Senate Economics References Committee

Inquiry into Liquidators and Administrators

IPA Submission – 12 February 2010

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EXECUTIVE SUMMARY

Section 1 Australia has a sound and balanced insolvency regime that is well regarded internationally and contributes positively to the legal and social well-being of the community.

Under this regime, the roles and practices of liquidators and administrators are closely regulated and insolvency practitioners for the most part uphold the high standards required by the law and by the IPA Code of Professional Practice.

Australia's regime is responsive to the need to change. A significant legislative review of corporate insolvency was conducted in 2007 when changes to the *Corporations Act* 2001 were made. These changes followed a review of all law reform proposals made in the preceding years, back to 1997. In particular, in relation to practitioner conduct and regulation, the law introduced increased disclosure requirements on practitioners, greater regulatory controls, and fine-tuned many insolvency processes. Further reform proposals continue to be made.

Review of the corporate insolvency regime remains an on-going task, and reforms take time to be enacted, understood and implemented by the profession, regulators and the courts. The IPA has been closely involved in assisting the government in the insolvency related reform process. In fact, the IPA suggested many of these reforms.

The IPA acknowledges that there have been issues with individual insolvency practitioners and the public concern created by these issues.

We note that these problems have been identified by the IPA, ASIC and CALDB and appropriately dealt with and believe that this shows that the present system is working to produce appropriate outcomes in cases of misconduct.

While instances of misconduct attract significant media attention, the number of practitioners found to have engaged in misconduct is small.

Section 2 Insolvency practitioners play a key role in the orderly wind up, trade or sale of insolvent businesses.

Insolvency practitioners play a key role in taking control of insolvent businesses, securing and recovering assets, achieving order for creditors and employees and seeking to maximise returns to creditors and members in accordance with statutory priorities

Practitioners are exposed to significant financial and personal risk, and act in the interests of creditors and employees and in the public interest.

Corporate insolvency is a relatively infrequent event in the Australian economy, and individuals confronted with a corporate insolvency understandably experience disappointment, anger and frustration as a result. These emotions are frequently, but inappropriately, directed towards practitioners appointed to the company.

Section 3 It is fundamentally important that the community has confidence in the regime and in the integrity of its practitioners.

Confidence in a country's insolvency regime and in its practitioners and regulators is essential for the operation of the regime itself and for the efficient functioning of capital markets and for the country's economic infrastructure.

Insolvency practitioners are in a position of trust and their regulation is justified. On appointment, a practitioner takes full and immediate control of the assets of a business and so assumes a duty to deal with those assets according to law.

The IPA supports and encourages fair and effective regulation of the insolvency profession.

The IPA plays an important role in building and maintaining confidence in the profession, and promotes and seeks to maintain high standards of practice and professional conduct by its members.

Section 4 ASIC has prime responsibility for the registration, monitoring and discipline of liquidators and administrators.

These responsibilities are supported by the IPA and the professional accounting bodies. The behaviour and conduct of practitioners is also subject to public and media scrutiny.

ASIC registers liquidators, monitors their conduct and performance and takes disciplinary action when appropriate through the courts, the CALDB and through undertakings. The IPA supports ASIC in this role through its Code of Professional Practice, educating and informing members, receiving and considering complaints against members and referring serious matters to ASIC for its consideration and action.

Section 5 Practitioner remuneration is closely regulated.

Insolvency practitioners are skilled and experienced professionals and have a legal and moral entitlement to be fairly paid for their work. Practitioners undertake a significant amount of work for which they are not paid.

The current remuneration regime is reasonable, and the rates charged by practitioners are comparable to those of other similarly qualified professionals.

Creditors have the right to review and approve remuneration and to further challenge a practitioner's fees in the courts. ASIC also has the power to seek a review of a practitioner's remuneration.

ITEMS FOR CONSIDERATION – CONSOLIDATED

Section 1

Supervision of unincorporated associations in insolvency

One administration handled by Mr Ariff was a co-operative registered under the NSW Co-operatives Act 1992 – Adamstown Rosebud Sport & Recreation Club Co-op Ltd. It appears that administration was not the subject of attention by ASIC, nor by the NSW Supreme Court when orders were made against Mr Ariff. Co-operatives are regulated by state laws and in NSW by the Office of Fair Trading. Provisions of the *Corporations Act* apply to their external administrations and liquidators registered under the *Corporations Act* may be appointed to them.

The IPA received no complaint about Adamstown Rosebud and was not aware of it until recently.

The Ministerial Council on Consumer Affairs has invited comment on a proposed Cooperatives National Law.[1] NSW Fair Trading is coordinating public comment on behalf of all States and Territories. That new law is being proposed to create a uniform system of governance for co-operatives across States and Territories. One of its aims is to introduce nationally consistent provisions for the supervision of co-operatives. The IPA will be making a submission to NSW Fair Trading on means to ensure that corporations and state and territory co-operatives are consistently regulated for the purposes of insolvency.

Section 2

Improved information for stakeholders

The 2004 PJC Report recommended that ASIC should work with the IPA in providing information to "unsophisticated creditors" in insolvencies. Such information is available for the community from both ASIC and the IPA, and ITSA though publications, website information, forums and phone assistance. However the IPA would support any further or particular programs that would provide individuals suddenly affected by a corporate insolvency with focused and accessible information and assistance in enabling them to understand administration and liquidation processes. This could for example be industry targeted program or programs that focus on particular creditors groups, such as employees or small traders. The IPA would welcome the opportunity to contribute to such a program.

[1] See www.fairtrading.nsw.gov.au

Improved insolvency statistics

The 2004 PJC Report also recommended that "as a step towards a better understanding of the nature, effects and extent of insolvent assetless companies, the Government should commission an empirical study" of those companies. It further recommended 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". Whether in response to that or not, in June 2008 ASIC issued a statistical report called *External administrators: Schedule B statistics 1 July 2004–30 June 2007*. This report provides a broad picture of corporate insolvencies in Australia that is useful. The report was compiled from the estimates and opinions contained in statutory reports lodged with ASIC by practitioners.

While the IPA welcomed the 2008 report, we consider it is essential that more detailed and current information on insolvencies should be gathered by ASIC and published. For the purpose of this submission, the IPA conducted its own limited member surveys but we were constrained by the fact that much basic and current information about corporate insolvencies is not readily available.

Section 3

Industry ombudsman

Given the importance of maintaining community confidence in the regime, and the potential for stakeholder dissatisfaction from an insolvency, the IPA raises for consideration whether an industry ombudsman or some such position might be useful. Such a position may be appropriate as a separate layer of review of practitioner conduct, beyond that maintained by ASIC, the IPA and other professional bodies. There are comparable positions in other significant industries where there is a similar level of public interest.

Section 4

Possible changes to the registration, monitoring and disciplining of registered liquidators

It is instructive to note the differences in registration and practitioner review and discipline processes adopted by ASIC and those employed by ITSA, which registers and monitors bankruptcy trustees.

Like ASIC, ITSA accepts applications for registration from suitably qualified practitioners. In assessing those applications, ITSA includes an interview process whereby the applicant attends an interview conducted by a three person panel. The interview panel comprises a delegate of the Inspector-General in Bankruptcy (usually a senior ITSA officer), an APS employee (usually from Attorney-General's Department) and an experienced registered trustee nominated by the IPA. The interview and assessment process may be supplemented by a written exam and conditions imposed upon practice. [2]

[2] See Inspector-General Practice Statement 13 - Trustee Registered under Bankruptcy Act - Registration Application Process, 25 June 2008. Questions at interview cover a range of technical and ethical issues. Conditions may be imposed on an applicant's right to practise, for example that the trustee only take joint appointments with an experienced registered trustee for a certain period, or that the trustee limit the number of estates taken on in the first 12 months.

We are of the view that the interview stage of the application assessment may be important in identifying appropriately qualified and experienced practitioners, and those with an appropriate and informed approach to the practice of insolvency.

Under ASIC's current professional monitoring practices, we understand individual practitioner conduct is only reviewed if a complaint is lodged with ASIC.

In contrast, the practitioner review process undertaken by ITSA is conducted biennially and across all practitioners. Their process is not complaint driven. The scope and regularity of review arguably identifies underperforming practitioners more promptly, and enables ITSA to take timely disciplinary action (ie through education, suspension, termination of registration) against practitioners. The regularity of the practitioner review also identifies early trends in industry behaviour.

Under the bankruptcy disciplinary processes, a disciplinary panel of the same three representatives can hear and determines applications by the Inspector-General for the cancellation of registration of a trustee on grounds of misconduct. This disciplinary panel is the equivalent of the CALDB in corporate insolvency. As with ASIC in respect of registered liquidators, the Inspector-General may alternatively apply to the court in relation to the misconduct of a bankruptcy trustee.

The IPA recommends that consideration be given to the processes used by both ASIC and ITSA to determine if improvements can be made to the registration, review and discipline of registered liquidators.

Resourcing ASIC appropriately

The IPA is a firm supporter of the work undertaken by ASIC as the regulator of the corporate insolvency industry. Some of the matters that the IPA has put forward for consideration would involve significant change to existing ASIC procedures or the addition of further responsibilities. As a consequence, the insolvency team within ASIC would need to be provided with sufficient funding. Consideration of changes to regulatory oversight cannot be done without regard to the cost of such reform. The IPA supports the provision of adequate funding to ASIC to allow for effective regulation of the insolvency industry.

Section 5

Speedier, more cost effective processes for review of liquidators' fees

The right of access to the courts, and the criteria by which courts are required to assess remuneration, were important aspects of the 2007 insolvency reforms which the IPA supported. However we acknowledge that there are practical impediments to remuneration challenges through the courts, in terms of legal costs and time, and that these impediments can be disproportionally high for individual or small business creditors and employees. They can also consume court resources and time.

