Association of Independent Insolvency Practitioners

By the practitioner, For the practitioner

30 November 2022

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Email: corporations.joint@aph.gov.au

Dear Sir/Madam

Parliamentary Joint Committee on Corporations and Financial Services – Corporate Insolvency in Australia

The Association of Independent Insolvency Practitioners (AIIP) are delighted that the inquiry is occurring, and that we are able to provide contribution to the Inquiry through a written submission on behalf of our members.

The AIIP

The AIIP is an organisation that was established by insolvency practitioners (liquidators as well as trustees in bankruptcy) to assist fellow practitioners meet the challenges prevailing in the profession. The AIIP was formed in 2016 and it now has in excess of 190 full professional members. Our members primarily practise in the small to medium enterprise (SME) market and many members are also members of ARITA.

Acknowledgement for the review

Our membership is welcoming of any attempts to streamline corporate insolvency in Australia.

The inquiry and terms of reference are limited to corporate insolvency. The terms of reference are unfortunately silent about personal insolvency, and also, insolvency of trusts (other than trusts with corporate trustees).

The preparation and review of submissions will refresh conversation to achieve simpler and efficient outcomes in the small business sector for businesses experiencing financial distress, in particular consideration of the expectations of stakeholders including directors, employees, secured and unsecured creditors, ATO, ASIC, AFSA, ASBFEO, shareholders, registered liquidators and trustees in bankruptcy.

The review of corporate insolvency in Australia has been long awaited by AIIP's membership. This inquiry follows more than 10-years of consultation, reviews and papers into insolvency, aspects of insolvency in Australia, law reform including resultant legislation – some reforms fit-for-purpose; some reforms complex and expensive to implement and unsuccessful; and no Government response on consultations in 2021 including 'Clarifying the Treatment of Trusts Under Insolvency Law' which was substantially addressed in the Harmer Report more than 30-years ago. The Harmer Report into insolvency was comprehensive rather than piecemeal. A piecemeal approach to reform is sub-optimal.

Our submission will focus on a few of the terms of reference for the inquiry rather than address the terms in full, and in particular the areas where we have particular concerns.

A. Recent and emerging trends in the use of corporate insolvency in Australia and related practices in Australia.

1. The stringent quarantine policies of the Australian Federal and State governments in response to the COVID-19 pandemic continued in the second half of 2021 as the economic stimulus provided by the former Federal Government throughout 2020 was wound back. Despite this, there was not a significant increase in the number of insolvency appointments in Australia.

2. For the SME sector, the JobKeeper and Cash Flow Boost Payment schemes supported Australian businesses significantly. Those were combined with:
   - The curtailment of ATO debt recovery action which has resulted in unprecedented amounts owing to the ATO from the SME sector;
   - COVID-19 temporary relief measures announced on 22 March 2020 by the then Prime Minister and Treasurer which provided protection to directors against insolvent trading claims; and
   - Those temporary relief measures also substantially extended the timeframes to be able to petition for the winding-up of companies.
   - The last two measures were in force until 31 December 2020.
3. SMEs needed to bring their books and records, including tax compliance reporting, up to date to qualify for JobKeeper benefits. Anecdotally, however, our members' experience is that recalcitrant SMEs have again fallen behind in tax compliance reporting, and phoenix activity continues unabated in some industries including particularly building and construction.
4. The introduction of the small business restructuring (SBR) regime by the former Federal Government in January 2021 was intended to be a simple and effective regime for SMEs in financial distress. Instead, it is complex and expensive to implement, and the demand for small business restructuring has been modest by every measure, including the number of SBRs which number less than 200 nationally since implementation of the regime.
5. Both of the above measures were introduced by the former Federal Government with some haste due to the evolving nature of the pandemic. This meant there was limited industry consultation, which has likely resulted in the uptake being limited.
6. The introduction of simplified liquidations regime has not been successful as measured by simplicity and cost to implement.
7. The ATO has not articulated their strategy and financial and non-financial targets to reduce amounts owing, other than to promote SMEs to engage with the ATO with a repayment arrangement or in the alternative, to experience punitive action personally against directors which pierces the corporate veil. The ATO has underperformed in their

ability to manage their receivables book as measured either by sector, or across the economy.

