</b>	<p>ASIC's external liaison work at the stakeholder, national and international levels previously detailed will be continued with particular focus on influencing improved industry conduct standards.</p>
<b>Company officers</b>	
<b>Monitoring compliance</b> Monitoring compliance and conduct by company officers in relation to their obligations and behaviour where corporate failure occurs	<p>The national insolvency trading program is continuing and a report will be issued in June 2010.</p>
<b>Enforcement</b> Administer the Assetless Administration Fund to assist and identify misconduct where corporate failure occurs	<p><i>Liquidator Assistance Program and AA Fund</i></p> <ul style="list-style-type: none"> <li>• Between February and May 2010 ASIC is conducting a national awareness campaign to provide further information to insolvency practitioners about its' Liquidator Assistance Program and the Assetless Administration Fund. This is a continuation of similar programs conducted previously.</li> <li>• This will promote compliance by company officers when their company enters external administration, and also with improved identification of corporate misconduct through the statutory reports submitted by insolvency practitioners.</li> <li>• In January 2010 a dedicated Compliance and Deterrence team was brought together to give further focus to improving the compliance and summary prosecution work under the Liquidator Assistance Program, and the disqualification of directors involved in repeated corporate failures.</li> </ul>

<sup>136</sup> These appointments are principally creditors' voluntary liquidations and voluntary administrations.

ASIC's oversight responsibility	ASIC's forward program
<b>Complaints management</b>	
<b>Improving complaints management</b> By increasing risk-based assessment processes and identification of risks and trends	<i>Online portal IT upgrade</i> <ul style="list-style-type: none"> <li>• Upgrade and implementation continuing.</li> </ul> <i>Keyword capture</i> <ul style="list-style-type: none"> <li>• Refinement and improvement of complaint categorisation is continuing.</li> </ul>
<b>Improving communications</b> To provide clearer information on how ASIC has handled their complaint	<i>Project Transparency</i> <ul style="list-style-type: none"> <li>• Continuation of 'Project Transparency' including the review of precedent correspondence to complainants and improved brochure material to assist and guide complainants.</li> </ul> <i>Guidance publications</i> <ul style="list-style-type: none"> <li>• Continuing improvement of brochure material to assist and guide complainants.</li> </ul>
<b>Guidance and education</b> Educating, informing and assisting stakeholders to ensure that they are properly informed about insolvency laws and processes and their rights and obligations	<ul style="list-style-type: none"> <li>• Continued improved guidance to stakeholders through updated information sheets.</li> <li>• See 'Improving communications' above.</li> </ul>

## Misconduct and Breach Reporting team

289 ASIC will be conducting a number of projects over the 2010 and 2011 years to improve our complaints handling and referral processes and increase the intelligence we capture from complaints. We are committed to improving the service we deliver to our stakeholders, to provide clearer information upfront on when you should complain to ASIC, what complaints ASIC can action and what information we require to support allegations of misconduct. We also wish to improve the support we provide to members of the public impacted by external administration, by improving our online educational material and making available specially trained call centre staff to handle online and telephone enquiries about external administration matters. Further information on this work is provided in the following paragraphs.

### Complaints management

#### External portals project

290 In September 2009, ASIC commenced a significant upgrade to its online portal technology, which will include a new online complaints environment

(eComplaints). The eComplaints portal will provide an improved enquiry and complaint service for the public, including:

- (a) an online enquiry service;
- (b) a reformatted and improved eComplaint questionnaire with guiding questions to separate general enquiries from complaints, so that relevant misconduct is reported to ASIC expeditiously, escalated for the attention of dedicated and experienced complaints personnel;
- (c) greater transparency of information about what ASIC will do with your complaint, our assessment process and matters we are likely to action; and
- (d) increased information about the types of complaints and enquiries we have received and how we have handled them.

### **Keyword capture**

291 ASIC launched a new keyword categorisation system for calls and complaints in early 2009,<sup>137</sup> which will be further refined this year to allow ASIC to better identify risks and trends in particular types of calls and complaints, including insolvency and external administration.

292 By continuing our implementation of this process improvement, we will increase the integrity and accuracy of our data, improve the efficiency of our assessment and referral process, and allow faster risk and trend reporting across ASIC and for the public.

### **Deterrence**

293 On 4 January 2010, we brought together a dedicated Compliance and Deterrence team in the Real Economy, further improving the compliance and summary prosecution service under the Liquidator Assistance Program, and the disqualification of directors involved in repeated corporate failures.

### **Communication**

#### *Project Transparency*

294 The Misconduct and Breach Reporting team is continuing its work under 'Project Transparency' to improve how we communicate with complainants and better explain how ASIC has handled their complaint. An important element of this work is the review and issuing of guidance publications (see below).

295 Our call centre staff are trained to direct callers to relevant information not only on ASIC's website but also other relevant material, and to also

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<sup>137</sup> January 2009 for complaints and March 2009 for calls

distribute relevant brochure material. When providing written acknowledgement to complainants, brochure material is also included explaining how ASIC deals with complaints.

*Stakeholder (complaints) guidance*

296 In December 2009, we released a new brochure 'How ASIC deals with your complaints' which provides clearer information on ASIC's role and complaints handling process. This year we will review all precedent correspondence to improve the quality and timeliness of information we provide complainants.

297 ASIC continues to devote considerable resources to providing information and assisting complainants with their insolvency related concerns, as many such complainants have had minimal if any experience with the corporate insolvency environment, and may be unsure of their rights and responsibilities.

*Program awareness campaign*

298 Between February and May 2010, ASIC is conducting a national campaign to provide further information to insolvency practitioners about its Liquidator Assistance Program and the Assetless Administration Fund. This will assist ASIC's work in the promotion of compliance by company officers when their company enters external administration, and also with improved identification of corporate misconduct from statutory reports received from insolvency practitioners through the Assetless Administration Fund.

## Insolvency Practitioners and Liquidators team

### Registration

#### **Review Regulatory Guide 186 *External administration—Liquidator registration* (RG 186)**

299 This regulatory guide currently outlines ASIC's approach to the registration of liquidators and official liquidators, the criteria that must be met to become a registered liquidator, what must be done to remain registered, and when ASIC will register under the categories of 'official liquidator' or 'liquidator of a specified body corporate'.

300 ASIC is revising this regulatory guide to provide benchmarks and give clearer guidance on how we interpret the 'fit and proper' test when registering liquidators.

- 301 As part of this review we will also consider recommendations made to the Inquiry in other submissions that ASIC implement a pre-registration interview process as part of its registration assessment process.

## **Monitoring and supervision**

### **Independence oversight and surveillance projects**

- 302 ASIC is currently finalising the results of a 2009 project reviewing DIRRIs. This review has indicated a lack of consistency and interpretation of required disclosure by insolvency practitioners.
- 303 ASIC has been working with the IPA to improve guidance on independent reporting in the IPA Code. IPA has advised that they will be updating the Code in regard to independence disclosure requirements.
- 304 ASIC will issue a consultation paper and draft regulatory guide to supplement the guidance provided by relevant professional associations.
- 305 Following the government's recent law reform announcement, DIRRIs will be required to be filed with ASIC. When the legislation is enacted, this will assist ASIC with its increased monitoring of declarations of relevant relationships and indemnities and importantly will allow early intervention by ASIC in appropriate matters.

### **Liquidator remuneration project**

- 306 The current regime provides for creditors to approve remuneration. If creditors do not approve remuneration the practitioner is required to seek approval by the court. The 2007 amendments to the Corporations Act introduced the following guidelines to assist the court on assessing the reasonableness of remuneration:
- (a) was the work reasonably necessary;
  - (b) the extent to which the work likely to be performed is likely to be reasonably necessary;
  - (c) the period over which the work was done;
  - (d) the quality of work performed;
  - (e) the complexity of work performed;
  - (f) the number of extraordinary issues;
  - (g) higher level of risk and responsibility;
  - (h) value of property dealt with;
  - (i) whether other practitioners need to be dealt with (e.g. receivers);
  - (j) number, attributes and behaviour of creditors;

- (k) appropriateness of the time taken; and
- (l) any other relevant matter.

307 These factors are not yet provided for in the IPA Code.

308 This remuneration project will review selected insolvency administrations to assess compliance with remuneration disclosure and approval processes. It will also undertake an assessment of the relationship between asset recoveries, remuneration charged and returns to creditors. Detailed information of insolvency remuneration and other key financial data will be captured with a redesign of Form 524 (Statement of Receipts and Payments) after development of improved electronic data capture systems.

309 This project will also consider alternative approaches for an independent and experienced assessment of whether the fee being claimed is 'reasonable' based on the factors introduced into the Corporations Act as part of the 2007 insolvency amendments (e.g. an industry panel to assist ASIC).

310 On completion of the project ASIC will issue a regulatory guide to assist creditors by providing information regarding the assessment of whether remuneration is reasonable based on those factors, and complement what is currently provided by the professional associations.

311 Additionally, ASIC will increase its monitoring of compliance by external administrators with their fee disclosure and approval requirements, conducting transaction reviews as required and when necessary making an application to court for review of remuneration.

#### **Liquidator insurance project**

312 The 2007 insolvency law amendments introduced statutory professional indemnity and fidelity insurance with compliance required by July 2008. In June 2008 ASIC issued RG 194 providing guidance to insolvency practitioners on these statutory insurance requirements

313 ASIC is commencing work to test compliance with both the statutory provisions and RG 194. By December 2010 ASIC will have requested all practitioners to provide confirmation of relevant insurance policies held by them. This work supplements the current requirement that practitioners provide confirmation in annual returns that they hold appropriate insurance cover. ASIC will consider amending RG 194 to facilitate notification to ASIC of a policy cancellation.

314 Where ASIC identifies non-compliance, ASIC will proceed to cancel registration under s1290A.

**Insolvency practitioner surveillance program**

315 ASIC continues to develop and implement insolvency practitioner compliance visits. This involves expanding the existing compliance and transaction surveillance visits in response to complaint and other intelligence received, and undertaking a scheduled surveillance plan of visits to insolvency practices. These visits will be in conjunction with existing project and transactions surveillance visits, focusing on improving practice and industry behaviours.

316 The following specific reviews will be undertaken by ASIC as part of its surveillance program for 2010.

*Risk profile surveillance*

317 A risk assessment of practitioners has been undertaken and based on that identification process ASIC will be undertaking 10 practice surveillances by December 2010. These surveillances will focus on:

- (a) independence;
- (b) remuneration disclosure and approval;
- (c) quality of reporting to creditors;
- (d) adequacy of practice systems and compliance with the Corporations Act to assist ASIC's assessment of ongoing compliance with the 'fit and proper' requirement for liquidator registration.

*Late lodgement of documents*

318 ASIC will be writing to practitioners who have accumulated relatively large fines in relation to the late lodgement of documents, seeking explanations as to:

- (a) why the level of late fees have been incurred;
- (b) what systems are currently in place, or will be implemented in the near future, to ensure timely lodgement of documents with ASIC; and
- (c) confirmation that all late fees incurred have been paid by the liquidator in their personal capacity (as distinct from paying from an administration's funds).

*Lodgement of receipts and payments by registered liquidators*

319 Another area of focus for ASIC is the late lodgement of, or failure by registered liquidators to lodge six monthly receipts and payments for external administrations. ASIC intends to seek an explanation:

- (a) as to why they did not prepare and lodge the outstanding receipts and payments as required by the Corporations Act;
- (b) confirmation that they have lodged all outstanding receipts and payments;

- (c) of the practice systems that are currently in place, or will be implemented in the near future, to ensure timely lodgement of receipts and payments with ASIC;
- (d) as to how the liquidator manages the risks of misappropriation of funds from external administration bank accounts, given outstanding receipts and payments; and
- (e) confirmation that all late fees incurred upon lodgement of the outstanding receipts and payments will be paid by the liquidator in their personal capacity.

*Aged external administration project*

- 320        ASIC is continuing its monitoring of aged external administrations and correspondence has recently been issued to practitioners in regard to administrations aged over 4 years.

## **Deterrence teams**

- 321        ASIC's current enforcement powers to refer matters to CALDB or the court or to enter into an enforceable undertaking will continue to be utilised.



## E ASIC's response to issues raised in other submissions

### Key points

ASIC has reviewed and analysed submissions made to this Inquiry to:

- enable ASIC to respond appropriately to specific matters where ASIC considers it may be of benefit to the Inquiry; and
- identify areas for review and continued improvement of ASIC's performance.

ASIC's response to these concerns and recommendations is provided in Tables 21 and 22 below.

The submissions also made a number of recommendations which are policy matters for government.