It may be appropriate for the government to consider the establishment of an alternative non-judicial specialist forum to review practitioner fees through a more informal and cost effective process. In considering such an option, it would be important to ensure that:

- current avenues for creditors approval of remuneration would need to be followed first;

- any process would need to be transparent, cost-effective and speedy so as not to inadvertently prolong an administration; and
- there be set some threshold for review for the reason that too frequent challenges without good reason will simply increase the total costs to the community of corporate insolvency activity.

The IPA notes that a review process in bankruptcy proposed under the Bankruptcy Legislation Amendment Bill 2009 is proposed in recognition of the same sort of issue in bankruptcy fee disputes that we have explained in relation to corporate insolvency. The IPA made submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiring into that Bill in support of the proposed changes. Consideration may be given to similar processes in corporate insolvency as those proposed in bankruptcy.

SUBMISSION

Section 1 Australia has a sound and balanced insolvency regime that is well regarded internationally and contributes positively to the legal and social well-being of the community.

1.1 Australia has a sound, balanced and well regarded corporate insolvency regime

Australia's corporate insolvency regime balances the conflicting interests of stakeholders in a business failure, with an emphasis on the interests of creditors over those of other stakeholders, including shareholders and a company's directors and officers.

Our regime meets important legal, social and economic purposes. It allows the orderly wind up, trade-on or sale of the insolvent business by an experienced and independent practitioner.[3] It imposes order over creditors and provides them with fairness in the way they are dealt with. The reasons for the collapse of the business are investigated and breaches of the law are pursued. It provides protection for the directors and for the business itself. In addition, the insolvency regime maintains the availability of capital for business, and expedites the re-allocation of capital from the insolvent business to productive use.

Australia's corporate insolvency regime is well regarded internationally. In particular, other countries are interested in features of our voluntary administration regime and aspects of its have been adopted elsewhere.

Australia has a solid history of promoting sound insolvency policies in the Asia-Pacific region and beyond. It has been, and continues to be, active through UNCITRAL and other forums such as APEC and the OECD in encouraging nations to develop effective and efficient insolvency frameworks. A number of Australian insolvency practitioners are well regarded around the world and they have tended to feature prominently in leadership groups of international insolvency-related organisations.[4]

As noted in Mr Mumford's submission[5] to this Inquiry:

> *"Australia leads practice in some important respects, notably the emphasis on solvency certification in creditor protection, and (more relevant in the present context) the active role played by ASIC in supporting insolvency practitioners and creditors in investigating and (where appropriate) prosecuting malfeasance by directors and others."*

Further, in a 2007 World Bank report that researched insolvency regimes of 175 countries, Australia's insolvency regime:

- ranked 12th out of the 175 countries for the amount recovered for creditors when a business is closed;

[3] In this submission, we use the term 'practitioner' to refer to an insolvency practitioner appointed as a liquidator or administrator to a company under the Corporations Act, unless otherwise stated.
[4] http://www.treasury.gov.au/documents/448/HTML/docshell.asp?URL=5Australia.asp
[5] Michael J Mumford, January 2010, Submission to this Inquiry, p1

- was successful in recovering an average of 80% of assets when a business closed; and
- ranked 9th quickest (equal with 7 other countries) in finalising an insolvency, with the average time taken being one year.[6]

1.2 The regime responds well to the need for change

Australia's insolvency regime is responsive to the need to change, demonstrated by the significant reforms that have occurred in the recent past and continue to occur in 2010.

Australia's present regime has been the result of many reforms over the past 20 years (see Appendix C). Reforms that have taken place include:

- The major insolvency reforms in 1993 arising out of the 1988 Harmer report which set the structure of the present voluntary administration regime;
- The 2007 reforms, which took account of reform recommendations emerging from a total of six reviews over the period since the late 1990s, and in particular the reforms suggested in the 2004 Parliamentary Joint Committee 'Stocktake' report;
- Reforms in insolvency related areas including banking, insurance and cross-border insolvency in 2008;
- Further reforms announced by Minster Bowen in January 2010, providing for significant "modernisation" of insolvency activity, such as postal vote meetings and online advertising of notices, and for the implementation of various other insolvency reforms recommended by CAMAC.[7]

The most recent legislative changes in corporate insolvency were made at the end of 2007 when amendments to the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001 were made. The significant reforms were in relation to:[8]

- Improving outcomes for creditors, in particular in relation to pooling administration of corporate groups, protecting priorities of employee creditors, including in relation to superannuation claims, and increased focus on information being provided to creditors in relation to practitioner independence and remuneration;
- Greater regulatory controls over practitioners, with ASIC being given enhanced powers to investigate liquidators, to review their fees, and with improvements being made to the registration process;
- Law enforcement measures, including the enforcement powers given to ASIC to pursue phoenix company activity; and

[6] Source: World Bank and International Finance Corporation, Doing Business 2007 'How to reform', 2007, Center for International Comparisons of Production, Income and Prices, Penn world tables, OECD and cebr analysis, 2007

[7] The Corporations and markets Advisory Committee. See CAMAC's 2008 report – Issues in External Administration.

[8] As explained in the Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007.

- Fine-tuning of the voluntary administration process, for example in relation to increased time for practitioner investigations; streamlined processes for voluntary liquidations; and refined advertising and electronic communications requirements.

Reforms take time

Review of the corporate insolvency regime remains an on-going task, with the courts, ASIC, the IPA and the Accounting Professional & Ethical Standards Board (APESB) all dealing with different aspects of reform.

As the PJC Stocktake report said in 2004, a period of as much as ten years may be appropriate to review and test such major industry reforms.[9] The IPA's view is that many of these 2007 reforms still need time to gain traction for their benefits to be fully recognised, and for any difficulties with them to be identified.

For example…

The 2007 reforms introduced requirements for a declaration of relevant relationships to be provided to creditors by voluntary administrators and liquidators in creditors' voluntary liquidations, which serve to reinforce the important independence requirements of practitioners. ASIC has recently completed a review, the results of which are yet to be announced, of a large number of declarations of relevant relationships. This review will be the first insight into the quality of declarations provided by practitioners under this new law and will indicate where improvements may need to be made. Steps will then be taken by the IPA to support any necessary improvements through education programs, articles in our journal and amendments, if necessary, to the IPA Code. When major change is introduced, such as these declarations, sufficient time must be given for the full benefits to be felt within the industry.

In 2008, ASIC released a report on a review of section 439A reports prepared by administrators. These significant reports provide information and recommendations to creditors to allow them to decide whether and how the insolvent business might be salvaged. The ASIC report indicated a number of improvements that practitioners should make in the preparation of section 439A reports. In response to this ASIC report, the IPA developed a one day education program directly focused on improving the quality of these reports. The program was piloted in December 2008, and since then the IPA has conducted 12 programs in 5 cities, attended by over 200 practitioners from nearly 100 firms. The practitioners attending the course have transferred their learning back to their own firms.

1.3 The IPA plays a key role in reform of the Australian regime

The IPA has been closely involved in assisting the government in the insolvency related reform process. In fact, the IPA suggested many of these reforms. The IPA was subsequently involved in assisting the courts with changes to their insolvency court rules, including in relation to the hearing of remuneration challenges, and fee disclosure.

[9] At [1.7]

Once the new law commenced, throughout 2008, the IPA played an important role in the implementation of these law reforms – by way of training and information sessions for its members, publications, website guidance and liaison with ASIC and the government in resolving issues of interpretation or application that arose from the reforms.

That process in itself has resulted in more reforms, recently announced, that will serve to further improve the process.

Items for consideration

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[10] See www.fairtrading.nsw.gov.au

Section 2 Insolvency practitioners play a key role in the orderly wind up, trade-on or sale of insolvent businesses.

2.1 Insolvency practitioners take immediate control of an insolvent business on appointment

The front-line person in any insolvency is the practitioner, and their appointment is legally and commercially significant. Control of the company immediately passes to the practitioner on their appointment. They have the power to continue to run the insolvent business or shut it down, to secure and recover assets, to deal with creditors and to challenge transactions and asset transfers of the company, and to terminate or retain employees. All this is with a view to achieving order for creditors and employees and to maximise returns to creditors and members in accordance with statutory priorities.

For example...

As an example, a court may appoint a liquidator to an insolvent company that is continuing to trade and that has a workforce of 1000 employees around Australia. On appointment, the liquidator is immediately in legal control of that company and its business, its employees, its assets and its contracts. The role of the directors is excluded. The liquidator may need to assess the viability of the business, or parts of it, in order to try to realise value for creditors. The liquidator will need to decide on the retention, or termination of all or some employees, bearing in mind the liquidator's potential liability under OH&S laws.

Company assets may be in the hands of others and may need to be recovered. On-going company contracts will need to be assessed. Court proceedings may need to be taken, or existing proceedings of the company defended. The Corporations Act allows a person affected by the decisions of a practitioner to challenge those decisions and challenges can be made by creditors, directors or employees. The practitioner may need to assume liabilities and obligations in order to better realise assets. Statutory investigation and reporting obligations to ASIC, within time limits, are imposed under the legislation, and communications with creditors are necessary. There are also particular obligations to the Australian Taxation Office.

2.2 Practitioners are exposed to significant financial and personal risk.

Practitioners necessarily have significant powers and responsibilities. Appointments as liquidator or administrator are personal to the practitioner, based on their experience and qualifications. They assume control of, and often liability for, the insolvent business in place of the existing directors and management. They can assume occupational health and safety liabilities for on-going retention of employees, and tax liabilities. The nature of the role can sometimes lead to risks to the personal safety of practitioners when the emotions of those who suffer from the insolvency are involved, or where investigations into persons' misconduct are pursued.