8. Use of single touch payroll (STP) as it was initially designed, would result in payment of superannuation and PAYG at the same time as payment of wages to employees. More considered use of STP data and systems would make financially viable businesses stronger. Businesses that are non-viable or accumulating debt to the ATO (which will never be paid) would not survive. There would be a reduction in phoenix activity. The ATO could better manage itself and would not need to rely on the regime of personal liability.

9. The ATO has new powers for SMEs with liabilities over $100,000 owing to the ATO, which allows them to report on these debts to credit reporting agencies. A more blanket approach to reporting the debt would result in greater clarity for other participants of the credit system, as more data would be available about the debts a company might owe. This would allow other SMEs to choose not to do business with a company that has an outstanding debt to the ATO.

10. Registered liquidators and taxpayers are only able to liaise with a call centre staffed by persons who do not have ostensible authority to make decisions for the ATO. ATO communications threatening action personally against directors are complex to read and assume knowledge of tax legislation and do not recommend that taxpayers consult a registered liquidator.

11. Anecdotally, some of our members indicate that they need to escalate matters to the ATO Complaints to obtain a response on insolvency-related matters. However, that procedure is only typically available at the end of 28 days, and then it takes about 3 business days for the ATO to respond. These timeframes are inconsistent with the timeframes imposed to achieve statutory deadlines in SBRs and simplified liquidations. Submission to the ATO is via a portal provided by the ATO to registered liquidators. However, the registered liquidator needs to wait until contacted by the ATO, and in the event that the registered liquidator misses the call, there is no call-back facility other than a 1300-number to the ATO call centre. Furthermore, the ATO are taking more than 6 months and in some cases have taken 9 months to issue a simple taxation clearances. Even more time is spent on reconciling records pertaining to the employees'

superannuation claims. The delays encountered with the ATO are extremely frustrating for insolvency practitioners and their staff, and time spent chasing the ATO is quite often not recoverable and can result in significant delays in the timely administration of matters. These delays are making the practitioners look incompetent when it is the ATO causing delays. Urgent change is required for a more streamlined insolvency regime.

12. The insolvency and restructuring market will continue to develop and be shaped by the post-pandemic Australian and global economy. The sustained consequences of the pandemic, rapid inflation, and disruptions caused by the conflict in Ukraine, and the recent collapses in the building sector (Probuild and others), the technology sector, and also, the recent collapse of the crypto exchange FTX will have a material impact in Australia.

B. The operation of the existing legislation, common law, and regulatory arrangements

Small business restructuring (SBR) reforms (2021)

13. The SBR concept was conceived by the former Federal Government in September 2020. There was a very short period of industry consultation, and the legislation was enacted in January 2021. The legislation is principally contained in Corporations Act 2001 Part 5.3B (immediately following the voluntary administration regime in Corporations Act 2001 Part 5.3A). The process is currently neither simple for SMEs and their creditors to understand nor cheap to implement. Anecdotally, we find that many SMEs simply do not meet the strict criteria required for these processes, such as the cap on liabilities of $1 million and the need for all tax lodgements being up to date.

14. SBR legislation requires law reform to make it simple and more cost effective to implement and also more affordable than other forms of external administration. Alternatively, there needs to be law reform of the voluntary administration regime contained in Corporations Act 2001 Part 5.3A to make voluntary administrations more attractive for SMEs as measured by speed to implement, simplicity and cost effectiveness.

15. It is acknowledged that there has been a slow uptake of the SBR regime. Total numbers are less than 200 matters nationally since January 2021. Relative to the number of small

businesses in Australia, 200 matters are an extremely modest number. Guidelines are not available to registered liquidators to formally understand the expectations of the ATO. Information by registered liquidators on the ATO's attitude to SBRs is gathered incrementally via attendance at in-person and online seminars where the ATO speaks, including our own third national conference in Canberra in June 2022. It is not an efficient way to become aware of the expectations of ATO.