**Table 21: Responses to issues raised about ASIC's actions in relation to Mr Stuart Ariff**

Issue	ASIC response
ASIC failed to act on complaints about Stuart Ariff.	<p>All complaints received by ASIC are individually assessed and actioned as appropriate. These complaints assessment procedures are set out under 'Complaints handling and referral process' in Section C of this submission.</p> <p>Each complaint against Mr Ariff has been assessed in accordance with this process.</p> <p>A further response is provided in <i>confidential</i> Appendix E.</p>

**Table 22: Issues in relation to ASIC's oversight responsibility**

Issue	ASIC response
ASIC failed to protect insolvency stakeholders due to inaction.	<p>All complaints received by ASIC are individually assessed and actioned as appropriate. These complaints assessment procedures are set out under 'Complaints handling and referral process' in Section C of this submission.</p> <p>Outcomes can include referral to a specialist team (e.g. IPL team) for further assessment and investigation, or directly to Deterrence for enforcement action.</p>
ASIC lacks transparency on how it handles complaints and fails to communicate outcomes with stakeholders.	<p>ASIC's Project Transparency seeks to improve how ASIC communicates with complainants and better explain how ASIC has handled their complaint.</p> <p>Details on this project have been provided in Section D of this submission under 'Misconduct and Breach Reporting team—Complaints management'.</p>

Issue	ASIC response
<b><i>Insolvency practitioner conduct issues</i></b>	
ASIC does not address the excessive fees charged by insolvency practitioners.	<p>ASIC assesses each complaint received about remuneration in accordance with our complaints assessment process, and the IPL team deals directly with the insolvency practitioners to ensure that their fees are properly approved.</p> <p>For details of ASIC's ongoing work in dealing with insolvency practitioner remuneration, see Section D of this submission under 'Insolvency Practitioners and Liquidators Team—Liquidation remuneration project'.</p>
ASIC has not addressed the lack of independence of insolvency practitioners.	The law in relation to independence disclosure was amended in 2007 to strengthen the requirements. ASIC undertook a project in 2009 to review compliance with these new provisions. For details of this project, see 'Insolvency Practitioners and Liquidators team—Monitoring and surveillance' in Section C of this submission. ASIC is also undertaking further work on independence: see Section D under 'Insolvency Practitioners and Liquidators team—Monitoring and supervision'.

**Table 23: Proposals for change**

Proposal for change	ASIC response
<b><i>Stakeholder education</i></b>	
ASIC does not provide enough guidance/ information to stakeholders.	<p>ASIC has implemented a range of measures to assist and educate stakeholders. These include:</p> <ul style="list-style-type: none"> <li>• information sheets for stakeholders such as creditors;</li> <li>• published regulatory guidance; and</li> <li>• an improved electronic insolvency portal.</li> </ul> <p>See 'Insolvency Practitioners and Liquidators team—Education and Communication' in Section C of this submission for details of this information.</p>
ASIC should collect and publish more information on insolvencies	ASIC publishes monthly statistics on both the number of companies entering external administration for the first time and the number of insolvency appointments recorded in that period. See 'Insolvency Practitioners—Education and communication' in Section C of this submission for details of these statistics.
<b><i>Insolvency practitioner registration and conduct</i></b>	
<p>ASIC should improve the registration process.</p> <p>ASIC should clarify the 'fit and proper' criteria.</p>	ASIC continually reviews and assesses its regulatory guidance, and as part of that process the IPL team is undertaking a project to reissue Regulatory Guide 186 <i>External administration: Liquidator registration</i> (RG 186). See 'Insolvency Practitioners and Liquidators team—Registration' in Section D of this submission for details of this project.
ASIC should undertake annual reviews or audit insolvency practitioner files.	ASIC undertakes compliance and transaction reviews of practitioners. See 'Insolvency Practitioners and Liquidators team—Monitoring and supervision' in Section D of this submission for details of these reviews.

## Key terms

Term	Meaning in this document
2007 Reforms	<i>Corporations Amendment (Insolvency) Act 2007</i>
AA Fund	Assetless Administration Fund
AAT	Administrative Appeals Tribunal
AFS licence	Australian financial services licence
APEC	Asia–Pacific Economic Cooperation Forum
APES 330	APES 300 <i>Insolvency Services</i> , issued by the APESB September 2009 and effective from 1 April 2010
APESB	Accounting Professional and Ethical Standards Board
APRA	Australian Prudential Regulation Authority
APS 7 (for example)	A statement of Insolvency Standards issued by The National Councils of The Institute of Chartered Accountants in Australia and the Australian Society of Certified Practising Accountants (APS 7 in this example)
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
CALDB	Companies Auditors and Liquidators Disciplinary Board—the independent statutory body that considers applications from ASIC and APRA regarding the conduct of registered auditors and liquidators
CDPP	Commonwealth Director of Public Prosecutions
Code of Professional Practice (IPA Code)	Insolvency Practitioners Association of Australia Code of Professional Practice
committee of inspection or committee of creditors	A small group of creditors, or their representatives, sometimes appointed by the creditors of a company in external administration. The committee's role is to consult with the external administrator and to receive and consider reports by the external administrator. The committee may be called upon to approve the external administrator's fees. An external administrator must report to the committee when it reasonably requires.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
CPA	CPA Australia Ltd (formerly Australian Society of Certified Practising Accountants)
creditor	A person who is owed money

Term	Meaning in this document
deed administrator	The external administrator appointed to oversee a deed of company arrangement
deed of company arrangement	A binding arrangement between a company and its creditors governing how the company's affairs will be dealt with, which may be agreed to as a result of the company entering voluntary administration. Aims to maximise the chances of the company, or as much as possible of its business, continuing, or to provide a better return for creditors than an immediate winding up of the company, or both.
Deterrence or Deterrence team	ASIC has eight Financial Economy Deterrence teams, each with specific areas of focus. Deterrence teams deal with cases that seek to have a deterrent effect, or drive a behavioural change, in their relevant industry or area.
DIRRI	Declaration of Relevant Relationships and Indemnities. Declarations that must be provided by a voluntary administrator or a liquidator in a creditors' voluntary liquidation informing creditors about certain relationships and indemnities provided. The declarations provide information to enable creditors to make an informed decision about whether they wish to replace the administrator over concerns about independence
DOCA	Deed of company arrangement
enforceable undertaking	One of the remedies available for breaches of the legislation as an alternative to civil or administrative action
EXAD	An external administrator as defined below
external administration	The corporate insolvency that the external administrator has been appointed to administer
external administrator	A general term for an external person formally appointed to a company or its property. Includes provisional liquidator, liquidator, voluntary administrator, deed administrator, controller, receiver, and receiver and manager. Other than a liquidator for a members' voluntary liquidation and a controller who is not a receiver or receiver and manager, an external administrator is required to be registered by ASIC. An external administrator is sometimes also referred to as an insolvency practitioner
FAIR	Forum for Asian Insolvency Reform
FIDO	Financial Information Delivered Online, the consumer website of ASIC
Financial Economy	The area within ASIC that manages matters relating to the financial markets that are relied on by the real economy and by stakeholders of financial products and services
IAIR	The International Association of Insolvency Regulators

Term	Meaning in this document
ICAA	Institute of Chartered Accountants in Australia
INFO 42 (for example)	An ASIC information sheet (in this example numbered INFO 42)
information sheet	Guidance issued by ASIC to assist stakeholders
IPA	Insolvency Practitioners Association of Australia, the leading professional organisation in Australia for external administrators/insolvency practitioners.
IPA Code	Insolvency Practitioners Association of Australia Code of Professional Practice
IPL or IPL team	ASIC's Insolvency Practitioners and Liquidators team—a specialised insolvency stakeholder team within ASIC's Financial Economy area
LAP	Liquidator Assistance Program—a team within ASIC's Real Economy area which focuses on company officer compliance responsibilities in external administrations
liquidation	The orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders. The three types of liquidation are: court, creditors' voluntary and members' voluntary
liquidator	An external administrator appointed to undertake the liquidation of a company
M&BR or M&BR team	ASIC's Misconduct and Breach Reporting team—a specialised stakeholder team within ASIC's Real Economy area which undertakes initial assessment of complaints and inquiries received by ASIC
NIA	National Institute of Accountants
OECD	Organisation for Economic Co-operation and Development
official liquidator	An external administrator appointed by a court to undertake the liquidation of a company
PJC Report	Parliamentary Joint Committee Report <i>Corporate Insolvency Laws: A Stocktake</i> (30 June 2004)
professional accounting bodies	The CPA, the ICAA and the NIA
provisional liquidator	An official liquidator appointed by the court to preserve a company's assets until a winding-up application is decided
RATA	Report As To Affairs. A prescribed form required to be completed by the directors and secretary of a company in external administration, giving details of the company's assets and liabilities

Term	Meaning in this document
Real Economy	The area within ASIC that manages matters relating to that part of the economy that produces goods and services
receiver	An external administrator appointed by a secured creditor to realise enough of the assets subject to the secured creditor's charge to repay the secured debt. Less commonly, a receiver may also be appointed by a court to protect the company's assets or to carry out specific tasks
receiver and manager	A receiver who has, under the terms of their appointment, the power to manage the company's affairs
register of liquidators	A register held by ASIC under s1286(1) of the Corporations Act providing details of all registered liquidators
registered liquidator	A person registered by ASIC under s1282(2) of the Corporations Act
regulatory guide	A document issued by ASIC to explain when and how ASIC will exercise its powers, including how it will interpret the law, also giving practical guidance
RG 194 (for example)	An ASIC regulatory guide (in this example numbered 194)
s311 (for example)	A section of the Corporations Act (in this example numbered 766E), unless otherwise specified
secured creditor	A creditor who has a security (e.g. charge or mortgage) over some or all of a company's property
SOFAC	Statement of Facts and Contentions. A statement required by the CALDB to be submitted by the applicant, setting out the facts and documentary evidence on which the application relies
Superseded Policy Statement 33	Superseded Policy Statement 33 <i>Security deposits</i> (SPS 33)
unsecured creditor	A creditor who does not hold a security over a company's property
voluntary administrator	An external administrator appointed to carry out the voluntary administration of a company

# List of appendixes

The following appendixes contain additional information relating to sections of this submission.

## **Appendix A: ASIC's structure and strategic priorities**

## **Appendix B: Related information—The insolvency environment and regulatory framework**

Appendix B1: The insolvency market

Appendix B2: The regulatory framework

- Table B2.1: Comparison of international corporate insolvency regimes
- Table B2.2: International comparison of misconduct and regulation of insolvency practitioners
- Table B2.3: ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*
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Appendix B3: Insolvency appointments

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Appendix B5: IPA Code of Professional Practice—Conduct Principles (IPA Principles)

## **Appendix C: Related information—ASIC's activities**

Appendix C1: Complaints and inquiry statistics

Appendix C2: Insolvency Practitioners and Liquidators (IPL) team activities

Appendix C3: Misconduct and Breach Reporting team activities

## **Appendix D: Related information—How ASIC deals with your complaint (brochure)**

## **Appendix E: Related information—Confidential**

## Appendix A: ASIC structure and strategic priorities

To assist the Inquiry, this appendix provides background information setting out the structure of ASIC's operational activities.

### ASIC's strategic review

#### About ASIC's strategic review

- 322 As announced by ASIC's Chairman to Senate Estimates on 30 May 2007, ASIC has undertaken a strategic review that aimed to create an ASIC that:
- (a) better understands the markets it regulates;
  - (b) is more forward looking in examining issues and systemic risk;
  - (c) is clearer in outlining to the market why it has chosen to intervene and the behavioural changes it is seeking; and
  - (d) has a clearer set of priorities.
- 323 The appointment of three new Commissioners has significantly broadened the skills base of the Commission to include insolvency, investment banking, public policy and economics, adding to the strong existing commercial and legal strengths of the Commission.
- 324 Commissioner Michael Dwyer was appointed to bring specialised insolvency skills and has direct oversight of the stakeholder teams and issues that deal with insolvency. Commissioner Dwyer has extensive experience as a chartered accountant and an insolvency practitioner, including a term as National President of the Insolvency Practitioners' Association of Australia. He has also been a partner of international accounting firms for over 20 years specialising in insolvency and holding leadership positions in those firms

#### ASIC's current structure

- 325 Under ASIC's current structure the organisation is split between the Real Economy and the Financial Economy. The real economy is the part of the economy that produces goods and services, with ASIC responsible for its legal infrastructure (such as company registration, registration of charges and the issue of licenses). The financial economy refers to the financial markets that are relied on by the real economy and by stakeholders of financial products and services.
- 326 Within the Real Economy, the stakeholder team most relevant to the Inquiry's terms of reference is the Misconduct and Breach Reporting team.
- 327 The Financial Economy stakeholder teams most relevant to the Inquiry are:
- (a) the Insolvency Practitioners and Liquidators (IPL) team, specialising in insolvency practitioner issues and insolvency related activities;



