A Submission to the the Senate Inquiry into Insolvency Practitioners.

I was until recently the director and owner of a small business (...) which was forced into voluntary administration by the practices of a liquidator.

(...) , and (...) have been trading for over 25 years. Like most small businesses, it had its good times and bad times and its share of cash-flow crises. Over the last few years, changes in the industry and the retirement of some of our long-term clients has resulted in the business being less strong than I would have wished and making a loss for the last two years. Nevertheless, its position in October 2009 was that there were no outstanding creditors, wages were being paid, there was minimal leave entitlements owing to my only other full-time employee, and there was money put aside to cover the current quarter's expected BAS bill. There was even a modest share portfolio in reserve.

What happened next is closely linked to the fate of another business, (...) .

(...) had been a client of ours for a long time - possibly 20 years. By 2004, it was clear that (...) business was in trouble - his account to us was growing and he had not made regular payments for some time. After discussion, I agreed to continue providing services in the hope that he would trade his way out of trouble and he agreed to try to bring the account back in order. By 2005, it was clear that this was not going to work. (...) debt was now in excess of $25,000 and was now threatening the viability of my own business. (...) made the decision to sell the family home to pay his creditors, then he and his wife would retire to live with his wife's mother. He asked for another some more time to enable him to repaint the house and organise an orderly sale. I agreed. He paid off the sum of $27,103 in 2005. We continued to supply work to (...) until the ATO, who apparently declined to wait for the sale of the house, appointed (...) as liquidat or, for their debt of $5,600. At the time the liquidation commenced, the total deficit was on the order of $16,000, and it is my understanding that (...) has subsequently paid in full all the outstanding creditors from the proceeds of the house sale, as he promised. (...) has pursued him over the intervening period, claiming $96,691 in fees and $94,000 legal expenses. This matter was settled out of court on 2 October for the sum of $55,000. (...) is bound by a non-disclosure agreement as part of the settlement. I am aware of the final amount as it is documented in a report to creditors sent to me by (...) . I am not bound by any agreement.

In October 2009, I received notice from solicitors acting for (...) that they had commenced proceedings to recover the $27,103 on the grounds that it constituted a preference payment. This came as a great surprise as I had acted in good faith at all times and thought the matter resolved, as (...) had settled out of court with the liquidator some months earlier. I was also under the assumption that claims could not be made after 3 years (It became clear later that they had lodged the action with the court 1 day inside the 3-year deadline, then sat on it for another year). I sought legal advice, and advice

from several of my clients who were immediately aware that something was badly wrong. Should they succeed in proving the claim, the company did not have the capacity to pay and would then be insolvent. On my instruction, my solicitor provided financial statements showing the financial status of the company and proposed that they walk away. Unsurprisingly, they declined. I immediately sought advice from an insolvency practitioner, (...) at (...) . He advised me that, should they be succesful in their claim, the company would be either insolvent, or so close that it would shortly become so. He calculated what the most they would likely receive in a liquidation would be, and suggested I make a final offer of that amount. I did so. They rejected the offer, in effect increasing their claim by saying that GST would be payable as well, and announced their intention to seek judgement as soon as possible.

Under those circumstances, with great reluctance and a degree of personal distress, I decided that there was no viable future for the company, and immediately requested (...) to act as liquidator for (...) . My other staff member, who had been with me for over 12 years, was retrenched, with less than a week's notice.

I wish to make it clear that at the time of liquidation, there were no outstanding trade creditors or staff entitlements (excluding my own.)
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 behavior 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 Insolvency Practitioners would: helping to salvage what can be salvaged from a situation that is already a disaster.

I believe my experiences provoke a number of questions I would like the Senate Inquiry to consider:

1) How can a liquidator 'reasonably' spend over $200,000 pursuing the director of a company that owed a mere $16,000 at the time of their appointment. Their decision to do so must be questionable if they were prepared to settle for only $55,000.

2) In the (rare) situation where ALL the outstanding creditors have been paid off personally by the director, who is the Liquidator working for? It is my understanding in this case that (...) was notified up to two years prior that the creditors had been paid, yet he continued action, and claimed fees for that continued action.

3) is the current definition of a Preference Payment reasonable? My legal advice was that

I would be likely to lose a court case on two grounds:

(A) The payment was outside the normal course of business - my trading terms are 30 days and it took longer than that to get paid. Such a definition means that ANY business who does not get paid exactly on time risks having to repay the money if a liquidator is appointed within the next six months. Worse still, if you take any action to recover an overdue debt (such as court action), any resulting payment is specifically defined in the Act as a Preferential Payment and therefore repayable. To highlight the effects of this law, had I paid (...) the amount of his claim, then gone into liquidation (as seemed inevitable), he would have had to repay the money back to MY liquidator under the same law that allowed him to claim it in the first place.

(B) I received more than I would have if the claim was proved as part of the liquidation. The intent here is reasonable - it is to prevent some creditors getting in early and leaving nothing for anybody else. However it breaks down in the circumstances where the Liquidator will clearly NOT be returning any money to creditors. (In the process of seeking advice, one of my clients made the comment that: "Unfortunately, some Liquidators regard any money returned to creditors as a missed billing opportunity..."). Legally, this means that any creditor who received ANYTHING (being greater than nothing) in the preceding six months is obliged to repay it. I doubt whether that was the intent of the law when it was framed.

In conclusion, I believe that the intent of the Preference Payment provision is a good one: clearly it is designed to prevent unscrupulous business operators from transferring money to related parties then walking away. I must question whether it is achieving that goal when a small business such as mine can be wiped out despite acting in good faith at all times and within the law.

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