Simplified liquidation (2021)

16. The simplified liquidation process allows the liquidator to avoid the reporting requirements in connection with voidable transactions. The simplified liquidation reforms are neither simple nor efficient to enter and law reform is required if more market take up is wanted. Simplified liquidation does not reduce the cost of a standard liquidation and the processes are more complicated than a creditors' voluntary liquidation so many registered liquidators have not embraced the regime.

The Unlawful Phoenixing reforms (2019)

17. The former Federal Government announced a series of reforms to combat illegal phoenix activity, that is, transactions taking place at a time when a company is nearing insolvency that are intended to defeat creditors. As part of the wider reforms, the Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth) amended the Corporations Act 2001 to introduce new criminal offences and civil penalty provisions for officers and advisers who fail to prevent the company from making creditor-defeating dispositions, whereby the consideration is less than the lesser of market value and the best price reasonably obtainable, and the disposition has the effect of delaying the process for the property becoming available to creditors in liquidation, if at all. The reforms also enable ASIC to make orders on its own initiative or upon request by liquidators to recover company property lost through illegal phoenix activity, or require a person to pay the company the amount that in ASIC's opinion fairly represents the benefits that that person has received because of the disposition.
18. The first decision of a court enforcing the new anti-phoenixing regime was handed down by the Supreme Court of Victoria in Re Intellicomms Pty Ltd (in liq) [2022] VSC 228

where it was held that the sale of a business to a related party immediately prior to the company going into liquidation was a creditor-defeating disposition under Corporations Act 2001 section 588FDB. The Court noted that the transaction had 'all the hallmarks of a classic phoenix transaction' as it involved the transfer of the assets of an insolvent enterprise to an entity controlled by persons closely associated with the sole director. This matter was progressed to litigation and resulted in a recovery due to funding being made available to the liquidator by creditors in the liquidation. The cost of investigation and litigation in insolvency is often unfunded and requires the liquidator to dedicate time and costs personally to pursue a recovery. The costs of applying for funding from the ASIC Assetless Administration Fund is time-consuming to meet pre-requisites. The system should default to an automatic allowance for a capped amount of funding to cover preliminary investigations and evidence gathering exercises when a transaction is identified that meets the criteria of section 588FDB.

19. Data is not available to know whether ASIC have used their powers since introduction of the legislation.

The operation of the Personal Property Securities Act 2009 (Cth) in the context of corporate insolvency

20. The Personal Property Securities Act 2009 (Cth) is the main piece of legislation that underpins the operation of the Personal Properties Securities Register (PPSR). PPSR is an online federal government electronic noticeboard of security interests in personal property. The PPSR is well understood by registered liquidators, but not often understood by SMEs. SMEs often have not perfected their securities, and their retention of title clauses are ineffective, or other securities are ineffective.

21. A lack of understanding of the Personal Property Securities Act 2009 (Cth) by SMEs has led to additional costs in liquidations where liquidators are often on a stand-still in anticipation of a claim to assets by creditors with a PPSR registration who may not understand the time-pressure or process of a liquidation.

22. There have been periods of consultations and review most recently in 2014, 2015 and 2020 with relevant amendments to legislation. Law reform to force responsibility of a time-period within which a creditor may make a claim to assets under the Personal

Property Securities Act 2009 (Cth) should be considered to enable a more efficient and cost-effective process of dealing with assets in a liquidation.

C. Other potential areas of reform

Unfair preference claims

23. Clawback transactions will be vulnerable to challenge only when a company enters into liquidation. Whilst a voluntary administrator may identify potentially voidable transactions, only a liquidator has the power, pursuant to the Corporations Act, to bring an application to the court to declare certain transactions void.
24. Upon the finding of a voidable transaction, a court may make a number of orders, including directions that the offending person pay an amount equal to some or all of the impugned transaction, directions that a person transfer the property back to the company or directions that an individual pay an amount equal to the benefit received.
25. In March 2022, the former Federal Government announced that it was acting to simplify the law regarding unfair preference payments. Under the proposed reforms, liquidators will no longer be able to claw back transactions that are either less than A$30,000 or made more than three months prior to the company entering external administration, provided that the transactions are in the ordinary course of business and involve unrelated creditors.
26. We are of the opinion that the proposed changes will result in lower recoveries by liquidators, as the suggested cap of $30,000 is too high. The amount of $30,000 is a significant amount of money that can be recovered cost effectively for the benefit of creditors.
27. More importantly, the liquidation process is about fairness and equality, and those were the intentions of legislators many decades ago when these recoveries were first enabled through legislation.