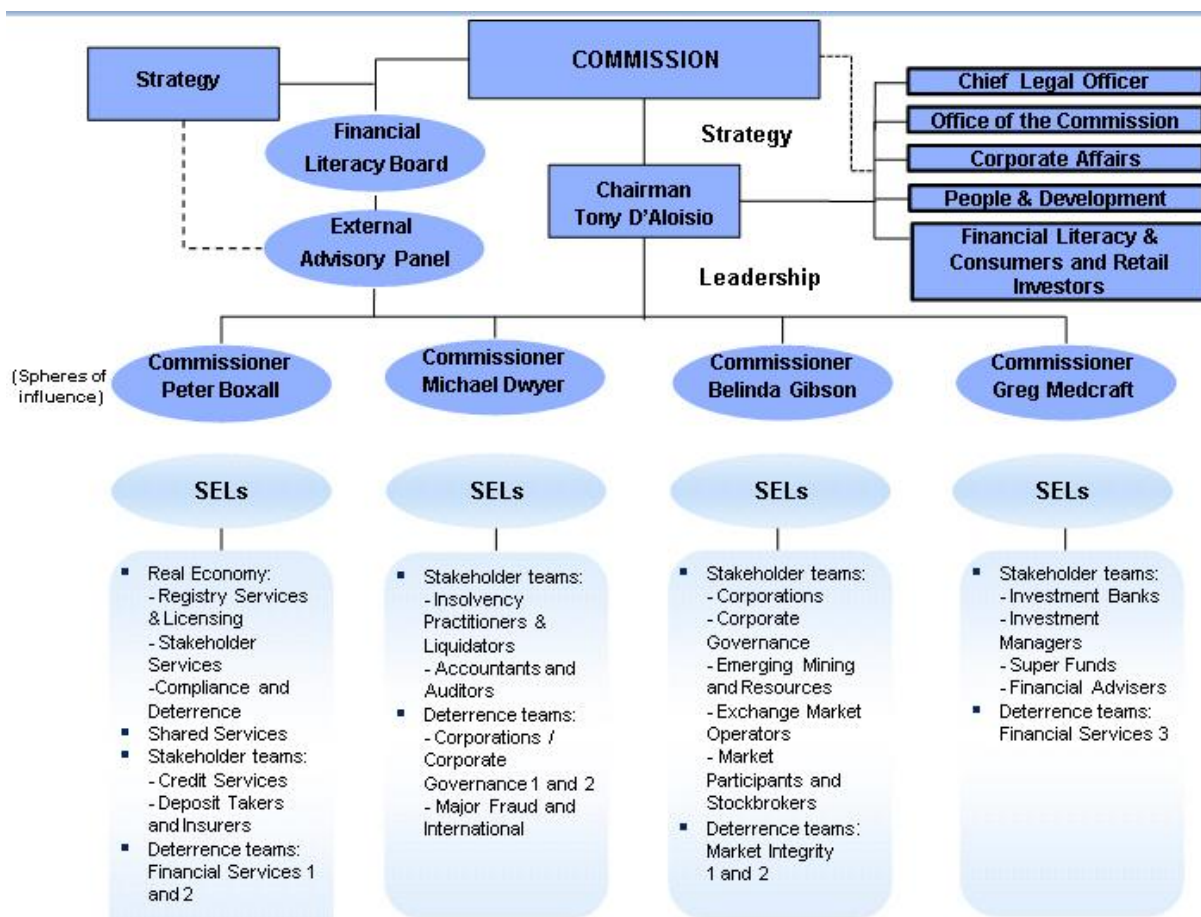
- (b) the Corporations and Emerging Mining and Resources teams, which may identify companies with financial distress through their various reporting, fundraising, mergers and acquisitions, prospectus review and related party assessment activities;
- (c) the Accountant and Auditors team; which may identify companies with financial distress or insolvency concerns through its financial reporting surveillance activities; and
- (d) the Investment Managers team, which deals with failed managed investment schemes and works with the IPL team liaising extensively with insolvency practitioners when they undertake these insolvency appointments.

328 There are two Deterrence teams which include as part of their activities enforcement actions in relation to insolvency practitioners and external administration.

329 In addition to the specialist insolvency teams and those involved on a regular basis in insolvency related matters, ASIC also has substantial insolvency skills in other teams including Chief Legal Office, other Deterrence teams and within the other Real Economy teams.

330 ASIC's current structure commenced on 1 September 2008.

**Figure A.1: ASIC's structure**



## ASIC's regulatory priorities

- 331 ASIC seeks to focus and deliver on set regulatory priorities. These regulatory priorities are:
- (a) assist and protect retail stakeholders and stakeholders in the financial economy;
  - (b) build confidence in the integrity of Australia's capital markets;
  - (c) facilitate international capital flows and international enforcement;
  - (d) manage the domestic and international implications of the global financial turmoil;
  - (e) lift operational effectiveness and service levels for all ASIC stakeholders; and
  - (f) improve services and reduce costs by using new technologies and processes.

**Table A.1: ASIC's activities in relation to the insolvency market**

ASIC's role in the insolvency market	What ASIC does
<b>Administer liquidator registration regime</b>	ASIC processes applications for registration of liquidators.
<b>Monitor compliance with:</b> <ul style="list-style-type: none"> <li>• liquidator registration requirements</li> <li>• the conduct obligations in the Corporations Act</li> <li>• the general stakeholder protection provisions for financial services and products in the ASIC Act and</li> <li>• disclosure obligations</li> </ul>	<p>ASIC monitors and acts on complaints and breach reports. ASIC considers a range of factors when deciding whether to investigate.</p> <p>In addition to monitoring and acting on complaints and breach reports, ASIC also directly monitors individual and entities, documents and transactions for compliance with the Insolvency obligations of its own initiative. ASIC has certain powers that facilitate its monitoring activities.</p>
<b>Take enforcement action against breaches of the law</b>	<p>ASIC's deterrence and enforcement activities consist of:</p> <ul style="list-style-type: none"> <li>• formal investigation or surveillances of suspected misconduct: and</li> <li>• enforcement actions, that is:               <ul style="list-style-type: none"> <li>– civil proceedings to protect stakeholders, impose a civil penalty or recover funds for stakeholders;</li> <li>– criminal proceedings (usually via the Commonwealth Director of Public Prosecutions (CDPP) to impose a criminal penalty and actively deter misconduct in the market place;</li> <li>– administrative proceedings by ASIC (or via a referral to another decision maker) to disqualify or ban persons (i.e. CALDB); or</li> <li>– set conditions on future conduct by the party (e.g. via an enforceable undertaking).</li> </ul> </li> </ul> <p>ASIC has a range of compulsory information-gathering, inspection and formal interview powers to facilitate its formal investigations.</p>

ASIC's role in the insolvency market	What ASIC does
<b>Modify and exempt from the law when appropriate</b>	<p>ASIC has powers to exempt individual entities or persons from aspects of the Insolvency regime.</p> <p>ASIC exercises these powers on application and on its own motion.</p> <p>ASIC issues regulatory guidance that explains how and when it will exercise its powers to exempt from or modify the law.</p>
<b>Encourage compliance with the law by helping the insolvency industry understand its compliance obligations</b>	<p>ASIC has developed and issued guidance in relation to how it administers the law to provide clarity to the industry participants about what we expect from them and to help them understand the legislative requirements.</p> <p>ASIC also helps industry understand its obligations through ASIC's compliance activities.</p>
<b>Educate and inform stakeholders</b>	<p>ASIC delivers stakeholder education and information in three ways:</p> <ul style="list-style-type: none"> <li>• through its stakeholder websites—ASIC's primary channel for delivery stakeholder / stakeholder education is through the internet. This is because we are able to reach a wide audience this way. ASIC currently has two websites focused on stakeholder/ stakeholder education;</li> <li>• through other channels—publications, media, professional learning packages and outreach; and</li> <li>• via stakeholder liaison.</li> </ul>

## **Appendix B: Related information—The insolvency environment and regulatory framework**

The following appendixes contain additional information relating to Section B of this submission.

**Appendix B1: The insolvency market**

**Appendix B2: The regulatory framework**

**Appendix B3: Insolvency appointments**

**Appendix B4: Registration requirements for liquidators**

**Appendix B5: IPA Code of Professional Practice—Conduct Principles (IPA Principles)**

## Appendix B1: The insolvency market

To assist the Inquiry, this appendix provides background information about: the size and structure of the insolvency profession, and some of the drivers and market forces acting in the insolvency profession.

This information supplements the market information contained in the main body of this submission.

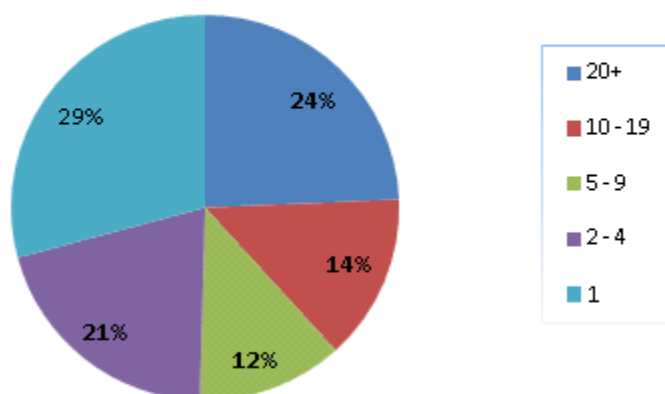
### Market size

- 332 The Australian insolvency industry consists of 662<sup>138</sup> registered liquidators and 492 official liquidators, dealing with corporate insolvency.
- 333 Each year there are between 7,500 and 10,000 companies entering external administration for the first time and for the period 2006–07 financial year to 31 December 2009, there were approximately 47,000 appointments in total (taking into consideration multiple external administration appointments to one company).
- 334 The market for the provision of insolvency services is arguably a mature market, as the numbers of registered liquidators have peaked in recent years, with a recent development being the consolidation of some of the larger firms. Although there is some full service practice firms which have insolvency divisions, many firms specialise in insolvency work, to mitigate potential conflicts arising from other areas of practice within the firm.

### Industry profile

- 335 Following is a profile of insolvency firms, based on the number of registered liquidators per firm.

**Figure B1.1: Number of liquidators by firm size—Dec 2009**



<sup>138</sup> As at February 2010.

- 336 There are a total 273 insolvency firms, ranging in size from sole practitioner firms to the multiple practitioner firms (the largest comprising 37 registered liquidators).
- 337 There is a concentration of registered liquidators in larger specialist insolvency firms as evidenced by the largest 13 firms each having greater than 10 registered liquidators. These firms have 251 registered liquidators and account for 39% of total current external administration appointments.
- 338 There are 248 firms with 4 registered liquidators or less, small practices and sole practitioners, having approximately 331 (50%) of the registered liquidator population.
- 339 78% of registered liquidators operating predominantly on the eastern seaboard states being NSW (35.2%), Victoria (25.9%) and Queensland (16.9%).
- 340 Characteristics of small, medium and large sized firms are shown in Table B1.3 below.
- 341 Typically the larger firms with national presence, insolvency specialisation, and resources and capacity to take on large complex receiverships and voluntary administration appointments; often at the instigation of a secured creditor.
- 342 Medium-sized firms will have a mixed practice with different types of appointments—smaller receiver and manager appointments, voluntary administrations and creditors' voluntary winding-up—representing a combination of appointments from secured creditor and those initiated by company directors.
- 343 Smaller firms and sole practitioners tend to be more focused on director initiated appointments being creditors' voluntary winding-up, small voluntary administration appointments and creditor-driven court liquidations. At the smaller end of the market, barriers to entry are low, as the capital required to establish a practice as a sole practitioner is minimal.
- 344 Some firms undertake only formal insolvency appointments whilst others have expanded into workout, restructuring, forensic accounting and expert opinion work.

## Historical trends in corporate insolvencies

- 345 ASICs receive statistical data from insolvency practitioners when they lodge certain statutory reports. This information is normally provided during administration and is based on estimates.

346 Table B1.1 below provides a profile of companies in external administration.

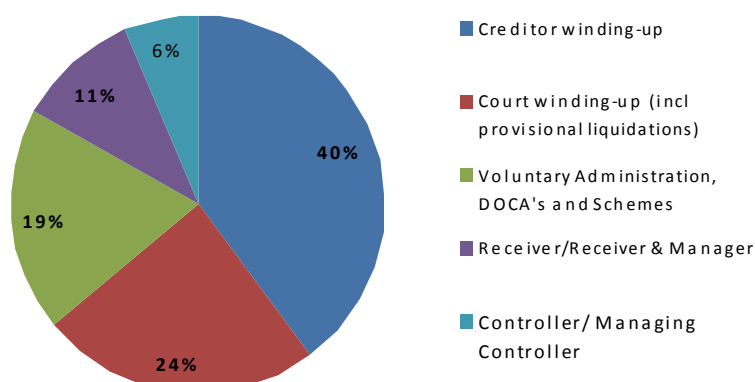
**Table B1.1: Profile of companies in external administration**

	2006–07	2005–06	2004–2005
Employees—Companies with less than 20 FTE employees	82%	84%	83%
Assets—Companies with assets of \$100,000 or less	87%	86%	84%
Unsecured creditors owed \$500,000 or less	82%	82%	82%
Unsecured creditors—number of creditors less than 50	88%	87%	85%
Deficiency—EXADs with asset deficiency \$500,000 or less	76%	75%	75%
Dividends to unsecured creditors of 10 cents in the dollar or less	96%	96%	95%
Secured creditors—EXADs with no secured creditor	73%	69%	66%

347 From this table, it can be seen that the majority of appointments involve small to medium proprietary limited companies. In 2006–07 these companies had less than 20 employees (82%), less than \$100,000 in assets (87%) unsecured creditors owed \$500,000 or less (82%). A large number of the external administrations have no secured creditors (73%). A large percentage estimated a deficiency of up to \$500,000 and a significant number (96%) estimated returns to unsecured creditors of less than 10 cents in the dollar.

## Types of appointments

348 The following chart shows that generally the greater number of external administration (first time) appointments are director driven through creditor voluntary winding ups (40%) and voluntary administrations (19%). Creditor-driven appointments through court liquidations amount to 24% and secured creditor appointments of 11%.