In addition, practitioners often take on personal liability for debts incurred and their remuneration is often uncertain. Practitioners can be required to take court proceedings

in their own name, and they can be and often are sued in relation to challenges to their decisions.

Some examples of the personal and financial risk to which a practitioner can be exposed are:

- a practitioner has personal liability for the company's GST liabilities under the tax laws;[11]
- a voluntary administrator has personal liability for debts incurred during the period of voluntary administration;[12]
- a practitioner assumes full responsibility for employees under occupational health and safety legislation during a trade-on.[13]

2.3 Practitioners act in the interests of creditors and employees and in the public interest

While the ultimate aim of an appointment is to account to and to realise moneys for the creditors, the practitioner is not subject to creditor direction and has the final decision to make, although the practitioner must take creditors' views into account. Also, while the creditors' interests are important, the practitioner also has public interest and investigative and reporting responsibilities that may not directly involve the creditors' interests.

In many cases, the practitioner's legal responsibility to conduct investigations and lodge reports, which are more in the public interest, will serve to reduce the quantum of funds available for distribution to creditors in any given insolvency.

In addition, the fact that directors may act properly to appoint the practitioner does not mean that the practitioner acts at the behest of directors; directors are not the clients of the practitioner. The practitioner may well sue the directors for insolvent trading, refer their breaches of the law to ASIC, or have the directors publicly examined. The law and the IPA Code emphasise the importance of independence of the practitioner, from the directors and from others interested in the insolvency.

The practitioner is entitled to creditor support throughout the process, for example by way of attendance at meetings, providing information, participating in committees, considering the recommendations of the practitioner and making decisions where requested. The creditors are likewise entitled to proper conduct of the administration by the practitioner.

Employees will often be creditors in an insolvency. A practitioner always has particular regard to employees of the insolvent business whose situation involves not only financial loss but also potential loss of employment. Employees have the protection of GEERS[14]

[11] Division 58 of the *A New Tax System (Goods and Services Tax) Act 1999*
[12] Section 443A Corporations Act
[13] See *Benbow v Scales* [2002] NSWCIMC 184
[14] The General Employee Entitlements and Redundancy Scheme, operated through the Department of Education, Employment and Workplace Relations (DEEWR).

in respect of unpaid wages and other entitlements. The IPA support GEERS and liaises with DEEWR in relation to its operation. Our practitioner members are closely involved in assisting GEERS to facilitate prompt payments to affected employees.

In many cases however, a sale of the business of the insolvent company by the practitioner and transfer of the employees, for example under a deed of company arrangement, can ensure employees' continued employment.

2.4 The length of an appointment can vary for many reasons

Concern is often expressed about the length of time that it can take to finalise an insolvency administration. There are many reasons why an appointment may extend beyond what may at first glance seem reasonable. The complexity of the company's affairs is a reason, in particular its financial dealings. Computer based forensic tools for financial investigations and analyses do allow more speedy investigations than were possible in the past. But the delays, and additional costs, in an insolvency administration often arise through legal proceedings, not only from the practitioner bringing proceedings to recover assets or challenge transactions, but also from having to defend proceedings brought against the practitioner by creditors or others. Although practitioners will seek to resolve disputes commercially, without recourse to litigation, legal proceedings and the time delay and administration costs involved are often unavoidable. In addition, in many instances the practitioner must go to court for approval of a particular course of conduct, for example in seeking an extension of time to hold a meeting of creditors, or an approval to enter into certain contracts, where the law requires court approval to be obtained.

Case in point

Ansett Australia

Ansett Australia and related companies were placed into voluntary administration in 2001. At the time the airline was one of the two major operators in the Australian aviation industry, employing 12,000 people.

Upon appointment the administrators – Mark Korda and Mark Mentha – were faced with the challenges of maximizing the proceeds of sale, and preserving employee entitlements.

They decided that recommencing airline operations after a period of shut-down was the best course of action. However this was dependent upon reaching an agreement with the parent company, Air New Zealand, navigating through a maze of regulatory issues, and instilling confidence in customers that it was 'business as usual' and that they could resume purchasing tickets.

At the time the Ansett group owed more than $2 billion.

The administrators traded-on the business for a period of time to allow them to structure a sale strategy for the main airline business, the subsidiaries and related assets (property, parts, aircraft). The administrators took the view that it was in the creditors' and employees' best interests to realize the assets in an orderly manner instead of through a fire sale.

Although the main airline business was unable to be sold or recapitalised, 12 other businesses were sold. Thousands of employee positions were transferred with the sold businesses.

This strategy, although lengthy, has achieved better results for all – the average dividend to employees is 95 cents in the dollar. It also focused on recovering the shortfall in the Ground Staff Superannuation Fund for employees. The administrators negotiated with the Federal Government to provide financial assistance (under the SEESA[15] scheme), which has been the blueprint for the current GEERS scheme. This approach resulted in the recovery of the vested shortfall and in employees receiving the majority of their entitlements.

2.5 Understanding community concerns with corporate insolvency

Over the ten years to 31 December 2009, registered liquidators in Australia received 113,602 appointments to a total of 71,726 corporations[16] in external administration. The average number of registered companies in Australia each year over that period was 16.6 million, meaning that the average proportion of companies going into external administration each year was less than one per cent (0.68%). In the same period, a total

[15] Special Employee Entitlement Scheme for Ansett Group Employees.

[16] There is frequently more than one appointment to a single insolvent company, eg an appointment as voluntary administrator, provisional liquidator or receiver may be followed by an appointment as liquidator.

of 1.2 million new company registrations were recorded, 17 times the number of companies entering administration.[17]

Given these statistics, it is not surprising that many individuals affected by a corporate insolvency face the event with no previous experience of insolvency and with very little information or understanding on which to base their expectations of what will occur. They can easily be frustrated by the legal requirements of a regime which is complex and can be difficult to understand.

A business failure may occur through adverse market forces, mismanagement by directors or officers, inadequate capitalisation, or from one of a large number of other causes. The creditors may not have been paid, the business may be in disarray, records may not have been kept and the workforce may be dissatisfied. Directors may not co-operate. An insolvency practitioner is frequently appointed in the midst of very difficult circumstances.

Creditors and other stakeholders may legitimately be disappointed, frustrated or angry at the business's collapse or vulnerability. In particular, employees of the business will be distressed at what may be their loss of employment. There is a strong tendency for these emotions to be focused on the practitioner who is appointed to take control and 'sort out the mess'. While this tendency is very understandable, it is important to remember that these emotions arise from events and activities that predate the involvement of the practitioner.

In addition, many parties affected by the collapse of a business have unrealistic expectations about what is possible as an outcome of the insolvency process. While there are indeed occasions when a business can be restructured or turned around, and the activity of the business can be maintained, this is not a result that can always, or even frequently, be delivered.

[17] http://asic.gov.au/asic/asic.nsf/byheadline/Insolvencies%2C+teminations+%26+new+reg+stats+portal+page?openDocument

Case in point

Darby's Pies

A company operating a manufacturing plant and 14 retail bakeries in the Hunter region of NSW, was placed into voluntary administration as a result of an ATO penalty notice served on one of its directors.

The bakery, known for its pies, cakes and breads, had been serving the community for over 20 years. It was a household name. It employed approximately 30 people, and had a turnover of over $2.5million pa.

Upon appointment of the administrator, the company had 75 creditors, owing debts of close to $1 million. The company was under-performing. Its state-of-the-art production technology was under-utilised, product lines were unprofitable, there were union issues, workplace inefficiencies, retail outlets were unprofitable, and there was a range of lease exposures.

The administrator's key objectives upon appointment were to:

- Stabilise the company's finances with a view to restructuring its operations
- Rationalise jobs, retain key employees and provide a vision for the future
- Protect the brand's reputation – particularly its reputation for the production of fresh pies, bread and pastries

Scale back operations so that focus was on the profitable product lines.

The strategy set in train by the administrator has seen the company restructure and trade-out of administration over a period of 5 years. The company has expanded its operations, is now employing more people from the local community, has under-gone a rebranding and grown its market-share.

The region has retained a business, an employer, and a reputation of having great pies.

If this course of action had not been taken the company would have been put in liquidation, jobs lost, and a regional icon gone forever.

There are indeed cases where the outcomes give rise to a high level of satisfaction. The likelihood of a good outcome depends on:

- How early financial problems are recognised and acted upon;
- The extent to which the there is a sound underlying business that can be salvaged;
- The extent of the co-operation provided to the practitioner by directors and management; and
- The adequacy of the company's books and records.

Case in point

Riverland Fruit Co-operative Ltd (in liquidation)("RFC")

RFC was a fruit packing co-operative in South Australia which had receivers & managers appointed to it, as well as to an unsuccessful joint venture company, in late 2001.

George Divitkos of BDO was subsequently appointed liquidator of RFC in early 2002.

The receivers & managers realised the majority of RFC's assets and paid out the secured creditor. They then passed to the liquidator a minority shareholding in Berri Limited with restrictive pre-emptive rights as well as a number of legal actions and a small surplus of funds.

The liquidator successfully managed to achieve a significant return on the sale of the shares when Berri Limited was sold to San Miguel.

The liquidator also successfully resolved each of the legal actions, with the main action against the joint venturer and co-guarantor taking some 6 years to resolve. This was only able to be achieved with the backing of and with an excellent working relationship between the liquidator, his legal advisers and the RFC committee of inspection.

As a result, the liquidator has paid 100c in the dollar to all admitted unsecured creditors (in excess of 1,300 largely Riverland based creditors owed some $2.6m - including a State government loan of $400,000) and is in the process of paying a dividend to all admitted unsecured creditors representing their entitlement to interest as prescribed under the Corporations Act. In addition, the liquidator anticipates that there will be funds available for a small return to shareholders.