Trusts with corporate trustees

28. The former Federal Government committed in the 2021 – 2022 federal budget to undertake a consultation on the options to improve the operation of schemes of arrangement to support businesses, as well as clarifying the treatment of trusts under

insolvency law. Consultation with insolvency experts and industry representative groups took place between 15 October 2021 and 10 December 2021 on the treatment of trusts.

29. At the time of writing, there have been no announcements from the government regarding the outcome of the consultations.

30. In a publication by the Treasury "Clarifying the treatment of trusts under insolvency law" dated 15 October 2021, the Treasury wrote the following;

    "The Government is committed to facilitating the successful restructure of companies, including those impacted by COVID-19, so that they can survive and go on trading".

31. In September 2020, the former Federal Government announced changes to Australia's insolvency framework (small business restructuring and simplified liquidations) to better serve Australian small businesses, their creditors and their employees.

32. These reforms, which came into effect on 1 January 2021, introduced new insolvency processes suitable for small businesses, reducing complexity, time and costs. Complimentary measures were also enacted to ensure the insolvency sector can respond effectively to any increased demand and to the needs of small businesses.

33. No changes were made to legislation in regard to trust structures, even though the treatment of trusts under corporate insolvency law has been identified as one area for improvement. Australia's current corporate insolvency regime does not expressly cover how companies which structure themselves through a trust, or businesses which have a corporate trustee (corporate trusts) are to be dealt with during insolvency. This differs from companies who do not employ a trust structure, which benefit from a clear statutory regime established under chapter 5 of the Corporations Act 2001.

34. Reforms to clarify the treatment of trusts under Australia's insolvency regime will help to reduce the costs and complexities associated with dealing with an insolvent business where a corporate trust is involved. Reform may also support more businesses to access the new small business insolvency processes.

35. The Harmer Report released more than 30-years ago made recommendations on trusts and insolvency and the recommendations were never implemented.

36. In the absence of law reform, liquidators of a corporate trustee need to make application to the Court to be appointed receiver of the trust and trust assets, if any. The application

to the court typically costs approximately $10,000 - $15,000 in legal fees and filing fees, plus the time-costs of the liquidator. At the time of the application, the liquidator is not assured that he or she will recover either the legal fees, filing fees, and also, the liquidator's time-costs (remuneration) associated with the application to the Court. If asset realisations are available, those funds will be applied to the legal fees, filing fees and liquidator's remuneration in priority to creditors' claims. If there were suitable law reform, the application to the Court would not be required, and there would be savings of costs and expense potentially available to creditors.

Insolvent trading safe harbour

37. In the 2021 – 2022 federal budget, the former Federal Government committed to commence an independent review of the insolvent trading safe harbour. The review panel engaged in consultation with industry participants in September and October 2021 with the aim of determining whether the safe harbour is "fit for purpose in enabling company turnaround and promoting a culture of entrepreneurship and innovation". The final report of the independent review committee was ultimately circulated on 24 March 2022. The review panel made 14 recommendations in the report including several changes to the drafting of the safe harbour provisions in Corporations Act 2001 to increase its accessibility. Perhaps most notably, the review panel departed from its focus on the safe harbour to recommend that the former Federal Government initiate a holistic in-depth review of Australia's insolvency laws. The government agreed to implement nine of the recommendations.

38. One of the risks that has traditionally cast a shadow over restructuring efforts has been the threat of insolvent trading liability for company directors and those who act as shadow directors. This risk is particularly concerning because the ability to determine a company's solvency at a specific point in time can be difficult, and the uncertainty can cause directors to be overly cautious and may even lead some of them to resign or place a company into formal insolvency earlier than necessary. This means that some companies that enter formal insolvency possibly could have been saved, and this brings an economic cost of lost enterprise value as well as the costs of the insolvency

proceeding itself. Concerns have also been raised that the threat of insolvent trading may discourage people from taking up positions as company directors.