**Figure B1.2: Total external administration appointments in Australia—July 2008 to June 2009<sup>139</sup>**

## Remuneration

- 349 In most instances, liquidators undertaking an external administration are remunerated from the assets of the company.
- 350 The majority of registered liquidators will charge fees (on a 'time charged' basis) calculated using a fee scale, dependent upon the qualifications and experience of the staff used.
- 351 The following table gives some examples of different sized firm's scales within the Sydney market (excluding GST). The rates charged by registered liquidators can be different in different firms and in different States.

**Table B1.2: Examples of different firms' fee scales**

Position	Small firms	Medium sized firms	Large firms
Registered liquidator and partner	\$460	\$550	\$690
Director	—	\$440	\$550
Manager	\$340	\$385	\$435
Supervisor	\$275	\$270	\$312
Senior accountant	\$225	\$235	\$250
Accountant	\$165	\$195	\$210
Support staff	\$145	\$130	\$130

<sup>139</sup> 83% of the controller appointments are secured creditor type appointments.



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The statutory processes requiring practitioner disclosure of information relevant to remuneration and creditor approval of remuneration claims are detailed in ASIC's submission.

**Table B1.3: Characteristics of small, medium-sized and large insolvency firms**

	<b>Small firms</b>	<b>Medium-sized firms</b>	<b>Large firms</b>
<b>Work type</b>	Small VAs and liquidations with limited assets and business operating from one location Typically no secured creditor work	Small to medium VAs and liquidations—with assets—and business often operating in more than one geographic location Some secured creditor work	Medium to large VAs and liquidations—with assets—and business often operating in more than one geographic location High proportion of secured creditor work National presence
<b>Work referrers</b>	Network of suburban accountants and lawyers	Network of mid-size accounting and legal firms Some banks and financial institutions	Network of large size accounting and legal firms Banks and financial institutions
<b>Basis of competition</b>	Volume of appointments Process efficiencies—minimising write-offs of work in progress Minimising cost and scope of work completed	Volume of appointments—to a lesser extent than small practices Minimising costs—to a lesser extent than small practices Capacity and access to specialist skills—to a lesser extent than large practices	Capacity Specialisation and expertise Reputation—allowing them to demand a premium for their services Do not compete on volume of appointments
<b>Capacity</b>	Limited experienced human resources Limited structured/written policies and procedures Basic procedures and systems Limited resources dedicated to continuous improvement or training Often specialist insolvency practices with no other source of revenue	Human resources generally experienced Documented policies and procedures Procedures and systems Limited internal access to specialist skills to undertake large appointments Some resources dedicated to continuous improvement and training Many are specialist insolvency practices with no other source of revenue	Experienced human resources Well developed and documented policies and procedures Resources dedicated to regular review and update of procedures Easy access to specialist skills to undertake large appointments Significant resources dedicated to continuous improvement and training
<b>Peer review</b>	Rare to have a peer review process	May have some form of peer review	Regular peer review

	Small firms	Medium-sized firms	Large firms
<b>Creditor profile</b>	Mostly small, unsophisticated creditors	Mixture of both smaller and larger creditors ranging in level of sophistication	In large appointments, the majority of creditors are large and sophisticated with access to their own legal and accounting advisers
<b>EXAD characteristics</b>	<p>Not complex with limited assets to meet costs of administration</p> <p>Insufficient assets to permit extensive investigation and reporting</p> <p>Directors not fully aware of their duties and obligations</p>	<p>Range from not complex to medium complexity</p> <p>Generally sufficient assets to meet costs of administration</p> <p>Directors have some access to external legal and accounting advisers</p>	<p>Complex, large administrations</p> <p>Significant assets to meet costs</p> <p>Directors generally have had access to external accounting and legal advisers and generally aware of their duties and obligations</p>

## Appendix B2: The regulatory framework

To assist the Inquiry, this appendix includes:

- a comparison of international corporate insolvency regimes (see Table B2.1)
- an international comparison of misconduct and regulation of insolvency practitioners (see Table B2.2)
- ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake* (see Table B2.3)
- a summary of insolvency law reform from 2004–10 (see Table B2.4).

**Table B2.1: Comparison of international corporate insolvency regimes**

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
<b>Key governing legislation</b>	Corporations Act 2001 Corporations Regulations 2001 ASIC Act 2001	The Bankruptcy Reform Act of 1978 (the Bankruptcy Code)	Insolvency Act 1986 Insolvency Rules 1986 Company Directors Disqualification Act 1986	Bankruptcy and Insolvency Act RSC 1985 (BIA) Companies' Creditors Arrangement Act RSC 1985 (CCAA) Winding-up and Re-structuring Act RSC 1985 (WURA)	Companies Act 1993 Insolvency Act 2006	Bankruptcy Law Corporate Reorganisation Law Commercial Code Composition Law Companies Act 2005	Insolvency Act (Insolvenzordnung) German Stock Corporation Act (Aktengesetz) German Companies with limited liability Act (GmbH-Gesetz)
<b>Insolvency regimes</b>	Part 5.1—Schemes of arrangement Part 5.2—Receivership Part 5.3A—Voluntary Administration Part 5.3A—Deed of co arrangement Part 5.4 and 5.4B—Liquidation	Ch 7—Liquidation Ch 11—Reorganization	Part I—Company Voluntary Arrangement/ Scheme of Arrangement Part III—Receivership Part II—Administration Parts IV and V—Winding up	Liquidation Reorganisation Compromise arrangement	Voluntary Administration Deed of company arrangement Scheme of arrangement Liquidation	Bankruptcy Special liquidation Corporate Reorganisation Corporate Arrangement Composition Compulsory Composition	Winding up Insolvency Plan (restructure) Sale as going concern

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
<b>Insolvent trading offence</b>	Directors have a duty to prevent insolvent trading (Corporations Act 2001, s588G)	No specific insolvent trading offence although other provisions and/or laws are likely to cover the conduct.	The court may order directors to make a contribution to the company's assets if they have engaged in wrongful trading (Insolvency Act 1986, s214)	No specific insolvent trading offence although other provisions and/or laws are likely to cover such conduct.  Creditors may have a claim under the oppression remedy where the directors have exercised their powers in a manner which is oppressive or unfairly prejudicial or that unfairly disregards the interests of a security holder or creditor (Canada Business Corporations Act RSC 1985 s241).  There is case law in Canada that follows the	A director has a duty not to agree to, or cause or allow, the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors (Companies Act 1993 s135—Reckless trading).	Articles 160–176 of the Bankruptcy Law provide a 'right of avoidance'. The right of avoidance invalidates certain transactions in the period preceding adjudication of bankruptcy, restoring the assets (the objects of the transaction) to the bankrupt estate. <sup>140</sup>  Nevertheless some general civil and criminal liability provisions are more likely to apply when a company is insolvent or at risk of insolvency (see a fraudulent bankruptcy <sup>141</sup> (Bankruptcy Law, Art 265) and negligent	Under German law, management boards and directors of corporations are obliged to file for insolvency if the company is either 'insolvent' or 'over-indebted'. <sup>143</sup> If filing does not take place within three weeks, the management render themselves liable to criminal prosecution for the delay and become personally liable for the damages to the company's creditors. <sup>144</sup>  Under a new law passed by the German parliament

<sup>140</sup> See Sate, Rika and Kaneko, Naho, *Right of Avoidance under Bankruptcy Law* (International Law Office, 25 September 2009) at <http://www.internationallawoffice.com/Newsletters/detail.aspx?g=83187f46-66da-437c-b5e2-1c7e1ee384ad>; See also, ISOL International, *Directors in the Twilight Zone III* (2009), p. 462, para 1.1.1.

<sup>141</sup> The crime of fraudulent bankruptcy includes the concealment or destruction of properties related to the estate in bankruptcy, the disposition of such properties in a manner prejudicial to creditors, and the fraudulent increase of liabilities of the estate, and is punishable with imprisonment not to exceed ten years (Bankruptcy Law, Art 265, Sec1, Paras 1 & 2 with the additional punishment of either imprisonment and/or a fine not to exceed ten million yen).

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
			approach taken in other common law jurisdictions (i.e. England, Australia, New Zealand), which suggests that when a corporation is insolvent the directors cannot disregard the interests of the creditors: <i>Peoples Department Stores Inc. v. Wise</i> [2004] 3 S.C.R. 461, 2004 SCC 68		bankruptcy (Bankruptcy Law, Art 266)). <sup>142</sup>  Directors are also jointly and severally liable to the company for the amount of damages caused by an act in violation of law or the articles of incorporation (Companies Act, Art 423). This liability may be limited for acts taken in good faith and in the absence of gross negligence (Companies Act, Art 425, Sec 1).	in October 2008, there is no obligation to file for insolvency on the grounds of over-indebtedness if a positive continuation forecast can be made. This amendment will cease to have effect after 31 December 2010. <sup>145</sup>
<b>Business Judgement Rule (BJR)</b>	There is no BJR for insolvent trading.	Yes, the rule may be used as a defence to actions taken by directors	No BJR. <sup>147</sup>	BJR operates as a defence to fiduciary and statutory obligations. <sup>148</sup>	No BJR, however, it is likely that only the taking of illegitimate business risks will	The Bankruptcy Law provides that with respect to those acts relating to the right of

<sup>143</sup> See for example, German Stock Corporations Act s92; Justin Wood, 'Director Duties and Creditor Protections in the Zone of Insolvency: A Comparison of the United States, Germany and Japan' (2007–2008) 26 *Penn State International Law Review*, p. 139.

<sup>144</sup> Mayer Brown, Restructuring *Bankruptcy and Insolvency Group Legal Alert: Relaxation of the Requirement to File for Insolvency under German Law* (24 October 2008) at [www.mayerbrown.com/publications/article.asp?id=6134&nid=6](http://www.mayerbrown.com/publications/article.asp?id=6134&nid=6); See also ISOL International, *Directors in the Twilight Zone III* (2009), p. 318, 2.1.2.

<sup>142</sup> The crime of negligent bankruptcy includes any provision of security or extinguishment of obligation that is preferential to some creditors notwithstanding existing knowledge regarding the causes of bankruptcy, or that the debtor has no duty to entertain such provision of security or extinguishment of obligation, and is punishable with imprisonment not to exceed five years or a fine not to exceed five million yen or both (Bankruptcy Law, Art 266).

<sup>145</sup> Mayer Brown, *Restructuring Bankruptcy and Insolvency Group Legal Alert: Relaxation of the Requirement to File for Insolvency under German Law* (24 October 2008) at [www.mayerbrown.com/publications/article.asp?id=6134&nid=6](http://www.mayerbrown.com/publications/article.asp?id=6134&nid=6).

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
		when company may be insolvent. <sup>146</sup>			warrant a finding of reckless trading.  Risks will be illegitimate if the director's conduct, <i>'departed so markedly from orthodox business practice and involved such extensive and unusual risk to the creditors that it can be fairly stigmatised as reckless'</i> . <sup>149</sup>	avoidance, it is an effective defence in relation to a civil or criminal offence to prove that the transfer of property, the performance of an obligation, or the provision of collateral, conducted before the filing of bankruptcy, had a proper objective and were executed in good faith. <sup>150</sup>	
<b>Prepacks</b>	Yes, possible.	Yes. The Bankruptcy Code provides for the sale of assets independent of a	Yes. An administrator has the power to sell assets without the prior approval of creditors or the permission of the	Usually only with court approval. <sup>154</sup>	—	Yes. Civil Rehabilitation Proceedings are often used. The consent of largest creditors required. After the	Sale of business can be effected via an Insolvency Plan. (The pre-packaged sale is generally

<sup>147</sup> Section 172 Companies Act 2006 states that it is the directors' duties to promote the success of the company. By virtue of S1157 Companies Act 2006, the court has discretion to relieve the director either wholly or partly from liability for breach of these duties on such terms as it thinks fit if: a) he acted honestly; b) he acted reasonably; and c) he ought fairly to be excused from liability in all the circumstances. Under s214(3) of the Insolvency Act, the court will not make a declaration that a director engaged in wrongful trading if the director took every step with a view to minimising the potential loss to the company's creditors (assuming they knew that there was no reasonable prospect that the company would avoid going into insolvent liquidation) as they ought to have taken.

<sup>148</sup> *CW Shareholdings Inc. v. WIC Western International Communications Ltd* (1998) 39 O.R. (3d) 755; *Brant Investments Ltd. v. KeepRite Inc.* reflex, (1987), 60 O.R. (2d) 737.

<sup>146</sup> *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004); the Credit Lyonnais decision's holding and spirit clearly emphasized that directors would be protected by the business judgment rule if they, in good faith, pursued a less risky business strategy precisely because they feared that a more risky strategy might render the firm unable to meet its legal obligations to creditors and other constituencies. See also *Credit Lyonnais Bank Nederland, N. V. v. Pathe Communications Corp.*, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

<sup>149</sup> *South Pacific Shipping Limited (in Liquidation), Re; Traveller & Anor v Löwer* (2004) 9 NZCLC 263; *Jordan and Vance v O'Sullivan* [2008] NZHC 679 (13 May 2008).

<sup>150</sup> ISOL International, *Directors in the Twilight Zone III* (2009), p. 466, 2.5.