On many occasions, shareholders or directors of an insolvent business may have views about the continued viability or value of their business, despite its insolvency, and they expect a practitioner to share what is in reality an unrealistic assessment. This can often result in friction and dissatisfaction with the practitioner appointed. The owners want the practitioner to approach any trade-on of the business with the same entrepreneurial mindset that they themselves employed in establishing and growing the business. By contrast, the mindset of the practitioner in assessing the business will necessarily be impartial, independent and objective. The practitioner will take a balanced and pragmatic but strategic view in making the required commercial decisions about the business.

For these reasons, high levels of dissatisfaction arising from the fact of an insolvency can be focused inappropriately on the practitioner.

Notwithstanding this frequent circumstance, our members also report that the owners of small to medium business are often very relieved when they appoint a practitioner to oversee the sale, or orderly wind up of their business. A substantial emotional, psychological and financial strain is lifted from the owners' shoulders, permitting them to contemplate a future life beyond the failed business.

We note that Mr Gittus, in his submission to the Inquiry makes comments along these lines:

> *"I have started a new business and am slowly getting back on my feet with the wonderful support of my family, suppliers and clients.*
>
> *So far, the behaviour of … at has been outstanding - when I first saw him, I was in a state of considerable distress and he managed to make sense out of my position and advised what the possible options would be. He gave an estimate of fees which I thought was entirely reasonable ($8-12,000). This money will come from provision I had set aside for the next quarter BAS, so it has effectively lost the Government that income... The liquidation is ongoing at the time of writing, but to this point he has behaved as one would hope ll [sic.] Insolvency Practitioners would: helping to salvage what can be salvaged from a situation that is already a disaster."*[18]

Items for consideration

Improved information for stakeholders

The 2004 PJC Report recommended that ASIC should work with the IPA on providing information to "unsophisticated creditors" in insolvencies. Such information is available to the community from ASIC and the IPA, and from ITSA, though publications, website information, forums and phone assistance. However the IPA would support any further or particular programs that would provide individuals suddenly affected by a corporate insolvency with focused and accessible information and assistance in enabling them to understand administration and liquidation processes. This could for example be an industry targeted program, or programs that focus on particular creditors groups, such as employees or small traders. The IPA would welcome the opportunity to contribute to such a program.

Improved insolvency statistics

The 2004 PJC Report also recommended that "as a step towards a better understanding of the nature, effects and extent of insolvent assetless companies, the Government should commission an empirical study" of those companies. It further recommended 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". Whether in response to that or not, in June 2008 ASIC issued a statistical report called *External administrators: Schedule B statistics 1 July 2004–30 June 2007*. This report provides a broad picture of corporate insolvencies in Australia that is useful. The report was compiled from the estimates and opinions contained in statutory reports lodged with ASIC by practitioners.

[18] Mr Grant Gittus, Submission to the Inquiry, p2

While the IPA welcomed the 2008 report, we consider it is essential that more detailed and current information on insolvencies should be gathered by ASIC and published. For the purpose of this submission, the IPA conducted its own limited member surveys but we were constrained by the fact that much basic and current information about corporate insolvencies is not readily available.

Section 3 It is fundamentally important that the community has confidence in the insolvency regime and in the integrity of its practitioners.

3.1 Orderly dealing with business failure is important to the economy

Confidence in a country's insolvency regime and in its practitioners and regulators is essential for the efficient functioning of the regime itself and of capital markets and the country's economic infrastructure. It is also imperative for the effective functioning of the insolvency regime itself.

> *"Market perceptions, particularly of companies and of the business environment are also greatly influenced by the effectiveness and reliability of liquidators in maximising the returns to creditors of failed companies, ensuring early payment of recoverable moneys and identifying and reporting deficient conduct by company officers.*
>
> *Market perceptions are a major determinant of the cost and availability of capital to companies. Increased capital cost and impaired ability to raise funds result in competitive disadvantage."*[19]

Given the significant authority of a practitioner in the conduct of an insolvency administration, it is important that all stakeholders have confidence in the integrity of the regime, and in its practitioners.

A purpose of insolvency is to provide protection and relief for insolvent companies. Most insolvencies in the Small to Medium Enterprise (SME) sector are initiated by the directors themselves, through creditors' voluntary liquidations or voluntary administrations. Properly informed, they have made the decision that in light of their company's financial situation, they should put the company into a formal insolvency process. That provides immediate protection for the company's assets and business, and some relief for the directors. They should feel assured that the process properly deals with the consequences of their company's insolvency.

3.2 Insolvency Practitioners are in a position of trust and regulation is justified

On appointment, a practitioner takes full and immediate control of the assets of a company and assumes a duty to deal with those assets according to law.

Practitioners are fiduciaries, officers of the court and must be, and be seen to be, independent. They are required to uphold the highest standards of integrity and professionalism in the conduct of insolvency administrations. The courts expect this and compare the standards expected of them to those of judges.[20] The fact that judicial standards of conduct are expected - of impartiality, independence, fairness etc – shows that there is no comparable position of authority and responsibility in other private

[19] CALDB Annual Report 2002-2003, p6

[20] "The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law" from whom judicial standards of conduct are expected: *ASIC v Edge* [2007] VSC 170 at [39] ff citing *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 696.

professions. It is for this reason that the effective regulation of insolvency practitioners is of such importance.

The IPA supports and encourages fair and effective regulation of the insolvency profession.

The regulators, the courts, and the IPA and related professional bodies, work together to provide a regime for the regulation of the conduct of liquidators and administrators. No regime can guarantee that the conduct of all practitioners is satisfactory. The IPA, along with other partners, is concerned to ensure that serious misconduct is dealt with promptly and effectively.

If there are members of the profession who are not maintaining the required standards, the IPA supports action being taken against them. Instances of serious concern that come to IPA's attention, or to that of the regulator, should be investigated and pursued. The fact that this is done, and is seen to be done, serves to maintain the necessary confidence in the regime.

3.3 The IPA plays an important role in building and maintaining confidence in the profession

The IPA promotes and maintains high standards of practice and professional conduct by its members. It does this primarily through its Code of Professional Practice (the IPA Code) which states principles of conduct and gives detailed practice guidance, in many cases setting a standard above the legal requirements. The Code was the subject of detailed discussion and input from members from mid 2007 to its issue in May 2008. This involved meetings of members around the country at which member and community input was obtained. In particular, input was received from ASIC and ITSA on the principles and guidance offered. Other regulators and stakeholders also gave comments.

Since then, our view is that the Code has been well accepted and broadly adopted by the profession. In addition, APES 330, the new insolvency standard issued by the APESB, released in December 2009, and which becomes mandatory from April 2010, has adopted many of the principles of the Code and its guidance. This means that all members of the ICA, CPA and NIA, whether members of the IPA or not, are similarly bound. The Code has been favourably referred to by the courts in judgments,[21] and in academic writings,[22] and regulators also refer to it and rely upon it.

The IPA recognises the importance of the Code remaining up to date and has recently undertaken a comprehensive review of the original document. Among other items, the revision will take into account ASIC's findings from its recent review of declarations of relevant relationships. A second edition of the Code will be released after ASIC's findings from this review are published.

The IPA also offers guidance to its members on the law and practice of insolvency, including on difficult issues of independence, reporting of remuneration, conduct of

[21] See *Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (In Liquidation)* [2009] FCA 626; *Re Monarch Gold Mining; ex parte Hughes* [2008] WASC 201

[22] For example *Mediation and the Insolvency Practitioner*, (2009) 17 Insol LJ 135, P Agardy. The writer likens the standards in the IPA Code to the model litigant obligations of the Commonwealth.

meetings and so on. This includes telephone and email guidance, web and journal notifications, and training and conference sessions.

Full membership of the IPA requires insolvency specific post-graduate university level study, attendance and performance at workshops conducted by senior practitioners, and (since the beginning of 2008) written assessment on matters of ethics. Applicants must also be members in good standing of either the Institute of Chartered Accountants, CPA Australia or the Law Society (for non-practitioner members). Once a person becomes a Full Member, they are required to complete a minimum of 40 hours of continued professional development in insolvency per year.

Membership of the IPA is voluntary and not a requirement in order to be able to practise as a registered liquidator or trustee in bankruptcy. As at February 2010, 82% of registered liquidators with current appointments[23] are members of the IPA. The figure for registered trustees in bankruptcy who are IPA members is 89%.

The IPA has processes whereby members' conduct is subject to IPA review on the IPA receiving complaints about their administrations, or on concerns coming to the IPA's attention; and further processes whereby disciplinary proceedings can be taken, or referral of their alleged misconduct to a regulator. In addition, the IPA monitors regulator and other proceedings brought against its members and takes action as necessary.

Items for Consideration

Industry ombudsman

Given the importance of maintaining community confidence in the regime, and the potential for stakeholder dissatisfaction from an insolvency, the IPA raises for consideration whether an industry ombudsman or some such position might be useful. Such a position may be appropriate as a separate layer of review of practitioner conduct, beyond that maintained by ASIC, the IPA and other professional bodies. There are comparable positions in other significant industries where there is a similar level of public interest.

[23] There are 662 registered liquidators, of whom ASIC report that 85 have no current appointments, leaving 577 active practitioners.

Section 4: ASIC has prime responsibility for the registration, monitoring and discipline of liquidators and administrators

These responsibilities are supported by the IPA and the professional accounting bodies. The behaviour and conduct of practitioners is also subject to public and media scrutiny.

4.1 Liquidator Registration

The role of assessing and registering practitioners lies with ASIC. ASIC's registration processes are important in ensuring the suitability of insolvency practitioners permitted to practise.