39. The government has sought to address these issues by the introduction of the safe harbour.

40. The aim of the safe harbour reform is to facilitate more successful company restructures outside of a formal insolvency process where doing so would achieve a better outcome for the company rather than immediately appointing an administrator or liquidator. This encourages directors to closely monitor the financial position of the business, engage early with financial distress and then actively take steps to either restructure the business or if that is not possible, to move quickly to formal insolvency.

41. The protection of the safe harbour under section 588GA is only for insolvent trading liability. It does not apply to other duties that company directors may have including the duty to act in the best interests of the company which includes a duty to consider creditor interests when a company is insolvent or the duty of care.

42. The review carried out extensive consultation with stakeholders in insolvency and restructuring and found there was support for the safe harbour.

43. The majority of the suggested changes in the report relates to clarifying and simplifying the language of the safe harbour provisions. The report suggested further guidance be provided by ASIC to help inform directors and their advisers, noting that submissions and consultations demonstrated a lack of awareness or misunderstanding about both insolvent trading and the safe harbour amongst SMEs and their advisers.

D. The role, remuneration, financial viability, and conduct of corporate insolvency practitioners (including receivers, liquidators, administrators, and small business restructuring practitioners).

44. There has been no financial relief for registered liquidators and their businesses during the pandemic other than JobKeeper and Cash Flow Boost. As a direct result of government and ATO policy there was an approximate 50% drop in the number of new corporate insolvency appointments for a lengthy period of time. Insolvency practices retrenched staff and reduced overheads. There was no relief for the considerable costs of conducting searches of the ASIC or AFSA databases, or registration renewal charges

as a registered liquidator, or the charges attributable to registered liquidators personally arising from ASIC Supervisory Cost Recovery Levy (Collection) Act 2017 (Cth).

45. Registered liquidators perform significant work in the interests of the Commonwealth and States in the absence of an Official Receiver, which occurs in bankruptcy. Despite the existence of Corporations Act 2001 section 545 which provides (with conditions) that a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property, ASIC require that registered liquidators perform substantial work, often unfunded, or otherwise, jeopardise the registration of the registered liquidator. An ASIC Assetless Administration Fund to fund liquidations that are assetless, for example a fee of $12,500 (as is currently permitted for the liquidation of abandoned companies), would encourage directors to appoint liquidators earlier, and enable liquidators to be partially paid for the work they conduct. Furthermore, as an alternative to Assetless Administration Fund, a better model is applied in bankruptcy where collection of funds as a percentage of realisations as occurs, rather than the ASIC Supervisory Cost Recovery Levy (which is prejudice towards small practices performing a higher volume of albeit smaller, insolvency matters, relative to larger practices). This has been the subject of a recent call for submissions.

E. The role of government agencies in the corporate insolvency system

The role and effectiveness of ASIC as the corporate insolvency regulator.

46. The processes to obtain funding for liquidators from the Assetless Administration Fund are slow and expensive to achieve. Data collection available from ASIC is improving; however available data generally is poor to support evidence-based research into insolvency-related matters for the present and also, for the future.

47. In insolvency matters where registered liquidators identify misfeasance, in the vast majority of cases no action is commenced by ASIC, or alternatively, the “easiest” matters are pursued.

48. We note that the Senate has commissioned a new inquiry into ASIC, in particular its role and performance in law enforcement, and the AIIP will likely make a written submission at the appropriate time.

The ATO's role and enforcement approaches to corporate insolvency, and relevant changes to its approach over the course of the COVID-19 pandemic.