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
		plan of reorganisation. <sup>151</sup>	court <sup>152</sup> – but such power should only be ‘exercised only in genuine furtherance of the administration’.  SIP 16 guidance concerning disclosure to be adhered to. <sup>153</sup>			petition is filed, such sale is carried out following court approval and may involve a competitive bidding process among potential buyers. <sup>155</sup>	negotiated with all or at least the major creditors and preliminary insolvency administrator prior to the formal opening of the insolvency proceedings. Once the proceeding is opened, the Insolvency Plan is implemented. <sup>156</sup>
<b>Ipsso Facto Clauses</b>	Enforceable. <sup>157</sup>	Only limited enforceability. <sup>158</sup>	Enforceable. Section 233 of the Insolvency Act	Only limited enforceability, except with leave of the court. <sup>159</sup>	Not enforceable (in limited cases). <sup>160</sup>	Usually enforceable. <sup>161</sup>	Usually enforceable. <sup>162</sup>

<sup>154</sup> *Insolvency Law Forum, The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009).

[http://www.insolvencylawforum.co.uk/index.php?option=com\\_content&view=article&id=378:reforms-to-australias-insolvency-regime-&catid=8:opinion-posts&Itemid=20](http://www.insolvencylawforum.co.uk/index.php?option=com_content&view=article&id=378:reforms-to-australias-insolvency-regime-&catid=8:opinion-posts&Itemid=20)

<sup>151</sup> Subchapter II of the Bankruptcy Code– The Plan. Pgs 38, 96, 151, 250 [all Para 7.3] *The International Comparative Legal Guide to Corporate Recovery & Insolvency 2009* (published by Global Legal Group).

<sup>152</sup> *T&D Industries Plc* [2001] 1 WLR 646; *Transbus International Ltd* [2004] EWHC 932 (Ch); *DKLL Solicitors* [2007] EWHC 2067 (Ch).

<sup>153</sup> Statement of Insolvency Practice 16: Pre-packaged sales in administrations. Enacted 1 January 2009 to improve transparency.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> Sections 541(c) and 365(e)(1) of the US Bankruptcy Code. A principal exception to this rule is stated in s365(e)(2) of the code. *Insolvency Law Forum, The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009) [http://www.insolvencylawforum.co.uk/index.php?option=com\\_content&view=article&id=378:reforms-to-australias-insolvency-regime-&catid=8:opinion-posts&Itemid=20](http://www.insolvencylawforum.co.uk/index.php?option=com_content&view=article&id=378:reforms-to-australias-insolvency-regime-&catid=8:opinion-posts&Itemid=20).

<sup>159</sup> *Bankruptcy and Insolvency Act 1985*, s65.1, 66.34, 84.2.

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
			addresses the necessary continuance of utilities when a company enters external administration. Director's may obtain a moratorium prior to entering into voluntary administration which prevents landlords forfeiting leases. (See Insolvency Act, s1A and Schedule 1A, cl 12(f))				
<b>Remuneration: Regulation and disclosure</b>	Meaningful Disclosure and Creditor Approval. Sections 425, 449E and 504 of the Corporations Act	Appointed by the United States Trustee or elected by creditors. <sup>163</sup> Court determines remuneration (see	For liquidators (insolvent liquidations) and administrators remuneration is fixed by liquidation committee or creditors,	Remuneration of trustee is voted on by meeting of creditors (s39 BIA). Where the remuneration of the	Liquidator is entitled to charge reasonable remuneration for carrying out his or her duties and exercising his or her powers as		Payment on a percentage basis is possible. <sup>166</sup>

<sup>160</sup> *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009) [http://books.google.com/books?id=f\\_yWaV\\_-l4C&pg=PT477&lpg=PT477&dq=ipso+facto+clauses+new+zealand+insolvency&source=bl&ots=DZmk5kMeT9&sig=GH971CbAXa7cP4iHfxgjU5tJuw&hl=en&ei=0KlKS\\_WfJoGUkAWa xpX9Ag&sa=X&oi=book\\_result&ct=result&resnum=6&ved=0CBQQ6AEwBQ#v=onepage&q=ipso%20facto%20clauses%20new%20zealand%20insolvency&f=false](http://books.google.com/books?id=f_yWaV_-l4C&pg=PT477&lpg=PT477&dq=ipso+facto+clauses+new+zealand+insolvency&source=bl&ots=DZmk5kMeT9&sig=GH971CbAXa7cP4iHfxgjU5tJuw&hl=en&ei=0KlKS_WfJoGUkAWa xpX9Ag&sa=X&oi=book_result&ct=result&resnum=6&ved=0CBQQ6AEwBQ#v=onepage&q=ipso%20facto%20clauses%20new%20zealand%20insolvency&f=false)

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Sections 701–702 Bankruptcy Code. United States Trustee program oversees the administration of cases filed under Chapters 7, 11, 12, 13 of the Bankruptcy Code. United States Trustees review fee applications in accordance with the *Fee Guidelines: Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses* filed under 11 U.S.C. § 330, [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm)

<sup>166</sup> Remuneration calculated on a declining basis on percentage of cash realised. Scale 40% of first €25,000 declining to a minimum of 0.5% for amounts realised in excess of €50m. See 'The Role of Insolvency Practitioners in Germany' in *Recovery Magazine* (Summer 2007) by Michael Thierhoff of Thierhoff Ily & Partner, Leipzig, Germany.



Table B2.1 (cont.): Comparison of international corporate insolvency regimes

Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
deal with remuneration.	<p>Bankruptcy Code, 11 USC, s330 and s326).</p> <p>United States Trustee is responsible for reviewing claims under s330 and filing objections with the court if appropriate (Judiciary and Judicial Procedure Code 28 U.S.C. s 586(a)(3))</p>	<p>or if remuneration is not fixed by the creditors/liquidation committee, by the court (Insolvency Rules 1986, rules 4.127–4131 (liquidators—insolvent liquidations), rules 2.106 (administrators)).<sup>164</sup></p> <p>If remuneration is fixed by the court it is done so on the basis of a statutory scale found in Schedule 6 of the Insolvency Rules 1986.</p> <p>For voluntary liquidations, remuneration is fixed by members (Insolvency Rules 1986, rules 4.148A and</p>	<p>trustee has not been fixed by creditors, the trustee may receive remuneration in a sum not exceeding 7.5% of the amount remaining out of the realisation of the property of the debtor after the claims of the secured creditors have been paid or satisfied (s39 BIA).</p> <p>Where a board of inspectors has been appointed, the board must approve the trustee's final account of receipts and disbursements (s120(4) BIA).</p>	<p>liquidator.</p> <p>An Official Assignee who is appointed as a liquidator must charge remuneration in accordance with rates prescribed by the Governor General under s277 of the Companies Act.</p>		

<sup>164</sup> The Rules state that the remuneration shall be fixed either as a percentage of the value of the assets which are realised or distributed or both, or by reference to the time properly given by the liquidator and his staff in attending to matters arising in the liquidation. It is for the liquidation committee (if there is one) to determine on which of these bases the remuneration is to be fixed, and if it is to be fixed as a percentage, to fix the percentage to be applied. In arriving at its decision the committee shall have regard to the following matters:

- the complexity (or otherwise) of the case;
- any responsibility of an exceptional kind or degree which falls on the liquidator in connection with the insolvency;
- the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his duties;
- the value and nature of the assets which the liquidator has to deal with.

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
			4.148B). Disclosure per SIP 9. <sup>165</sup>				
<b>Remuneration Independent Review</b>	Court on application by ASIC, administrator, creditor, member or officer of the company.	Court	Court on application of creditors (at least 25%) or the insolvency practitioner (Insolvency Rules 1986, rules 2.108, 2.109 (administrators), 4.130, 4.131, 4.148A(6) (liquidators).  Practitioners also have recourse to a meeting of creditors (Insolvency Rules 1986, rules 2.107 (administrators), 4.131(1) (liquidators)).	Court on application of trustee, creditor or debtor (Bankruptcy and Insolvency Act s39(5)).	Court on application of the liquidator, liquidation committee, creditor, shareholder or directors (Companies Act s284(1)).		
<b>Priority to Unsecured Creditors</b>	No priority to unsecured creditors other than Priority Creditors (e.g. employees for certain claims)/	Ranking of claims: 1 Secured 2 Employees 3 Unsecured (Bankruptcy)	Ranking of claims: 1 Fixed chargeholders 2 Preferential (employees) 3 Floating	Ranking of claims: 1 Priority claims <sup>169</sup> 2 Secured claims 3 Preferred claims (e.g. employees)	Preferential claims are paid according to the priority set out in Schedule 7 (including employee entitlements). Claims of other creditors and	No apparent priority to unsecured creditors other than in circumstance where they can enforce claims outside of the proceedings (e.g.	1 Privileged creditors <sup>171</sup> 2 Secured creditors 3 Ordinary creditors 4 Subordinated

<sup>165</sup> *Statement of Insolvency Practice 9: Remuneration of insolvency office holders*. Creditors must be provided with information set out in SIP 9 to enable them to fully consider resolutions regarding remuneration.

Table B2.1 (cont.): Comparison of international corporate insolvency regimes

Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand	Japan	Germany
	Code, 11 USC, s507). <sup>167</sup>	chargeholders 4 Unsecured <sup>168</sup> (Insolvency Act, s175– 176A).	4 Unsecured claims  (Bankruptcy and Insolvency Act, s136	distribution of the surplus of assets occurs after distribution of preferential claims. (Companies Act 1993, s312–313).	claims for wage/salary of employees. <sup>170</sup>	creditors. <sup>172</sup>

<sup>169</sup> See 81.1 Bankruptcy and Insolvency Law: Priority claims can include trade suppliers who have a limited remedy for the return of goods supplied within 30 days of delivery of a demand following a bankruptcy of receivership. See also Global Legal Group, *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009), Canada, p. 37, para 5.2.

<sup>171</sup> Privileged creditors are creditors: (i) who became so upon an agreement with or certain actions by the Insolvency Administrator after the opening of the proceedings (inter alia, the employees with respect to wages as of the opening); (ii) under an agreement for which the insolvency administrator exercised the option to have such an agreement; or (iii) under an agreement with a so-called 'strong' preliminary insolvency administrator. Privileged creditors must be fully settled otherwise the administrator might be subject to personal liability. See Global Legal Group, *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009), p. 95, para 5.2.

<sup>167</sup> In Ch 11 the designated rankings may be varied as creditors negotiate and reach agreement among themselves as to how to allocate value. See Global Legal Group, *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009), US, p. 250, para 5.2. See also s1122 Bankruptcy Code, which states: '(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class. (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.' Section 1171 also states: '(a) There shall be paid as an administrative expense any claim of an individual or of the personal representative of a deceased individual against the debtor or the estate, for personal injury to or death of such individual arising out of the operation of the debtor or the estate, whether such claim arose before or after the commencement of the case. (b) Any unsecured claim against the debtor that would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under this title shall be entitled to the same priority in the case under this chapter.'

<sup>168</sup> Proportion of the 'net property' of the company is set aside to pay unsecured creditors, as required by s176A of the Insolvency Act. Net property is defined as all the property of the company remaining after the payment of fixed charge liabilities, preferential debtors and the office-holder's costs of realising assets. It is calculated as being 50% of the first 10,000 in value of the net property and 20% of net property thereafter up to a maximum of 600,000. Floating charge holders whose charges were created before 15 September 2003 are not subject to the prescribed part provisions.

<sup>170</sup> Global Legal Group, *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009), p. 150, para 5.2.

<sup>172</sup> Creditors entitled to interest penalties or (in principle) all shareholder loans of like liabilities towards a shareholder. Global Legal Group, *The International Comparative Legal Guide to Corporate Recovery & Insolvency* (2009), p. 95, para 5.2.

**Table B2.2: International comparison of misconduct and regulation of insolvency practitioners**

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand
<b>Surveillance program</b>	LCU (ASIC)  Surveillances following complaints of misconduct.	Executive Office for US Trustees. <sup>173</sup>  Bankruptcy Administrators (operate in Alabama and North Carolina). <sup>174</sup>	Recognised professional Bodies (RPBs), of which there are four in England and Wales, are responsible for monitoring their individual members. <sup>175</sup>  This process is overseen by The Insolvency Service, which monitors the regulatory activities of the RPBs. <sup>176</sup>	Office of the Superintendent of Bankruptcy (OSB), which is part of the Department of Industry.	Surveillances following complaints of misconduct undertaken by the professional's' authorising body (NZ Institute of Chartered Accountants or NZ Law Society).

<sup>173</sup> The Executive Office for US Trustees is a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the federal bankruptcy system. The program monitors the conduct of bankruptcy parties and private estate trustees, overseas related administrative functions, and acts to ensure compliance with applicable laws and procedures. It also identifies and helps investigate bankruptcy fraud and abuse in coordination with United States Attorneys, the FBI, and other law enforcement agencies. The bankruptcy system relies heavily on private sector attorneys and accountants to act as trustees. The Executive Office for US Trustees operates in 21 regions (excluding Alabama and North Carolina—see note 3 below), each with a US Trustee who is responsible for the overall non-judicial administration and supervision of bankruptcy trustees and cases. Sources: International Association of Insolvency Regulators website, [http://www.insolvencyreg.org/sub\\_member\\_profiles/united\\_states/index.htm](http://www.insolvencyreg.org/sub_member_profiles/united_states/index.htm); US Trustee Program <http://www.justice.gov/ust/>.