A person requires relevant experience and tertiary qualifications to apply to be registered. This includes five years' experience in the last 10 in corporate insolvency under the supervision of a registered liquidator in a broad range of external administrations, including complex administrations. ASIC also expects that a person will generally have undertaken some specialist studies in corporate insolvency, although failure to have done so is not a bar to registration. Two references are required, and ASIC must be satisfied that the applicant is a fit and proper person to be registered. Details of the ASIC requirements are in a Regulatory Guide and information kit published by ASIC.[24]

An application for registration as a liquidator must be made in writing to ASIC. In the event that the preliminary view is that an application will be refused, the applicant has a right to a hearing. ASIC may contact applicants for further information in support of their application. It is seldom that ASIC interviews applicants for registration.

Once a practitioner is registered, they may take appointments over insolvent companies. The status of 'registered liquidator' allows a practitioner to be appointed to a creditors' voluntary liquidation, as a voluntary administrator and then deed administrator, and as a receiver. The higher status, also managed by ASIC, of official liquidator allows a practitioner additionally to be appointed to court appointed liquidations, and cross-border insolvency appointments.

4.2 Monitoring the conduct and performance of liquidators

The law gives ASIC significant powers to regulate the conduct of liquidators and administrators. This was a feature of the 2007 reforms. ASIC investigates the conduct of particular practitioners when they have received complaints or other intelligence about them.

ASIC also monitors the performance of the industry as a whole via regular reviews of particular aspects of practice. For example, in 2007-08 it reviewed section 439A reports issued in voluntary administrations. The findings of that review were used by the IPA to develop a training course to provide education to practitioners on these reports. In this way, ASIC works with the IPA and other association bodies to improve practitioner standards across the board.

[24] How to apply for registration as a liquidator, issued in September 2005.Regulatory Guide 186.

4.3 Disciplinary action against practitioners

ASIC has powers to deal with practitioners who are not performing their duties to the required standard. These powers are contained in the Corporations Act and the ASIC Act. ASIC may compulsorily investigate and examine practitioners, it may take court proceedings against a practitioner, it may bring proceedings against a practitioner before the Companies Auditors and Liquidators Disciplinary Board (CALDB), or it may seek undertakings or other remedies.

ASIC's referrals of disciplinary matters to CALDB over the last 10 years have resulted in a number of practitioners being suspended from practice as a liquidator for periods of between 9 months and 2 years. Court proceedings against a practitioner, which are usually taken for more serious misconduct, resulted in one practitioner being suspended for 10 years, and the other, Mr Ariff, for life. A summary of these outcomes and suspensions is included in Attachment D.

Actions against practitioners can also be taken by directors, creditors and others in relation to alleged breaches of law or practice. Those actions may relate to what is alleged to be misconduct of the practitioner; or simply in relation to legal challenges made by the party dissatisfied by the practitioner's decision. Litigation involving practitioners, whose decisions are often challenged, is not uncommon.

Practitioner misconduct of a serious nature is infrequent. Over the last decade (from 1 January 2000 to 31 December 2009, registered liquidators in Australia have accepted a total of 113,602 formal insolvency appointments. In the same period, we are aware of a total of 14 cancellations (4 in the last 5 years) and 13 suspensions (4 in the last 5 years) in respect of liquidators.

Stuart Ariff is an exception

In 2008, ASIC took proceedings under the Corporations Act against Mr Stuart Ariff, then a registered liquidator and an Associate Member of the IPA. The Act allows action to be brought against a registered liquidator for misconduct or failure to perform their duties. ASIC's powers under the Act have been successfully exercised before in such instances and there is are similar powers available to the regulator in bankruptcy.

In August 2009, the NSW Supreme Court banned Mr Ariff for life from practising as a practitioner. The judgment describes the extent of his misconduct which the Court labelled "appalling".[25] The extent of the misconduct found in this case was extreme, and fully warranted the "life" ban.

Mr Ariff is totally unrepresentative of the insolvency profession, his conduct clearly breached the current laws, accounting standards and relevant codes of conduct. We do not believe that his case in any way demonstrates the need for further regulation.

The IPA would welcome consideration of ways in which misconduct, even on a much lesser scale than in this case, could be more rapidly identified and acted upon.

[25] See *ASIC v Ariff* [2009] NSWSC 829

4.4 Role of the IPA in co-regulation

Under its discipline regime, the IPA seeks both to assist ASIC and ITSA and to take action itself in response to the outcome of the ASIC or ITSA action. The IPA is in the process of seeking member approval to changes to its Constitution that will allow it to act more effectively and promptly in relation to member misconduct, and to act independently of action taken by the regulator. The IPA proposes to be able to continue to refer serious misconduct to a regulator and be able itself to take action against a member who has been the subject of regulator discipline. These proposed changes follow a review of our disciplinary processes that was commenced in 2007.

The IPA receives and acts upon complaints made to it about its members, and the IPA website gives assistance with the process of making a complaint. By way of an indication of the number and nature of complaints, in 2009 the IPA received 36 formal complaints. After investigation and inquiry, 20 were not substantiated, 7 complaints were found to be valid, and the remainder were either withdrawn or still under consideration. Two of the valid complaints were in relation to Mr Ariff and therefore involved serious maladministration.

Others mostly fell into the categories of inadequate or delayed communications with creditors, including in relation to the conduct of meetings, or delay in taking some action. There were complaints about remuneration itself, or concerns about remuneration that were incidental to the main complaint. Resolution of matters in favour of the complainant was generally achieved by way of prompt attention to their concern and with guidance to the member on the relevant issue in the complaint. In some instances, the complainant had also complained to ASIC and to another professional body. When this occurs, the IPA is generally not able to be informed of progress on or outcomes of ASIC's or other body's investigations.

Case in point

In relation to Mr Ariff, the IPA first received a complaint about his conduct from Mr Doherty in 2006 in relation to Independent Powder Coating (IPC), although we also have an earlier communication in July 2005 about another company. The IPA presented the substance of this complaint to Mr Ariff and received an answer from him that, in the context of the then available information, was judged to adequately address the matters raised. In mid to late 2007, the IPA began to receive serious complaints about a number of Mr Ariff's administrations. We made investigations into those and in October to November 2007, we referred those matters to ASIC, and to the ICA and CPA. We continued to deal with issues concerning Mr Ariff throughout 2008.

In August 2008, ASIC commenced NSW Supreme Court proceedings against him. The IPA then took action against Mr Ariff, based on the ASIC action, on the extent and range of complaints against him and on his failure to respond adequately to questions the IPA had put to him about the further complaints. In February 2009, the IPA suspended Mr Ariff's associate membership pending the outcome of the ASIC action or other developments. In August 2009, the Court terminated Mr Ariff's right to practise, and the IPA then terminated his associate membership.

4.5 Role of Public & Media Scrutiny

Apart from formal regulation, in the conduct of an administration, the law requires an open process that allows scrutiny in particular by creditors, but also by employees, shareholders, the media and the company's former directors and officers. There are regular reports that a practitioner must prepare and lodge with ASIC which record the progress of the administration, the receipts and payments, and the meetings of creditors.[26] Failure to lodge certain reports is an offence.[27]

The media plays an important role in informing the community and creditors about particular insolvency administrations and by providing comment and analysis on important issues in law reform. The IPA assists by maintaining good communications with the media.

We acknowledge that the media played a significant role in reporting on concerns about Mr Ariff from 2007, leading up to the court decision against him in 2009.

Items for consideration

Possible changes to the registration, monitoring and disciplining of registered liquidators

It is instructive to note the differences in registration, practitioner review and discipline processes adopted by ASIC and those employed by ITSA, which registers and monitors bankruptcy trustees.

[26] For a list of reporting requirements – see *ASIC v Edge* [2007] VSC 170 at [51]
[27] S 475 *Corporations Act*

Like ASIC, ITSA accepts applications for registration from suitably qualified practitioners. In assessing those applications, ITSA includes an interview process whereby the applicant attends an interview conducted by a three person panel. The interview panel comprises a delegate of the Inspector-General in Bankruptcy (usually a senior ITSA officer), an APS employee (usually from Attorney-General's Department) and an experienced registered trustee nominated by the IPA. The interview and assessment process may be supplemented by a written exam.

We are of the view that the interview stage of the application assessment may be important in identifying appropriately qualified and experienced practitioners, and those with an appropriate and informed approach to the practice of insolvency.

Under ASIC's current professional monitoring practices, we understand individual practitioner conduct is only reviewed if a complaint is lodged with ASIC.

In contrast, the practitioner review process undertaken by ITSA is conducted biennially and across all practitioners. Their process is not complaint driven. The scope and regularity of review arguably identifies underperforming practitioners more promptly, and enables ITSA to take timely disciplinary action (ie through education, suspension, termination of registration) against practitioners. The regularity of the practitioner review also identifies early trends in industry behaviour.

Under the bankruptcy disciplinary processes, a disciplinary panel of the same three representatives can hear and determines applications by the Inspector-General for the cancellation of registration of a trustee on grounds of misconduct. This disciplinary panel is the equivalent of the CALDB in corporate insolvency. As with ASIC in respect of registered liquidators, the Inspector-General may alternatively apply to the court in relation to the misconduct of a bankruptcy trustee.

The IPA recommends that consideration be given to the processes used by both ASIC and ITSA to determine if improvements can be made to the registration, review and discipline of registered liquidators.

Resourcing ASIC appropriately

The IPA is a firm supporter of the work undertaken by ASIC as the regulator of the corporate insolvency industry. Some of the matters that the IPA has put forward for consideration would involve significant change to existing ASIC procedures or the addition of further responsibilities. As a consequence, the insolvency team within ASIC would need to be provided with sufficient funding. Consideration of changes to regulatory oversight cannot be done without regard to the cost of such reform. The IPA supports the provision of adequate funding to ASIC to allow for effective regulation of the insolvency industry.

Section 5 Practitioner Remuneration is closely regulated

5.1 Insolvency practitioners are entitled to be paid for their work

An insolvency practitioner has a legal entitlement to remuneration under the Corporations Act. Practitioners are also morally entitled to be fairly remunerated for the responsibilities they assume and the work they perform.