49. The ATO has not articulated their strategy and financial and non-financial targets to reduce amounts owing, other than, to promote SMEs to engage with the ATO with a repayment arrangement or in the alternative, to experience punitive action personally against directors which pierces the corporate veil. The ATO has underperformed in their ability to manage their receivables book as measured either by sector, or across the economy.
50. Use of single-touch-payroll (STP) as it was initially designed would result in payment of superannuation and PAYG at the same time as payment of wages to employees. Use of STP would make financially viable business stronger and should alert the ATO to companies that are unable to meet their debts sooner. Better management of the data obtained from the STP system could result in identification of insolvent companies, and may save directors from the need to rely on the regime of personal liability.
51. We also refer again to our comments in paragraphs 8 to 10 above regarding the ATO.
52. The ATO has new powers for SMEs with liabilities over $100,000 to the ATO. However registered liquidators, and taxpayers, are only able to liaise with a call centre staffed by persons that do not have ostensible authority to make decisions for the ATO. ATO communications threatening action personally against directors are complex to read and assume knowledge of tax legislation and do not recommend that taxpayers consult a registered liquidator.
53. Anecdotally, some of our members indicate that they need to escalate matters to the ATO Complaints to obtain a response on insolvency-related matters. However, that procedure is only typically available at the end of 28-days, and then, it takes about 3-business days for the ATO to respond. These timeframes are inconsistent with the timeframes imposed to achieve statutory deadlines in small business restructure and voluntary administration. Submission to the ATO is via a portal provided by the ATO to registered liquidators. However, the registered liquidator needs to wait until contacted by the ATO, and in the event that the registered liquidator misses the call, there is no

call-back facility other than a 1300-number to the ATO call centre. Frustrating. Time spent queuing and or waiting on the ATO is often unfunded with significant delay.

The role, funding and operation of relevant bodies, including the Assetless Administration Fund and the Small Business Ombudsman.

54. Comments in connection with the ASIC Assetless Administration Fund are included above under the heading “The role, remuneration, financial viability, and conduct of corporate insolvency practitioners (including receivers, liquidators, administrators, and small business restructuring practitioners).”
55. The Small Business Ombudsman, Hon Bruce Billson, has to his credit, and the credit of ASBFEO, been proactive in seeking out some of our leadership in AIIP to discuss the Terms of Reference.
56. Our observations and opinions, as an association, have not been requested by ASIC, ATO, AFSA or FEG.
57. Similar to there being the combined Federal Circuit and Family Court of Australia which covers Family Law, Migration Law and General federal law, it emerged out of discussion with the Ombudsman that perhaps there should be a separate court responsible for company and personal insolvency for SMEs.

F. Any related corporate insolvency matters.

Specific Insolvency Legislation

58. Insolvency legislation presently is covered by a range of different acts and regulations, for example the Corporations Act and Regulations, Bankruptcy Act and Regulations, Insolvency Practice Rules (Bankruptcy and Corporations), and Insolvency Practice Schedules (Bankruptcy and Corporations). There are also ASIC regulatory guides, ASIC Act and Regulations, Court Rules, Personal Property Securities Act, employment law, taxation law and various other State and Federal legislation that influence how insolvency administrations are conducted.
59. There are also separate regulatory bodies for personal insolvencies (AFSA) and corporate insolvencies (ASIC), often with different approaches and relationships with insolvency practitioners.

60. There have been some amendments in the last few years, especially in the Insolvency Law Reforms starting in 2017, that have started to harmonise the processes of both bankruptcy and corporate insolvencies. Nevertheless, there remain material differences in some areas of the various legislation that treat personal and corporate insolvencies differently. For example Section 139ZQ of the Bankruptcy Act allows the Official Receiver to perform cost effective asset recovery procedures on behalf of the trustee, while no similar provision is included in the Corporations Act.

61. Many SMEs in Australia operate their businesses through corporate structures, and owners tend to mingle personal and business affairs. There should be a more holistic approach to business debts and any reforms should take a high-level approach to a debtor's circumstances

62. To ensure a consistent and cost-effective approach to insolvencies, there should be specific insolvency legislation, covering both personal and corporate insolvency. The regulation of insolvency practitioners should likewise be conducted by one body rather than the two bodies currently in place.

63. A disproportionate number of companies are deregistered each year without a formal liquidation. Some of these are voluntary deregistrations, and others are enforced by ASIC because of non-payment of annual fees. As these are primarily exempt proprietary companies, and data on their financial positions is not made public, there is no information available on whether those deregistrations are in the best interests of creditors and other stakeholders, for example whether there were any recoveries that could otherwise have been made for the benefit of creditors. This process, because it removes the ability to investigate the behaviour of directors and officers, also does not allow for proper education of directors as to their duties and responsibilities.