<sup>174</sup> The US Bankruptcy Administrator Program, established by the US Congress in 1986, is the Judiciary's bankruptcy estate oversight program. The Bankruptcy Administrator oversees the administration of bankruptcy cases, supervises a panel of private trustees and monitors the transactions and conduct of parties in bankruptcy. The Bankruptcy Administrator Program, subject to Judicial Conference oversight, presently serves the six federal judicial districts in the States of Alabama and North Carolina. Bankruptcy administrators are appointed by the court of appeals and supervise the administration of cases and trustees in cases under Chapters 7, 11, 12 and 13. See International Association of Insolvency Regulators website ([http://www.insolvencyreg.org/sub\\_member\\_profiles/united\\_states/index.htm](http://www.insolvencyreg.org/sub_member_profiles/united_states/index.htm)) and US Bankruptcy Administrator Program—Southern District of Alabama website (<http://www.alsba.uscourts.gov/>).

<sup>175</sup> In England and Wales, the Secretary of State recognises professional bodies (RPBs) to authorise and regulate their members to act as insolvency practitioners. The RPBs for England and Wales are: Institute of Chartered Accountants in England & Wales (ICAEW); Association of Chartered Certified Accountants (ACCA); Insolvency Practitioners Association (IPA); The Law Society. The RPBs for Scotland and Ireland are: Institute of Chartered Accountants of Scotland (ICAS); Institute of Chartered Accountants in Ireland (ICAI); Law Society of Scotland (LSS). In addition, the Secretary of State is able to directly authorise insolvency practitioners. In such instances the authorisation and monitoring of insolvency practitioners licensed by the Secretary of State is done by the Insolvency Service, an Executive Agency of the Government's Department for Business, Innovation and Skills (BIS). A Memorandum of Understanding agreed between the RPBs and the Secretary of State sets out principles covering the granting of authorisations, ethics and professional standards, etc. Monitoring practices must comply with The Principles for Monitoring. Every insolvency practitioner holding at least one appointment is subject to routine monitoring visits. Each practitioner should be visited at least once every three years but, if satisfactory risk assessment measures are employed by the authorising body, the gap between visits may be extended to, but not exceed, six years. See Insolvency Service, *Annual Review of Insolvency Practitioner Regulation* (June 2009).

<sup>176</sup> Ibid.

Table B2.2 (cont.): International comparison of misconduct and regulation of insolvency practitioners

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand
<b>Disciplinary board</b>	<p>CALDB</p> <p>Deals with applications made by ASIC and APRA pursuant to s1292–1298 of the <i>Corporations Act 2001</i>.</p> <p>Sections 203–223 of the <i>ASIC Act 2001</i> establish and set out the powers of the CALDB.</p> <p>Hearings are generally held in private.<sup>177</sup></p>	<p>Bankruptcy trustees can be suspended or terminated as Panel Trustees by the US Trustee.<sup>178</sup></p>	<p>RPBs are the relevant disciplinary body if the insolvency practitioner is authorised by an RPB. If the insolvency practitioner has been authorised by the Secretary of State, the Insolvency Service may encourage the insolvency practitioner to resolve any complaint made against them. However, the Secretary of State cannot take any disciplinary action.<sup>179</sup></p>	<p>Reports submitted to OSB who will review and decide whether a hearing is required. The Superintendent will make a decision after the hearing.<sup>180</sup></p>	<p>The court may make orders to enforce liquidators' duties, remove a liquidator from office or prohibit a person from acting as a liquidator, indefinitely or for a defined period (s280 and s286, <i>Companies Act 1993</i>).</p> <p>The professional's' authorising body also has some disciplinary capabilities. For chartered accountants this is the New Zealand Institute of Chartered Accountants. For lawyers, the authorising body is the NZ Law Society.</p> <p>These bodies also have standing under s286 of the <i>Companies Act 1993</i> to apply to the court for an order enforcing the liquidator's duties, removing the liquidator or prohibiting the liquidator from acting as a liquidator in future liquidations.</p>

<sup>177</sup> Section 216(2), *ASIC Act 2001*. However, under s216(3) of the *ASIC Act*, if a person (other than ASIC or APRA) requests that the hearing take place in public, then the hearing must, subject to any directions of the Panel, take place in public. If a person requests a public hearing then the Panel may, if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter, or in order to protect the interests of any other person, direct that part of the hearing take place in private and give directions as to who may be present, or give directions preventing or restricting the publication of evidence given before the Panel or matters contained in documents lodged with, or produced to the Panel: s216(5), *ASIC Act*. The Board must publish notice of its decision in the Business Notices edition of the *Commonwealth of Australia Gazette* where it has decided to exercise one of its powers under s1292: CALDB Manual of Practice and Procedure – Administrative Matters, para 4.13. The Board may also take such steps as it considers reasonable and appropriate to publicise the decision and the reasons for the decision. This may

Table B2.2 (cont.): International comparison of misconduct and regulation of insolvency practitioners

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand
<b>Appeal process</b>	Administrative Appeals Tribunal (under the <i>Administrative Appeals Act 1975</i> ) or to the Federal Court of Australia (under the <i>Administrative Decisions (Judicial Review) Act 1977</i> ).	The Director of the Executive Office for the United States Trustee can review a decision of the US Trustee to suspend or terminate a Panel Trustee. <sup>181</sup>  If the final action is adverse, the trustee can obtain judicial review of it pursuant to the Administrative Procedure Act. 5 U.S.C. 702. <sup>182</sup>	Appeals dealt with internally by the particular RPB.  An appeal may be made to the Insolvency Practitioners Tribunal where an RPB has made a decision to reject or withdraw authorisation as an insolvency practitioner. <sup>183</sup>	The decision of the Superintendent is subject to judicial review by the Federal Court: s14.02(5), Bankruptcy and Insolvency Act RSC 1985.	For complaints dealt with by NZICA and NZ Law Society—their own internal appeals processes. <sup>184</sup>

include making the decision and the reasons for the decision available on the internet: CALDB Manual of Practice and Procedure – Administrative Matters, para 4.13. See CALDB Manual of Practice and Procedures (March 2009).

<sup>178</sup> Code of Federal Regulations, Title 28, 58.

<sup>179</sup> See Insolvency Service, 'How to make a complaint against an IP', August 2008, available at <http://www.insolvency.gov.uk/howtocomplain/complaininssip.htm>.

<sup>180</sup> Process For Decisions Affecting a Trustee's Licence Under Sections 14.01 and 14.02 of the Act. See International Association of Insolvency Regulators website at [http://www.insolvencyreg.org/sub\\_member\\_profiles/canada/index.htm](http://www.insolvencyreg.org/sub_member_profiles/canada/index.htm) and Office of Superintendent of Bankruptcy website at <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01185.html>

<sup>181</sup> Code of Federal Regulations, Title 28, 58.6(b).

<sup>182</sup> Department of Justice, *Procedures for Suspension and Removal of Panel Trustees and Standing Trustees* Federal Register, 2 October 1997 (vol. 62, no. 191), pp. 51740–51751 [FR DOC # 97-26172].

<sup>183</sup> A person can apply to the Insolvency Practitioners Tribunal under s396, *Insolvency Act 1986* (UK). The tribunal deals with challenges to decisions by the Secretary of State to reject or withdraw authorisation to act as an IP.

<sup>184</sup> The *Institute of Chartered Accountants of New Zealand Act 1996* requires the Institute to have Rules and Code of Ethics which regulate members, with the aim of upholding the high degree of responsibility and trust in the accountancy profession. See NZ Institute of Chartered Accountants website at [http://www.nzica.com/AM/Template.cfm?Section=Professional\\_Conduct](http://www.nzica.com/AM/Template.cfm?Section=Professional_Conduct)

Table B2.2 (cont.): International comparison of misconduct and regulation of insolvency practitioners

	Australia	United States	United Kingdom (England and Wales)	Canada	New Zealand
<b>Licensing / registration regime</b>	Registration under Part 9.2 of the <i>Corporations Act 2001</i> .	No licensing or registration regime. However, private trustees can apply to the Office of the United States Trustee to become Panel Trustees. <sup>185</sup>	Insolvency licence obtained on application to members' RPBs or the Secretary of State. <sup>186</sup>	Bankruptcy Trustee Licenses <sup>187</sup>	No licences and no register kept. <sup>188</sup>

<sup>185</sup> Panel trustees are private citizens appointed and supervised by the Office of the United States Trustee to administer bankruptcy cases under Chapter 7 of the US Bankruptcy Code. Private trustees are enacted as Panel Trustees by satisfying the requirements of Title 28 of the Code of Federal Regulations at Part 58 (28 C.F.R. Part 58). They are usually private attorneys and accountants.

<sup>186</sup> Sections 392 and 393, *Insolvency Act 1986* (UK) outlines the process by which a person may be authorised as an insolvency practitioner. Licences issued by RPBs are renewable annually; those issued by the Secretary of State can be granted for up to three years. At 1 January 2008, there were 1,275 appointment-taking licence-holders (in the whole of the United Kingdom), of which 1,885 were issued by the RPBs and 90 were issued by the Secretary of State. Non-appointment-taking licence-holders total 426 at the same date.

<sup>187</sup> Issued to individuals by OSB under s5(4)(d) of the Bankruptcy and Insolvency Act and in accordance with the Licensing Directive No. 13.R2. See: Directive No 13R.2 at <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02154.html>

<sup>188</sup> See above note 5.

**TableB2.3: ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>189</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
<p>5 The Committee strongly endorses the heavy emphasis that ASIC places on practical experience in external administration, especially managerial skills, as a prerequisite for registration as a liquidator and recommends that it should not be weakened. It does, however, recommend that the criteria for registration as an insolvency practitioner be broadened to recognise qualifications in other relevant disciplines including legal practice.</p>	<p>Criteria for registration as an insolvency practitioner be broadened by ASIC to recognise qualifications and other disciplines</p>	<p>ASIC issued Regulatory Guide 186 <i>External administration: Liquidator registration</i> (RG 186) on 30 September 2005. This guide outlines ASIC's approach to what a person must do to become and remain registered as a liquidator and provides the criteria for registration as an insolvency practitioner including being broadened to take in lawyers.</p>
<p>8 The Committee recommends that, in its enforcement programs for the lodgement of reports as to the affairs of a company (RATAs), ASIC take greater account of the quality of reports provided.</p>	<p>ASIC take steps to improve the quality of RATAs</p>	<p>Liquidators Assistance program setup in 2002 that assists registered liquidators obtain a RATA and for ASIC to pursue directors where the quality of RATAs lodged with ASIC is poor.</p> <p>ASIC Information Sheet 53 <i>Providing assistance to external administrators: books and records &amp; RATA</i> (INFO 53)</p> <p>Regulatory Guide 16 <i>External administrators: Reporting and lodging</i> (RG 16) which provides ASIC guidance to insolvency practitioners regarding their reporting obligations including what's required in those reports.</p>

<sup>189</sup> Following the release of the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake* on 30 June 2004 (PJC Report) and the Government's response to the recommendations made, ASIC prioritised the recommendations directed to it, developed a strategy and has taken steps to address the matters raised in the PJC Report. The PJC Report made 17 recommendations for ASIC to consider, which ASIC has implemented.



**TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
11 The Committee recommends that ASIC issue a practice note as to what constitutes insolvency for the guidance of company directors passing solvency resolutions and making director's declarations.	ASIC issue a practice note for directors as to what constitutes insolvency	<p>ASIC released a consultation paper in relation to a director's duty to prevent insolvent trading on 24 November 2009 with feedback closed on 22 January 2010.</p> <p>A regulatory guide will be issued regarding insolvent trading after submissions in response to the consultation paper are considered.</p> <p>ASIC has also issued Information Sheet 42 <i>Insolvency: a guide for directors</i> (INFO 42) on 15 December 2005, which provides information for directors on insolvency. This was reviewed and re-issued in December 2008.</p> <p>To provide further access to guidance, in 2009 ASIC extensively revised its website to include insolvency information for stakeholders. This information was provided in question and answer format.</p> <p>Regulatory Guide 22 <i>Directors' statement as to solvency</i> (RG 22)</p>
18 The Committee further recommends that ASIC publish a guidance note to assist administrators in ensuring that administrators include all matters material to the creditors' decision in their administrator's report.	ASIC publish guidance to assist administrators regarding the content of their reports	<p>ASIC worked closely with the IPA to develop guidance to administrators regarding the content of administrator's reports.</p> <p>ASIC released in June 2008 Report 129 <i>Review of s439A reports for voluntary administrations</i> (REP 129), which provided the results of a detailed review of voluntary administrators' s439A reports to creditors. The Project reviewed the adequacy and quality of investigations conducted and the reporting to creditors in voluntary administrations. The report suggested eight improvements for preparation of s439A reports to creditors.</p> <p>Following the release of ASIC's report, the IPA, in consultation</p>

<sup>190</sup> Following the release of the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake* on 30 June 2004 (PJC Report) and the Government's response to the recommendations made, ASIC prioritised the recommendations directed to it, developed a strategy and has taken steps to address the matters raised in the PJC Report. The PJC Report made 17 recommendations for ASIC to consider, which ASIC has implemented.

**TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
22 The Committee recommends that ASIC provide, from the perspective of an unsophisticated, unsecured creditor who may be affected once only by an insolvency proceeding, a series of Frequently Asked Questions or other suitable materials that address the issues they may need to consider as creditors of a failed company, and which explains the law and outlines options and issues that they may need to address.	ASIC provide information to assist unsophisticated unsecured creditors so that they understand the effect of an insolvency administration on them	<p>with ASIC, has prepared specialised training courses regarding the preparation of s439A reports to take into account the issues raised by ASIC.</p> <p>ASIC issued a series of information sheets on 15 December 2005 outlining in simple and clear language the effect of an external administration on creditors, employees, shareholders and directors.</p> <p>These information sheets were revised and re-issued in December 2008.</p> <p>ASIC's website has also been extensively revised to include insolvency information for stakeholders. The information included in the website is in question and answer format.</p>
24 The Committee recommends that ASIC 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.	ASIC work with professional bodies to encourage best practice standards relating to the charging and disclosure of remuneration	<p>ASIC worked with the IPA to develop and release detailed best practice standards for remuneration. The IPA Code of Professional Practice was released and became effective from 31 December 2007 (for Remuneration and Independence) with a transition period to 21 May 2008 for the balance.</p> <p>ASIC contributed to the release of APES 330 (being its professional standard for the provision of insolvency services), liaising with the Accounting Professional and Ethical Standards Board regarding the content of APES 330.</p>
26 The Committee recommends that ASIC, in consultation with the relevant professional bodies, implement appropriate means to educate unsecured creditors about the different methods of fee setting available and the rights which creditors have with regard to the setting of fees (see also recommendations 22 and 50).	ASIC consult with professional bodies to educate unsecured creditors regarding their rights when setting fees and the different methods of setting those fees	<p>ASIC released Information Sheet 85 <i>Approving fees: a guide for creditors</i> (INFO 85) and updated this in December 2008 regarding the approval of external administrators' remuneration.</p> <p>The IPA Code of Professional Practice includes a mandatory requirement for an external administrator to provide the information sheets (or information on how to access the information sheets) to creditors before the approval of</p>

**TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
27 The Committee recommends that ASIC periodically sample the fees charged by insolvency practitioners and make public a comparative report.	ASIC periodically review remuneration claimed by practitioners and make public comparative reports	<p>remuneration is sought.</p> <p>ASIC is currently undertaking a project on remuneration. Work on this project was not commenced until after the expected amendments to the Act relating to remuneration were made and became effective on 31 December 2007. These amendments substantially altered the remuneration requirements including the requirement to provide to creditors a remuneration report setting out the details of remuneration being claimed.</p> <p>ASIC prioritised the other recommendations that were not dependent upon enacting legislation, e.g. the implementation of the assetless administration fund. Now that the requirements regarding remuneration have been implemented, ASIC is undertaking surveillance and investigative work to assess compliance with remuneration disclosure and approval processes and take enforcement action where necessary.</p> <p>This will be followed by a regulatory guide on the statutory provisions relevant to the assessment of whether remuneration is reasonable to complement what is currently provided by the professional associations.</p> <p>ASIC will obtain data from practitioners to allow an assessment of the relationship between asset recoveries, remuneration charged and returns to creditors.</p>
28 The Committee is of the firm belief that the problem of assetless companies must be addressed. It recommends that the Government establish an assetless company administration fund to finance preliminary investigations of breaches of directors' duties and fraudulent conduct using the skills of registered insolvency practitioners.	An assetless administration fund be established	<p>An assetless administration fund was established and implemented in 2006 to allow the financing of preliminary investigations and reports by liquidators in external administrations with minimal/no assets.</p> <p>Funding is provided for supplementary s533 reports following receipt of an initial report identifying potential offences of interest to ASIC, with an application for AA funding</p>

**TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
		<p>Supplementary reports are for matters where substantive misconduct is suspected</p> <p>Of the 243 director bannings undertaken since July 2006, 147 have been AA funded.</p> <p>The fund also assists ASIC better identify potential corporate misconduct in companies under external administration which require a supplementary statutory report to assist further assessment and investigation.</p>
30 The Committee further recommends that as a first and immediate step, ASIC begin to collate statistics on insolvent assetless companies and publish such figures on a triennial basis together with an analysis.	ASIC collate statistics on insolvent assetless companies and publish those figures on a triennial basis	<p>From the data available on ASIC's system, ASIC published a detailed report capturing statistics from liquidator reports covering the period 1 July 2004–30 June 2007 on 26 June 2008.</p> <p>ASIC prepares monthly insolvency statistics tables identifying numbers, type of appointment and state, which is provided to Treasury and available to the public on the ASIC website <a href="http://www.asic.gov.au">www.asic.gov.au</a>.</p>
35 The Committee recommends that ASIC consider establishing a hot-line and guidelines for its operation in conjunction with strategically located employees for the purpose of facilitating possible early detection of, and intervention to prevent the implementation of, illicit phoenix activities.	ASIC consider establishing a hot-line to assist regarding illicit phoenix activity	<p>ASIC considered the establishment of a dedicated hotline and determined that the existing info-line and complaints service would satisfy this recommendation.</p> <p>ASIC has an information line where complaints are made. When allegations as to phoenix activity are raised, those complaints are assessed and if appropriate referred to an officer within ASIC for further review.</p>
37 The Committee recommends that in its enforcement programs for the lodgement of external administrators' statutory reports, ASIC also take greater account of the quality of reports provided.	ASIC take steps to obtain better quality reports from external administrators	<p>Regulatory Guide 16 <i>External administrators: Reporting and lodging</i> (RG 16) was revised in July 2008 to detail the information requirements in respect of liquidator reports.</p> <p>ASIC has changed its complaints handling procedures to better identify statutory reports.</p>

**TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>**

PJC recommendation	What ASIC needed to do	What ASIC has been doing
		In 2006 the assetless administration fund was implemented to obtain better quality reports from liquidators.
39 The Committee requests that ANAO conduct a performance audit of ASIC's processes in receiving and investigating statutory reports.	ANAO conduct a performance audit of ASIC's processes regarding statutory reports	This audit has been completed.
40 The Committee recommends that ASIC consider enhancing its capacity to provide more comprehensive, comparable analyses of statutory reports of liquidators for the assistance of journalists, academic researchers, the public and the Government and its own management requirements. Such information should be assessed in terms of maintaining public confidence in the administration and enforcement of corporate laws.	ASIC consider providing comparative analyses of statutory reports for the assistance of journalists and others	<p>A detailed report capturing statistics from liquidator reports covering the period 1 July 2004 – 30 June 2007 was released on 26 June 2008.</p> <p>Monthly insolvency stats are prepared and made available to the public on ASIC's website.</p> <p>ASIC publishes articles regarding insolvency statistics and gives presentations regarding those statistics.</p>
41 The Committee recommends that ASIC continuously evaluate the incidence of possible failures to keep books and records adequately as disclosed in external administrators' reports on an annual comparative basis. This measure would allow ASIC to assess the effectiveness of its annual programs for the enforcement of financial reporting requirements.	ASIC implement procedures to record and monitor possible failures to keep books and records identified in external administrators' reports	<p>ASIC has implemented procedures to identify where books and records have not been adequately maintained and to enable administrators to request ASIC assistance to obtain the company's books and records.</p> <p>We note that over 90% of companies that enter external administration are not reporting entities and therefore they do not have to lodge financial reports.</p>
50 The Committee recommends that ASIC work with the IPAA to educate unsophisticated creditors about their rights in the process of formulating a deed of company arrangement and during the period in which the company is subject to a DCA.	ASIC work with the IPA to educate unsophisticated creditors regarding their rights in respect of DCAs	<p>ASIC worked with the IPA and released Information Sheet 74 <i>Voluntary administration: a guide for creditors</i> (INFO 74) and Information Sheet 75 <i>Voluntary administration: a guide for employees</i> (INFO 75), which provide information regarding the voluntary administration process.</p> <p>In May 2005 ASIC released Regulatory Guide 82 <i>External administration: Deeds of company arrangement involving a</i></p>

TableB2.3 (cont.): ASIC's response to recommendations in the Parliamentary Joint Committee Report *Corporate Insolvency Laws: A Stocktake*<sup>190</sup>

PJC recommendation	What ASIC needed to do	What ASIC has been doing
		<p><i>creditors' trust</i> (RG 82) to provide creditors with information about the information they might expect to be provided if a DCA involving a creditors' trust was proposed.</p> <p>ASIC has worked with the IPA to ensure that the Code of Professional Practice protects creditors' rights. In particular the Code sets out extensive requirements for a proposal for a DCA in paragraph 22.6.5. Paragraph 8.9 of the Code is also relevant as it requires administrators to provide copies of information sheets prepared by ASIC to creditors in the first communication.</p> <p>ASIC's website has been revised to include insolvency information for stakeholders. This includes information in question and answer format.</p>
53 The Committee recommends that ASIC work with the IPAA to inform unsophisticated creditors about the options open to them for the purpose of monitoring the fulfilment of terms of DCAs and reporting on compliance.	ASIC work with the IPA to inform unsophisticated creditors regarding the monitoring and fulfilment of DCAs	Following ASIC's detailed review of 439A reports, we liaised with the IPA to improve guidance to creditors in their 439A reports regarding the monitoring and fulfilment of DCAs. The Code of Professional Practice was amended to improve guidance in respect of 439A reports.

**Table B2.4: Summary of insolvency law reform 2004–10**

Date	Document type	Law reform	Publisher
19 January 2010	Discussion paper	<i>Insolvent trading: A safe harbour for reorganisation attempts outside of external administration</i>	Treasury
19 Jan 2010	Law reform proposals	<p>2010 Corporate Insolvency Reforms: Proposals for the coming year:</p> <ul style="list-style-type: none"> <li>• Reverse Sons of Gwalia decision</li> <li>• Clarify terms 'relation back' and 'commencement date'</li> <li>• Access to creditors lists</li> <li>• Notice to property owners</li> <li>• Chairing the majority meeting</li> <li>• Notification of breach of DOCA</li> <li>• Provisional liquidators remuneration</li> <li>• Postal voting by creditors</li> <li>• Replacing a liquidator</li> <li>• Taking possession and transferring books</li> <li>• The publishing of external administration notices</li> <li>• Exemption from publication</li> <li>• Electronic communication with creditors</li> <li>• Other minor miscellaneous insolvency reforms</li> </ul>	Treasury
14 Nov 2009	Proposals Paper	<i>Options to address fraudulent phoenix activity</i>	Treasury
Dec 2008	Report	<p>Shareholder claims against insolvent companies: Implications of the Sons of Gwalia decision</p> <p>See 2010 Corporate Insolvency Reforms for Government's proposed response to CAMAC's report. The Government intends to amend the law so that it substantially corresponds to how it was generally perceived to be prior to the High Court's decision (i.e. to 'reverse' Sons of Gwalia decision).</p> <p>The Government will also amend the law so that:</p> <ul style="list-style-type: none"> <li>• the right of subordinated shareholder claimants to vote as creditors in insolvency proceedings be removed, unless the court permits otherwise;</li> <li>• any requirement for an administrator or liquidator to provide reports to creditors to such claimants be removed, except where a claimant makes a specific request for a copy of a particular report; and</li> <li>• the rule in the case of <i>Houldsworth v. City of Glasgow Bank</i> be abrogated.</li> </ul>	CAMAC
Nov 2008	Report	<p><i>Issues in external administration</i></p> <p>See 2010 Corporate Insolvency Reforms document for Government's response to the CAMAC report.</p>	Nov 2008

**Table B2.4 (cont.): Summary of insolvency law reform 2004–10**

Date	Document type	Law reform	Publisher
May 2008	Report	<i>Long-tail liabilities: The treatment of unascertained future personal injury claims</i>	CAMAC
13 Feb 2008		The Cross-Border Insolvency Bill 2008 was introduced into Parliament.	
20 Aug 2007		The <i>Corporations Amendment (Insolvency) Act 2007</i> received Royal Assent. The majority of the Act became effective immediately, with the remaining provisions becoming effective on the proclamation date of 31 December 2007.	
31 May 2007		Corporations Amendment (Insolvency) Bill 2007 introduced into Parliament	
5 Mar 2007		Review of sanctions in corporate law	Treasury
12 Oct 2005		Insolvency Law Reform Package	Treasury
Oct 2004	Report	<i>Report on rehabilitating large and complex enterprises in financial times</i>	CAMAC
June 2004	Report	<i>Corporate Insolvency Laws: A Stocktake</i>	PJC (Corporations and Financial Services)



## Appendix B3: Insolvency appointments

There have been approximately 47,000 insolvency appointments over the period (3.5 years) of which 17,000 are multiple appointments to a single entity.

**Table B3.1: Insolvency appointments<sup>191</sup>**

Type of external administration	2006–07	2007–08	2008–09	Jul–Dec 2009	Total
Provisional wind-up*	83	37	46	13	179
Court wind-up*	3,389	3,122	3,708	1,485	11,704
Creditors wind-up	4,790	5,453	6,200	3,155	19,598
Voluntary administration/Deed of company arrangement (DOCA)	2,974	2,720	2,969	1,134	9,797
Receiver/Receiver and manager	460	707	1,639	651	3,457
Controller/Managing controller	269	484	980	585	2,318
Scheme administrator appointed	1	1	25	4	31
Foreign/RAB wind-up	0	0	0	0	0
<b>Total</b>	<b>11,966</b>	<b>12,524</b>	<b>15,567</b>	<b>7,027</b>	<b>47,084</b>

Source: ASIC insolvency statistics—Insolvency appointments

\* Note: These appointments are only able to be taken by official liquidators.