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

Insolvency practitioners have a high instance of non-recoverable work compared to other professions. In a recent survey, 30% of IPA members reported that they expected not to be remunerated for 20-25% of the appointments they undertook in 2009.

Approval of remuneration does not mean that the practitioner will be paid. If there are insufficient funds in the insolvency administration, the practitioner will not be paid. It is industry practice to seek approval of remuneration even when funds are not to hand. This saves the expense of convening a subsequent meeting for the sole purpose of the approval of remuneration.

5.2 Insolvency Practitioners are skilled and experienced professionals

A person requires tertiary qualifications and significant experience to become registered as a liquidator. Apart from a degree which includes three years of accounting and two years of legal study, persons applying to be registered must have worked under the supervision of a registered liquidator for a period of 5 years out of the preceding 10. Many of the profession's current senior practitioners have over 30 years' experience, and have been successfully involved in the restructure and orderly administration of many insolvent companies, always acting in the interests of creditors and employees. They are frequently drawn upon by government, regulators and the industry to comment or provide insights on industry issues.

Case in point – ABC Learning

Receivers and managers were appointed to ABC by the secured creditors, following the appointment of voluntary administrators by the company's directors. The receivers worked closely with government to ensure the continued operation of centres which provided care for some 100,000 children, jobs for 16,000 workers and the capacity to contribute to the economy for tens of thousands of working parents.

The company records were inadequate and the company was not able to measure profitability on a centre by centre basis. The receivers and managers undertook this analysis to identify the core group of viable centres which were, or could be once restructured, profitable. Solutions were also developed for the large number of centres assessed as unviable (and therefore a liability, not an asset) in a manner which preserved as many child-care places and jobs as possible.

The viable centres were restructured and an international sale process undertaken resulting in a not-for-profit purchaser of 678 of the 706 centres on offer. Other purchasers were found for all but two of the balance and the children and staff of these two centres were offered places at alternative centres. The parents, children, staff, centre landlords and ongoing suppliers have fared better than the company's financiers and creditors, but the situation could have been far worse for all these stakeholder groups and the wider community.

Case in point – HIH

HIH Insurance Limited ("HIH") collapsed in 2001. The liquidators took control of a global enterprise comprising some 80 companies, which had deep penetration in several key insurance markets in Australia. The liquidators liaised closely with the State bodies formed to protect policy holders and assisted the Commonwealth government to establish a Statutory Scheme to support small businesses and individuals. The saleable enterprises were sold and the liquidators developed and implemented Schemes of Arrangement, the first of their kind in Australia, to allow for a more efficient claims process and expedite both the payment of returns to creditors and the finalisation of the companies' liquidation.

While HIH is a long running matter, it is in the nature of insurance companies to have "long-tail" liabilities, which must crystallise and be quantified in order to determine dividends to creditors. In this context, with completion of the administration anticipated within 15 years, and with distributions having been made progressively, the outcome in HIH, due to the application of skill, experience and professionalism, is delivering an enviable outcome.

5.3 The current remuneration regime is reasonable

Practitioners generally charge on a time basis at hourly rates. The rates of practitioners are set according to the market, and recognise the high level of skill and experience

required of practitioners, along with matters such as the complexity of the administration, the risk involved, the specialised nature of the industry and the practitioner's internal cost structures.

The cost is determined by the nature of the tasks in recovering assets, dealing with creditors and informing them of progress, seeking information, often by compulsory or legal means, such as taking court proceedings.

These tasks are time intensive and can be made worse by difficulties in dealing with aggrieved parties to the process, eg unco-operative or combative directors.

The cost is also determined by the legal requirements imposed on the practitioner to expend time ensuring the maintenance of the integrity of the regime. These requirements focus on investigations, reporting to creditors and to ASIC, and general disclosure and accountability requirements placed on practitioners under the Corporations Act and compliance obligations under tax, environmental and other laws.

5.4 Practitioner rates are comparable to those of similarly qualified professionals

The IPA has sought to compare work handled by a practitioner, and their responsibilities and expertise, with other professional service providers. For example, work undertaken by a practitioner in a major reconstruction of insolvent businesses, and sale of significant business assets is comparable to merger and acquisition work performed by merchant banks or their advisors. The fees charged by merchant banks and advisors for corporate restructures are significant. They often comprise a base fee plus percentage incentives (ie equity raising 2-3% of the equity raised, sale of assets – 1% of the sale price, etc) and can be a base fixed fee as well. The remuneration of insolvency practitioners for similar work is far less.

Further, the work and remuneration model of merchant banks and corporate advisors is not geared towards working with or assisting SMEs who are facing insolvency.

Concern about the level of insolvency fees is likely to be far greater in this sector. The law setting out the work that a practitioner must perform does not draw any distinction based on the size of the insolvent business. The same number of tasks and investigations have to be completed and the same number of reports have to be written and lodged.

While it is reasonable to expect that larger corporations will require work of a greater volume and complexity to be done to discharge these duties, this is not always the case. It frequently happens that small and medium businesses have lower standards of record-keeping in any event, and that in the period immediately preceding an appointment, record keeping disintegrates altogether.

The absence of adequate books and records increase the amount and complexity of work that a practitioner must undertake and can give rise to significant delays in finalising important decisions such as on the sale of assets. A practitioner will not be able to act on the sale of an asset until first becoming certain of its ownership and of any challenges to title that it might be under.

The public sector is another possible alternative to the current corporate regime, and while costs may be lower, there may be a shortage of specialist skills to perform the work. While we note that there is considerable bankruptcy expertise held within ITSA, it

is ITSA's current practice to refer the more complex matters to insolvency practitioners in private practice.

Our research indicates that the rates charged by a specialist insolvency practitioner in a large metropolitan practice are 20% less than a corporate lawyer in a tier-one law firm and a corporate finance partner in one of the big four accounting firms. They are comparable to an partner working on insolvency matters at a mid-tier law firm. Further, insolvency practitioner rates of a suburban firm or sole practice are still less than their legal practitioner counterparts. See Appendix E.

5.5 Creditors have a right to review and approve remuneration

The cost of the administration of the insolvency regime is borne by creditors, in that remuneration and expenses are paid from available funds in priority to unsecured creditors' claims. For these reasons, the law requires creditors to approve remuneration.

Practitioners may only be remunerated for work that is necessary and proper[28]. The practitioner is remunerated for work performed from the assets of the insolvent company or from assets recovered from third parties. In cases where there are no or insufficient funds, and creditors do not want to offer funding, the practitioner is often unpaid for the work performed.

The IPA Code gives detailed guidance on what remuneration can be claimed, the recording of remuneration information, how this information is to be reported to creditors, timing of that reporting, and when remuneration can be drawn. This guidance builds on the requirements set down in the Corporations Act in an effort to ensure that practitioners provide the best quality remuneration information to creditors. On that being done, it is then a matter for the creditors to decide whether the remuneration should be approved.

Even though creditors have approved the amount of remuneration claimed, the law allows a particular creditor or creditors to have that remuneration reviewed in the Courts.[29]

ASIC also has the power to seek a review of a practitioner's remuneration.

[28] IPA Code, 2008, Chapter 12

[29] Voluntary administration and deed of company arrangement: s449E; court liquidation: s473; creditors' voluntary liquidation: s504

Items for consideration

Speedier, more cost effective processes for review of liquidators' fees

The right of access to the courts, and the criteria by which courts are required to assess remuneration, were important aspects of the 2007 insolvency reforms which the IPA supported. However we acknowledge that there are practical impediments to remuneration challenges through the courts, in terms of legal costs and time, and that these impediments can be disproportionally high for individual or small business creditors and employees. They can also consume court resources and time.

It may be appropriate for the government to consider the establishment of an alternative non-judicial specialist forum to review practitioner fees through a more informal and cost effective process. In considering such an option, it would be important to ensure that:

- current avenues for creditors approval of remuneration would need to be followed first;
- any process would need to be transparent, cost effective and speedy so as not to inadvertently prolong an administration;
- there be set some threshold for review on the basis that too frequent challenges without good reason will just increase the total costs to the community of corporate insolvency activity.

The IPA notes that a review process in bankruptcy under the *Bankruptcy Legislation Amendment Bill 2009* is proposed in recognition of the same sort of issues in bankruptcy fee disputes that we have explained in relation to corporate insolvency. The IPA made submissions to the Senate Committee inquiring into that Bill in support of the proposed changes. Consideration may be given to similar processes in corporate insolvency as those proposed in bankruptcy.

APPENDIX A – About the IPA

The Insolvency Practitioners Association of Australia (IPA) is the country's peak membership body for the industry, which has its origins in the Bankruptcy Trustees and Liquidators Association of Australia dating from the 1930s and which was incorporated in its current form in 2001. The IPA is a company limited by guarantee.

The IPA's board is elected from State Committees and foundation organisations. It comprises 15 member representatives. The Chair of the Board is Mark Robinson. The Board's responsibilities are:

- the strategic direction of the IPA
- Stakeholder management
- Governance – including oversight of compliance, ethics and risk management
- Development and maintenance of professional practice standards
- Delegation of authority (when appropriate) to the CEO and Board Committees
- Monitoring of performance against the plan and objectives
- Oversight of financial performance and management
- Oversight of appointment and removal of the CEO
- Review and approval of projects
- Protect and foster the interests of members and the profession
- Review and approve policies
- Oversight of board committees

The National Secretary and CEO is Denise North.

Vision and purpose

The IPA's vision is building professional excellence, achieved by member commitment to the highest standards of professional and ethical conduct, through their adherence to education requirement and professional code of practice. The Association works co-operatively with regulators and consults with members to ensure Australia has one of the most effective and efficient insolvency systems in the world.