64. AFSA currently operates as an Official Receiver for personal insolvencies that are not administered by private trustees, often due to lack of funds. That role should also exist in the corporate sector, and the body overseeing the insolvency practitioners could also undertake the role of Official Receiver, for both corporate as well as personal insolvency.

National Company App Base Platform

65. There needs to be discussion about the adoption of better digital technologies and a paperless environment.
66. Countries including Finland, Scandinavia, China, New Zealand and South America are making greater use of technology than Australia currently.
67. All corporations could have something similar to how the myGov app operates for individuals, perhaps myCompany for each incorporated entity. A company would use this platform for its day-to-day operations and could be connected to various agencies such as ASIC, ABRS, ATO, banks and accounting software providers.
68. In the event of the appointment of an external administrator that platform is taken over by the practitioner appointed. All stakeholders as well as creditors could continue to access that platform and interact with such processes as lodging proofs of debts and receiving updates of the winding up of the affairs of that company.
69. Such a system would allow greater regulatory oversight both prior to and after external administration. Use of a one-stop portal will create efficiencies, additional information for stakeholders, and reduce costs.
70. For example, Finland has a web-based system. The system receives data from the courts on insolvency-related and reorganisation matters. All stakeholders can communicate via the web-based system. EU countries have comparable systems, or are building them.

Clarity on Priorities

71. There should also be some consideration to improving the conflicts and confusion around priorities with secured creditors and employees, particularly in respect to the costs incurred by liquidators.
72. The current position is that Section 556 of the Corporations Act 2001 establishes the priority for certain debts and claims that “must be paid in priority to all other unsecured debts and claims”, which includes employee claims. Employee claims are also afforded a priority under Section 561 of the Act, over assets subject to circulating assets (which is contingent on there being insufficient unencumbered assets to meet employee claims).

73. That means that Section 556 applies to unsecured assets, while Section 561 applies (with respect to employee claims) to assets that are subject to circulating securities.

74. Universal Distributing Co. Ltd (In Liq) (1933) 48 CLR 171 allows the liquidator to be paid for time incurred in securing, preserving and realising assets, but this does not extend to general expenses (such as statutory tasks like investigations, reports filed with ASIC and reports prepared for creditors etc).

75. So at present, employees (and in their stead the Government body under the Fair Entitlements Guarantee) stand ahead of the costs incurred by a liquidator for completing statutory tasks like investigations, reports filed with ASIC and reports prepared for creditors etc).

76. There is often disagreement between FEG and registered liquidators on the correct interpretation of the Corporations Act in relation to both Sections 561 and 556. In brief, where there are insufficient assets to pay creditors in full from circulating assets, FEG requires that the whole of the proceeds are paid to FEG with some modest allowance for the direct costs of realisation, but not general expenses.

77. The interpretation by FEG of Section 561 and the subsequent pressure on liquidators to hand over proceeds, has resulted in some potential trade-on administrations to be prematurely terminated with a subsequent loss of business value and return to all creditors. In receiverships, the receiver also needs to (often adversely) adjust strategies to anticipate the claims of FEG against the receiver in the event that the entity later goes into liquidation. Again, this may not ultimately be in the interests of all stakeholders.

78. Urgent law reform in this area is required. For example, in the United Kingdom, they fixed the issue by inserting a section in the Insolvency Act 1986 (UK) after the Buchler v Talbot [2004] UKHL 9 case. Section 176ZA was inserted to give a liquidator's general expenses priority over the priority creditors to the extent the general assets are insufficient. It is acknowledged that the UK legislation is drafted differently to the Corporations Act, but some consideration should be given to a similar resolution of this area.

Conclusion

We thank the Parliamentary Joint Committee for this opportunity to make a submission on behalf of our members, as we feel that substantial reform is long overdue.

If you have any questions regarding this submission, please do not hesitate to contact us. If there is to be any further consultation with the profession, we would ask that AIIP be invited to participate. Please contact:

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Yours faithfully
Association of Independent Insolvency Practitioners Limited

David Levi
Director