<sup>191</sup> This table represents the number of insolvency appointments made including multiple appointments to a single entity.

## Appendix B4: Registration requirements for liquidators

The following documents are available via hyperlink:

- [Corporations Act 2001, s1282](#)
- [Regulatory Guide 186 External administration: Liquidator registration \(RG 186\)](#)
- [Information Sheet 34 How to apply for registration as a liquidator \(INFO 34\)](#)
- [Information Sheet 59 Registration of official liquidators \(INFO 59\)](#)
- [Regulatory Guide 194 Insurance requirements for registered liquidators \(RG 194\)](#)

- 353 As per RG 186 and the liquidator registration kit (INFO 34), under s1282(2)(c) of the Corporations Act, ASIC will only determine an applicant to be a fit and proper person if we are satisfied as to their honesty, integrity, good reputation and personal solvency.
- 354 To form this view, ASIC takes into account the following points:
- (a) a letter of membership from a professional accounting body;
  - (b) the applicant's experience with corporate insolvency, focusing on length of experience and seniority;
  - (c) two referees attesting to currency and depth of liquidation experience, competency, integrity and reputation (whether applicant is 'fit and proper');
  - (d) proof of relevant qualifications;
  - (e) historical searches on the status of the applicant (i.e. whether subject of any previous adverse decisions);
  - (f) statement by the applicant, declaring that they are not:
    - (i) an insolvent under administration;
    - (ii) convicted of a criminal offence;
    - (iii) subject of disciplinary action by their professional body or the ATO;
    - (iv) disqualified from managing corporations under Part 2D.6.

## Appendix B5: IPA Code of Professional Practice— Conduct Principles (IPA Principles)

Table B5.1: IPA Principles

Subject matter	Purpose
<b>Conduct</b>	Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.
	When accepting or retaining an appointment the practitioner must at all times during the administration be, and be seen to be, independent.
	Disclosure and acceptance of a lack of independence is not necessarily a cure.
	Members must communicate with affected parties in a manner that is honest, open, clear, succinct and timely to ensure effective understanding of the processes, rights and obligations of the parties.
	Members must act in a professional manner and maintain their objectivity, independence, integrity and impartiality when competing for work and promoting their business.
	Members must attend to their duties in a timely way.
	Members must not acquire directly or indirectly any assets under the administration of the Practitioner.
	When promoting themselves, or their firm, or when competing for work, Members must act with integrity and must not bring the profession into disrepute.
<b>Remuneration</b>	A practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration.
	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.
	A practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.
<b>Practice management</b>	Members must implement policies, procedures and systems to ensure effective quality assurance compliance and risk management and complaints management.

## **Appendix C: Related information—ASIC's activities**

The following appendixes contain additional information relating to Section C of this submission.

**Appendix C1: Complaints and inquiry statistics**

**Appendix C2: Insolvency Practitioners and Liquidators (IPL) team activities**

**Appendix C3: Misconduct and Breach Reporting team activities**

## Appendix C1: Complaints and inquiry statistics

**Table C1.1: Complaints volume trend**

	2006–07	2007–08	2008–09	to Dec 2009	Total/ Average %
Total complaints and enquiries finalised	11,455	12,514	14,543	6,650	45,162
Total insolvency appointments	11,966	12,524	15,567	7,028	47,085
Total complaints and enquiries against insolvency practitioners	406	352	633	256	1,647
Total complaints and enquiries against insolvency practitioners excluding duplicates <sup>192</sup>	344	317	438	230	1,329
% insolvency practitioner complaints and enquiries of total complaints and enquiries	3.5%	2.8%	4.4%	3.8%	3.6%
% insolvency practitioner complaints and enquiries of total appointments	3.4%	2.8%	4.1%	3.6%	3.5%

<sup>192</sup> For example, in 2007–08 ASIC received high volume complaints raising identical concerns in relation to the conduct of high-profile external administrations such as Ventracorp Limited and Timbercorp. In cases where a high volume of identical complaints or enquiries are received, ASIC merges these activities to consider the matter as a whole, while noting the significance that several members of the public have raised a concern or requested information.

## Appendix C2: Insolvency Practitioners and Liquidators (IPL) team activities

Table C2.1: Outcomes of reviews—July 2006 to December 2009

Outcome	Complaint originated	Other sources	No.	%
Conduct remedied voluntarily	5	33	38	21%
Referred to deterrence	11	3	14	8%
No issues identified	5	14	19	11%
Insufficient evidence	13	31	44	25%
Other	9	16	25	14%
Information retained for future practice reviews	15	1	16	9%
Ongoing	20	3	23	13%
<b>Total</b>	<b>78</b>	<b>101</b>	<b>179</b>	<b>100%</b>

Table C2.2: Definitions of outcomes

Outcome	Definition
<b>Conduct remedied voluntarily</b>	Following investigation and contact, the registered liquidator voluntarily agreed to take remedial action to address ASIC concerns (e.g. amend and reissue their Declaration of Relevant Relationships, provide further information to enable creditors to assess the reasonableness of remuneration claimed).
<b>Referred to deterrence</b>	Investigations and inquiries identified serious misconduct on the registered liquidator's part for which a compliance outcome was inappropriate and was referred to Deterrence to commence enforcement action.
<b>No issues identified</b>	Investigations and review of available information did not identify any breach of the Corporations Act or any misconduct or failure by the registered liquidator to comply with their duties and functions which required further remedial action.
<b>Insufficient evidence</b>	Investigations and review of available records did not identify sufficient information to establish the alleged misconduct.
<b>Other</b>	Following inquiries no further action was taken in relation to the matter. This may have been for any number of reasons, including: the complaint was otherwise resolved; the conduct complained of was aged and no regulatory response was appropriate; the conduct complained of was not significant to warrant resourcing further action as it would not achieve a positive regulatory outcome etc.
<b>Information retained for future practice reviews</b>	Information obtained was recorded for the purposes of planning future surveillance activities.
<b>Ongoing</b>	Investigations and inquiries were ongoing at the time of preparing this submission.

## **Reviews of companies at risk of insolvency (national insolvent trading program)**

- 355 ASIC currently selects companies to be reviewed from a number of sources, including (this is not an exhaustive list):
- (a) complaints received by the Misconduct and Breach Reporting team;
  - (b) referrals from other stakeholder teams within ASIC;
  - (c) credit agencies—Dun & Bradstreet and ABR Credit Gazette;
  - (d) Australian Taxation Office or other federal agencies;
  - (e) state government agencies; and
  - (f) other sources (e.g. press articles, lawyers, insolvency practitioners, accountants).
- 356 Companies vary in size from small, single director companies to listed entities. ASIC do not review companies which already have an external administrator in place or companies which have ceased trading.
- 357 A file will be considered for a surveillance activity based upon a preliminary review including, but not limited to, factors such as:
- (a) the initial file review—based upon discussions other ASIC teams or external sources;
  - (b) quality of the complaint or external source information—review of materials provided that form the basis of the complaint, discussions with the complainant or external source material provided;
  - (c) preliminary tasks performed include searches of company/director reveal a history of complaint activity or failed company activity;
  - (d) for listed entities, announcements and other information available in the public domain (i.e. ASX website, company website, media);
  - (e) credit searches, judgement orders or petitions to wind up and financial analysis of publicly available financial accounts; and
  - (f) media searches highlight poor performance, solvency concerns or trading difficulties.
- 358 If the preliminary review identifies possible insolvency indicators, a surveillance activity will commence by:
- (a) contacting one of the company directors to arrange a suitable time to meet with them and their advisers which includes the service of notices under s30 or 33 of the ASIC Act to produce records and relevant financial information of the company; and
  - (b) attending a meeting typically within 14 days of serving the notice, at which the directors are requested to provide an overview of the business and discuss the documents produced pursuant to the notice.

- 359 Following the meeting, ASIC officers will undertake a detailed review and analysis of the books and records produced in conjunction with the verbal information and explanations provided by the directors at the meeting.
- 360 Should concerns or possible breaches of the Corporations Act be identified the ASIC officer will:
- (a) issue a review letter setting out ASIC's concerns and reminding the directors of their obligations pursuant to the Corporations Act. The review letter concisely states the key insolvency indicators of concern and encourages the directors to seek appropriate advice to address the issues raised.
  - (b) In certain cases where the company is insolvent or has significant indicators of insolvency, ASIC may request the director to provide a written submission regarding solvency.
- 361 On occasion ASIC will wind up companies where appropriate.

**Table C2.3: Policy and law reform activities**

Period	IPL team initiatives
<b>May 2005</b>	Released Regulatory Guide 82 <i>External administration: Deeds of company arrangement involving a creditor's trust</i> (RG 82)
<b>Post-Dec 2004</b>	Following Stockford remuneration decision in Dec 2004, agreed to run a test case on remuneration to help clarify the law
<b>Sept 2005</b>	Released Regulatory Guide 186 <i>External administration: Liquidator registration</i> (RG 186). Outlines what is required to obtain registration and to maintain that status. Incorporates PJC recommendations regarding experience criteria and practice capacities
<b>Oct 2005</b>	Government announced establishment of Assetless Administration Fund
<b>Dec 2005</b>	Nine information sheets released to provide employees, creditors, shareholders and directors with information on how an insolvency administration may affect them
<b>Feb 2006</b>	Released Regulatory Guide 109: <i>Assetless Administration Fund: Funding criteria and guidelines (administrative bannings—section 206F)</i> (RG 109)
<b>Feb 2006</b>	Outcome of the remuneration test case handed down—IPA dealing with fixing prospective remuneration by reference to hourly rates and the use of caps [Alliance Motor Body Pty Ltd (subject to deed of company arrangement) (ACN 109 860 899); Gidley (as admin of deed of company arrangement for Alliance Motor Group Pty Ltd (subject to deed of company arrangement)) (ACN 109 860 899) - (2006) 56 ACSR 463 ]
<b>Feb / March 2006</b>	Liquidator Compliance Unit was formed
<b>June 2006</b>	Assetless Administration Fund guidelines for Stage 2 released



Period	IPL team initiatives
Post June 2006	Since release of Assetless Administration Fund guidelines, IPL have proactively visited over 150 insolvency firms to promote understanding and use of the Fund
Nov 2006-March 2007	Provided detailed comments on Insolvency Law Reform Bill
July to Dec 2007	Close consultation with IPA in relation to Code of Professional Practice (in particular in relation to independence and remuneration requirements)
Dec 2007	Insolvency Law Reform enacted. IPL revised all stakeholder information sheets and reissued these to reflect the changes to the Law. Additionally, 2 further information sheets were published in relation to remuneration and independence
June 2008	Released Regulatory Guide 194 <i>Insurance requirements for registered liquidators</i> (RG 194)
June 2008	Released liquidator statistics (Schedule B) for the period from 1 July 2004 to 30 June 2007
June 2008	Conducted joint national training program with the IPA on requirements and role of Assetless Administration Fund, including our investigation and reporting requirements. Training was attended by over 420 insolvency practitioners
June 2008	Released <i>Review of s439A reports for voluntary administrations</i> (REP 129)
July 2008	Re-issued Regulatory Guide 16 <i>External administrators: Reporting and lodging</i> (RG 16) to improve guidance on the information requirements of Liquidator reports
Late 2008	ASIC began preparation for independence and remuneration projects review, noting that the changes to the law had been in place for approximately 12 months to enable industry sufficient time to adopt the new procedures resulting from law reform
May 2009	ASIC commenced 'independence' project which involved the review of 239 appointments involving 79 insolvency firms
During 2009	Contributed to APES330 development of insolvency professional standards. Standard was released in September 2009
Nov 2009	Released Consultation Paper 124 <i>Directors duty to prevent insolvent trading: Guide for directors</i> (CP 124)
Nov 2009	Released Regulatory Guide 109 <i>Assetless Administration Fund: Funding criteria and guidelines</i> (RG 109)

## Appendix C3: Misconduct and Breach Reporting team activities

**Table C3.1: Assetless Administration Fund (AA Fund) application statistics**

	2005–06	2006–07	2007–08	2008–09	to Dec 2009	Total
<b>Banning applications received</b>	158	198	129	286	178	949
<b>Other matter applications received</b>	3	93	103	130	83	412

**Table C3.2: Director bannings and AA funded director bannings<sup>193</sup>**

Year	Total number of directors banned	AA funded director bannings
2006–07	81	52
2007–08	67	43
2008–09	50	33
to Dec 2009	45	19
<b>Total</b>	<b>243</b>	<b>147</b>

<sup>193</sup> Since the inception of the AA Fund, there has been over a 100% increase in the number of directors banned by ASIC when comparing the number of directors banned in the three years before (99 directors banned) and three years after AA Fund was introduced.

## **Appendix D: Related information—ASIC's forward program**

The following brochure is available via hyperlink:

- [How ASIC deals with your complaint](#)

## **Appendix E: Related information—Confidential**

To assist the Inquiry, ASIC has provided further information in a separate confidential appendix (Appendix E).

The material in this appendix has been provided to the Inquiry on a confidential basis so as not to prejudice ASIC's ongoing investigations or breach ASIC's legal obligations under s127 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).