Its purpose is to:

- Establish and promote high standards of professional service and conduct
- Design and delivery quality education programs for all members
- Engage constructively with government and regulators for improvement in the legal and regulatory framework
- Represent our members with an informed voice
- Provide clear and accessible information to the public

It is guided by four values: integrity, transparency, accountability and technical proficiency.

Members

The IPA has over 1,700 members of which 977 are full members (accounting and legal qualifications together with completion of the IEP). There are over 500 members who are registered liquidators

and 185 who are bankruptcy trustees. Other members comprise of lenders, academics and students. The membership has grown over 30% since 2007.

The IPA is a voluntary membership organisation. The IPA is not a licensing authority. Registration of insolvency practitioners is controlled by the Australian Securities and Investments Commission (ASIC) and the Insolvency and Trustee Service Australia (ITSA). The IPA works with the regulators in a co-regulatory role.

As at 31 December 2009, 85% of registered liquidators and bankruptcy trustees are members of the IPA. The IPA has no jurisdiction over practitioners who are not members.

The IPA has no formal investigative powers. Investigations are carried out by the member's foundation body (ICA, CPA or Law Society), ASIC or ITSA. If investigations establish that a member has breached the law, or professional codes of conduct, the member will be required to show cause why the IPA should not terminate or suspend membership.

The standards and codes set by the IPA are used to determine the required level of professional competence and conduct. They are referred to by regulators, tribunals and the Courts. The codes set standards that are often higher than those prescribed by law or regulation.

The IPA has a high member satisfaction rating of over 70%.

Foundation bodies

The IPA has relationship agreements with 3 principal professional foundation bodies to which all full members belong. They are:

- Institute of Chartered Accountants in Australia (ICA)
- CPA Australia (CPA)
- The Law Societies in each State.

Education and member activities

The IPA runs over 80 events throughout the year ranging from conferences held at a national and state level to single events that can be technical, social or both. These provide members with the opportunity to attend technical sessions led by experienced speakers on current topics as well as opportunities to network with others in the profession. Attendance at technical events also provides members with CPD/CLE points that are required to maintain IPA membership as well as other professional memberships they may hold.

An important role is to educate our members on compliance with the guides and codes. We work with the regulators to ensure standards and education programs meet not just the letter of the law and regulation, but the spirit of the law and the legislative intent.

Our standards form the basis for assessing good professional practice and are thus referred to in disciplinary proceedings

In 2009, regular study groups and forums catered for over 2,600 filled places. These were conducted in each State and were led by experienced IPA members. The education programs had over 600 people enrol of which 430 enrolled in the university level Insolvency Education Program (IEP).

The education program has 3 core streams: Insolvency Education Program (IEP), Introduction to Insolvency Program (IIP) and a range of practice focused training programs.

Insolvency Education Program (IEP)

The IEP is a unique specialist program that provides a professional qualification for insolvency specialists and is a prerequisite for full membership of the IPA. It is a combination of two units of post-graduate university level study, attendance and performance at workshops conducted by senior practitioners, and written assessment on an ethics topic. The IEP takes a minimum of one year to complete and covers each of the different types of insolvency administration, in both personal and corporate, and includes topics of establishing insolvency, workouts, and ethics.

Introduction to Insolvency Program (IIP)

The IIP is a two day face-to-face interactive course that provides new entrants to the profession with knowledge of insolvency and restructuring and provides a stepping stone to further learning. The course includes an overview of both personal and corporate insolvency with a strong focus on some of the practical and challenging issues that participants will encounter on the job.

Practice Focused Training Programs

The IPA developed the section 439A Report Training course in response to the findings of ASIC's review of section 439A reports released in 2008. This course assists practitioners with improving the standard of their section 439A reports by covering the theory of the reports, such as the legal and professional standards, tools for gathering information and presenting information to creditors; as well as allowing for practical analysis of sample reports.

Leading and influencing debate

Each year the IPA makes numerous written submissions and representations to government, regulators, and policy makers. In 2009, the IPA produced 16 submissions to government about reform and regime improvement, including in relation to directors' liabilities, anti-money laundering, and personal property securities. The IPA also worked closely with the courts on insolvency issues and maintained connections with professional groups on corporate governance, tax and finance. The IPA is a regular contributor to the media on current regulatory issues facing the profession.

Code of Professional Practice

The IPA Code was issued in 2008 and was developed by the IPA and its members with input from both ASIC and ITSA and other insolvency stakeholders.

The IPA Code sets high standards of conduct for insolvency practitioners; gives guidance on how those standards are to be achieved; and provides a reference for creditors and other stakeholders that allows them to gauge the conduct of practitioners.

The IPA Code reinforces the legal and regulatory requirements and in some cases goes beyond them in the standards of conduct it requires of IPA members. The goal of the IPA is a system of co-regulation, in conjunction with the regulators and other professional bodies, that protects the integrity of the insolvency regime and promotes community confidence in it.

The more important principles of the IPA Code require members to exhibit the highest levels of integrity, objectivity, and impartiality; be independent in accepting or retaining an administration; attend to their duties in a timely manner; provide clear disclosure of their claims for remuneration; and communicate and deal with creditors openly and clearly.

The IPA recognises the importance of the Code remaining up to date and has recently undertaken a comprehensive review of the original document. Among other items, the revision will take into account ASIC's findings from its recent review of declarations of relevant relationships. The Second Edition of the Code will be released after ASIC's findings from this review are published.

Accountability and regulation

IPA members are subject to oversight and regulation from the following regulators:

- Australian Securities and Investments Commission (ASIC) – corporate regulation
- Companies Auditors and Liquidators Disciplinary Board (CALDB) – an independent tribunal
- Insolvency and Trustee Service Australia (ITSA) - bankruptcy regulation.

The IPA has no power to suspend or remove registration as an insolvency practitioner. This is the prerogative of the regulators, tribunals and Courts. The IPA's primary sanction is to remove people from IPA membership who do not adhere to our standards.

Dealing with complaints in the profession

Maintaining professional standards is a core objective of the IPA. This entails dealing with complaints in a proper and timely manner. The IPA only has authority to investigate complaints of IPA members. The IPA will bring a complaint to the attention of the relevant regulator if necessary. Complaints fall into 3 categories:

- misunderstanding of the processes being undertaken, often caused by a failure of effective communication by the appointee;
- matters that can be readily resolved by discussion;
- serious matters requiring further action.

Most complaints fall into the first category. On average the IPA receives under 40 formal complaints per year. Matters rarely fall into category three.

APPENDIX B – About the industry

About the industry

Insolvency is an inability of a company to pay its debts when they fall due. The role of the insolvency practitioner is to administer an insolvency outcome within the legislative and regulatory framework and to ensure a fair, efficient and timely redistribution of assets. The practitioner needs to take a measured approach – taking into account the long-term and short-term interests of creditors, debtors and employees.

The industry also works with directors to avoid corporate insolvency. Practitioners are often engaged in an advisory role to directors and major creditors to provide turnaround solutions.

Size and shape of the industry

The insolvency industry in Australia comprises over 600 people operating in private practice either as sole practitioners, within small accounting firms, large specialist insolvency practices or multi-disciplinary accounting firms. Practitioners and their practices or firms are located throughout Australia – in all major capital cities, and satellite/service cities and towns. There is a disproportionate number of large practices – specialist and multi-disciplinary – located in the major capital cities. It is a small and niche industry.

Practitioners are supported by a network of staff which account for further jobs in the industry. Firms and practices deal with a variety of personal and corporate insolvencies, including liquidations, voluntary administrations and receiverships, and bankruptcy and personal insolvency agreements.

Qualifications and experience of practitioners

The industry is well educated with practitioners having an undergraduate university degree and many having post-graduate degrees. The most common under-graduate degrees are in accounting, commerce and/or law.

The IPA offers an Insolvency Education Program (IEP) of which completion is one of the factors to be eligible to be admitted as a full member of the IPA. The IEP is a specialist advanced insolvency course based around two units of post-graduate university study, along with a serious of workshops conducted by senior practitioners and a written assignment on an ethics topic.

Although not mandatory for registration as a liquidator, or working in the insolvency industry, the IEP has proven to be the cornerstone of study of insolvency in Australia and over 400 students per year currently enrol. Completion of the course is highly regarded within the industry.

For a person to become a registered liquidator, ASIC requires 5 years' experience in the last 10 in corporate insolvency under the supervision of a registered liquidator in a broad range of external administrations, and experience in complex matters.

Functions and types of administrations

An **insolvency practitioner** is a **registered liquidator** who is authorised under the Corporations Act to take control of an insolvent company. When registered, the practitioner can fulfil the roles of: administrator, voluntary administrator, deed administrator, liquidator, receiver, receiver and manager. A higher level of registration as an **official liquidator** is required to accept appointments to

court liquidations, provisional liquidations and cross boarder insolvency matters. A practitioner cannot be an official liquidator without first obtaining registration as a registered liquidator.

- A **voluntary administrator** is a person appointed to a voluntary administration.
- A **deed administrator** is a person appointed to a deed of company arrangement.
- A **liquidator** is a person appointed to a creditors' voluntary liquidation, members' voluntary liquidation or court liquidation.
- A **court liquidator** is a person appointed to a court liquidation. A court liquidator may also be referred to as a liquidator.
- A **provisional liquidator** is a person appointed to a provisional liquidation.
- A **receiver** is a person appointed to a receivership.
- A **receiver and manager** is a person appointed to a receivership.
- A **scheme manager** is a person appointed to a scheme of arrangement.

There are a number of options for company in financial difficulty and for each the person must be registered or official liquidator:

- **Voluntary Liquidation** is a process formally initiated by the debtor company to wind-up its affairs and cease business, so that assets may be controlled and realised and the proceeds distributed in accordance with the Corporations Act. The company is placed into Voluntary Liquidation by a resolution of its members. There are Members' Voluntary Liquidations and Creditors' Voluntary Liquidations.

  For a company to enter into a **Members' Voluntary Liquidation**, the company must actually be solvent.

  If the company is insolvent, it will be placed into **Creditors' Voluntary Liquidation** upon the passing of the resolution by members. A company can also be placed into Creditors' Voluntary Liquidation by creditors so resolving at a meeting of creditors held during a Voluntary Administration or Deed of Company Arrangement.

- A **liquidation** is a term used generally for either a creditors' voluntary liquidation, members' voluntary liquidation or court liquidation.

- A court liquidation occurs when and if the Court exercises it discretion to order the winding up of the company, following consideration of an application filed with it. The applicant is usually a creditor, although others including the company can apply. A Court Liquidation provides for the winding up of a company's affairs under the control of an independent official liquidator and the orderly distribution of available monies amongst creditors. The liquidator will also carry out investigations of the company's demise.

- A ***provisional liquidation*** can occur any time after the application for the winding up of a company is lodged. The purpose of appointing a provisional liquidator is to preserve the assets of the company until the Court hears the winding up application and decides whether to appoint a liquidator or not. The appointment of a provisional liquidator may be requested if it is felt that the assets of the company are in jeopardy or for commercial reasons (such as directors' potential exposure to insolvent trading).

- Many companies avoid liquidation by being placed into **voluntary administration**. *Voluntary administration* is a formal moratorium type administration. A proposal for the company's future will be put to creditors, who may decide to accept a Deed of Company Arrangement or to liquidate the company. In the meantime, a unique stay on creditor

action extends, with limited exceptions, to even secured creditors, landlords and other owners of property used by the company.

- A ***deed of company arrangement*** is a procedure permitting a company to make a compromise or arrangement binding on all its creditors. It follows on from a voluntary administration. It will usually compromise creditor' rights, but with the aim of producing a situation ultimately beneficial to creditors when compared with liquidation. The *Corporations Act* provides the procedures for effecting such a compromise, and enables the arrangement to be made binding on all creditors if assented to by a simple majority at a meeting of creditors. If the company's undertakings under the Deed are not carried out, the Deed will fail and the company will usually be wound up by means of a creditors' voluntary winding up.

- A controller of property of a corporation is a ***receiver*** or ***receiver and manager*** or anyone else in possession or control of corporate property for the purpose of enforcing a charge. The appointment is usually made by a secured creditor, or in some cases by the Court. The controller has the power to realise company assets for the benefit of the appointor. While ordinary creditors are not prevented from pursuing normal remedies (e.g., forcing the company into liquidation), unless the controller has been improperly appointed, the assets which he or she is entitled to realise will not be generally available to ordinary creditors until the appointor is repaid.

- A ***scheme of arrangement*** has similar objectives to a Deed of Company Arrangement, but it is more complex and may be used by both solvent and insolvent companies. It is rarely used by insolvent companies now, having been largely replaced by Deeds of Company Arrangement.

Corporate administrations are not necessarily exclusive, e.g., a receivership and a liquidation may co-exist; or a receivership and a voluntary administration.

The direct and indirect contribution of the industry

There is a current lack of community and government awareness of the role and contribution the industry has to the economy. Small pockets of unfair criticism have not assisted, nor has the industry's record of under-promoting its value and worth.

The industry contributes in a number of ways to the economy:

- Employment
- GDP
- Purchase of goods and services from suppliers
- Transactions

The community underestimates the role the industry and its practitioners has as 'business enablers', 'employer', and 'job saver'.

Practitioners play a role in creating business stability, and then building and returning a business to profitability through measured decisions and deal making all the while safe-guarding creditors and employees.

In 2007, the World Bank reported on the insolvency regimes of 175 countries. Australia's insolvency regime is:

- ranked 12th out of the 175 countries for the amount recovered for creditors when a business is closed;
- successful in recovering an average of 80% of assets when a business closes; and
- ranked 9th quickest (equal with 7 other countries) with the average time taken being one year

In a 2009 survey of IPA members:

- 32% of respondents achieved 10 cents or more in the dollar for creditors on voluntary administrations
- 18% of respondents achieved greater than 30 cents in the dollar for creditors on voluntary administrations
- 20% of respondents achieved greater than 10 cents in the dollar for creditors on liquidations

Trends in insolvency

The economic cycle is the main driver for insolvencies and the number of insolvencies. A change in the number of insolvencies tends to follow a turn in the economy after a year's lag. The lag is because it takes time for businesses to use up existing resources and for financial difficulty to occur.

The recession of the early 1990s caused an increase in insolvencies. As the economy recovered in 1994-95, the number of insolvencies stabilised. After 1996, there was a period of economic stability and growth which saw the instance of insolvency far less than in the early 90s. In 2008, which saw the start of the GFC, it took a further 9 months before businesses felt the full brunt of the decline in the economy and there was a subsequent growth in the number of insolvencies.

State	**(All)**
Data	**External Admin**

	Year										
Month	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
January	217	238	341	309	305	275	308	375	347	372	**517**
February	457	367	543	573	590	576	574	723	651	706	**796**
March	482	420	620	589	636	683	588	750	729	668	**1095**
April	338	315	499	480	629	585	555	561	498	680	**810**
May	377	423	605	524	623	585	624	704	723	780	**829**
June	429	428	628	538	613	580	641	718	633	761	**812**
July	345	403	581	523	620	576	604	614	747	843	**876**
August	343	386	574	546	536	563	675	744	732	**765**	733
September	469	337	217	545	562	582	729	634	557	**867**	744
October	229	632	669	610	561	520	681	623	633	**847**	772
November	341	573	551	565	500	572	705	653	673	**1011**	747
December	287	400	404	406	486	521	593	638	598	**813**	706
Full Year	**4314**	**4922**	**6232**	**6208**	**6661**	**6618**	**7277**	**7737**	**7521**	**9113**	**9437**

Source: ASIC Insolvency Statistics

APPENDIX C – summary of industry reforms

MAJOR REFORM RECOMMENDATIONS IN CORPORATE INSOLVENCY SINCE 1988

1988 - Australian Law Reform Commission (ALRC report No 45) – "the Harmer Report" which led to the implementation of the *Corporate Law Reform Act 1992*.

1997 - *Review of the Regulation of Corporate Insolvency Practitioner*s;

1998 - research paper commissioned by the then Australian Securities Commission, *A Study of Voluntary Administrations in NSW;*

1998 - *Report of the Legal Committee of the Companies and Securities Advisory Committee (CASAC) on Corporate Voluntary Administration;*

2000 - *Report of CASAC on Corporate Groups* (approximately half of the recommendations in this report relate to insolvency law);

1993 - Report of the ALRC on *Personal Property Securities* (ALRC Report No 64). Arising from this report, the *Personal Property Security Act* 2009 will commence operation in 2011;

2002 - Report of the ALRC on *Federal Civil & Administrative Penalties in Australia* (ALRC Report No 95) which also considered aspects of insolvency law and policy;

2003 - *Royal Commission into the Building and Construction Industry Report* (on the problem of fraudulent phoenix company activity);

2004 - the Corporations and Markets Advisory Committee (CAMAC) *Report on rehabilitating large and complex enterprises in financial difficulties*;

2004 - Parliamentary Joint Committee report – *Corporate Insolvency Laws: a Stocktake*;

May 2008 - CAMAC, *Long-tail liabilities: The treatment of unascertained future personal injury claims*;

November 2008 - CAMAC, *Issues in external administration*. The government announced its decision on this report in January 2010.

December 2008 - CAMAC, *Shareholder claims against insolvent companies: Implications of the Sons of Gwalia decision*. The government announced its decision on this report in January 2010.

APPENDIX D – Recent Practitioner Disciplinary Actions

Practitioner	Process	Outcome	IPA action and outcome
Dean-Willcocks	CALDB	Suspension for 12 months, 2006	Suspension as an IPA member for 12 months
Edge	Court	Suspension for 10 years, 2007	No action – Mr Edge was not an IPA member
Ariff	Court	Termination of registration, 2009	Referral by IPA to ASIC in 2007. Initial suspension by IPA in 2008 and then termination of IPA associate membership in 2009.
McDonald	CALDB	Suspension for 24 months, 2009	Suspension as an IPA member for 24 months
Albarran	CALDB	Suspension 9 months, 2008	Suspension as an IPA member for 9 months
McVeigh	CALDB	Suspension 18 months, February 2010	Suspension as an IPA member for 18 months

APPENDIX E – Comparable Professional Rates

Professional service comparison rate card

	Tier 1 insolvency firm	Tier 1 law firm	"Big 4" accounting firm	Mid tier law firm – insolvency rates	Mid tier accounting firm – insolvency rates	Small insolvency firm
Partner/director	450 - 630	700 - 900	650 - 900	480 - 600	420 - 495	330 - 475
Manager/ Senior Associate	375 - 425	530 -700	550 - 690	375	275 - 320	205 - 307
Lawyers 3-4 yrs/Senior analyst	250 - 300	350 - 450	300 - 450	275 - 300	200 - 255	100 - 170
Graduate	175	300	250	220	100 - 180	95 - 116
Administration	150	200	200	160	80	100 - 120

Merchant Banks

- Rarely hourly rates
- Usual practice is a monthly retainer
- The M&A teams – success fee or fixed transaction fee tied to an agreed amount. General rule of thumb 1% of sale price. Given the risks, most firms also seek a retainer.
- Restructuring teams– base fee plus an incentive. Incentives will vary based upon the work (ie equity raising, etc). Possible fee for a restructuring is between $5 million and $10 million.
- Equity raising fees – 2-3% of amount to be raised.