Senate Economics References Committee

Inquiry into Liquidators and Administrators

Second IPA Submission – 21 June 2010

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EXECUTIVE SUMMARY

The IPA has prepared this subsequent submission to:

1. answer the specific questions asked by the Committee when we first appeared;
2. respond to a number of allegations raised in submissions made and evidence given by other parties; and
3. offer comment on the issues that seem to be areas of focus for the Committee.

In addition, we reiterate the key messages of our first submission.

Section 1 Matters raised by the Committee at 12th March hearings

The specific questions asked by the Committee in March concerned - the IPA's handling, in 2005, of the initial complaints it received against Stuart Ariff; our further thoughts on the idea of an insolvency ombudsman; comments we would have made if receiverships had been included in the original Terms of Reference; and some more detailed information about fee write-offs in insolvency appointments.

Answers to these questions are given in Section 1.

Section 2 IPA's response to matters in submissions and evidence.

We note that an unusually large number of submissions to the Inquiry remain confidential, and that some evidence was given *in camera*. We are of course unable to respond to any matters raised in that way. We would respectfully recommend to the Committee that considerable care be taken is weighing confidential submissions and *in camera* evidence where they contain allegations of wrongdoing or non-performance by our members.

Corporate insolvency processes are essentially public, and many key documents in any insolvency appointment are matters of public record. That being the case, we query the proliferation of confidential submissions, and do wonder whether in many cases the desire for confidentiality arises from a wish to make representations and accusations that are then not able to be answered.

We do comment on a number of allegations against practitioners where it is possible to do so.

We note also the frequency with which allegations against liquidators and administrators are made by the directors of now insolvent companies. We pointed out in our first submission that we believed that many of these allegations stem from disappointment, anger and frustration about the failure of the business in question, rather than from any action by a practitioner.

We would add that in many cases, and in some that are mentioned here, those allegations are made by directors who themselves are alleged, and often found, to have committed offences under the Corporations Act, particularly breach of duty, failure to keep proper books and records and trading while insolvent.

The practitioner appointed to the company has a duty to investigate and report on such offences, and we suggest that in many cases, the allegations against the liquidator or administrator are a case of attack being seen as the best form of defence.

We draw the Committee's attention to an opinion piece by Dr John Hewson in the Australian Financial Review of Friday 19th June 2010, where he makes a series of broad and unsubstantiated attacks on insolvency practitioners, and recommends an overhaul of the Australian insolvency regime. We note that this editorial appeared just six days after publication of a news story that action was in preparation against Dr Hewson in relation to alleged insolvent trading when he was a director of Elderslie Finance Corporation Limited (in liquidation).

Section 3 General comment on areas of interest to the Inquiry

During the course of the Inquiry, and in subsequent discussions, a number of areas of interest to the Committee have emerged, and we offer our comment on them.

These areas include liquidator and administrator remuneration, the use and appropriateness of litigation in insolvency, processes for the removal of liquidators once appointed, the question of liquidator regulation and proposed tightening of the liquidator registration process.

We also offer some comments on the operation of Chapter 11 in the United States insolvency regime.

SUBMISSION

Section 1 Matters raised by the Committee at 12th March hearings

Committee members requested further information from the IPA on a number of specific matters at this hearing. We address each of those requests.

1.1 IPA handling of complaints against Stuart Ariff

At the first hearing, Senator Williams asked a number of questions about complaints received by the IPA about Mr Stuart Ariff and the manner in which they had been handled.

We set out the details requested in our letter to the Secretary of 7th April 2010. A copy is included as Appendix A.

As our letter shows, it is the case that the first complaint against Mr Ariff was accepted by the IPA as having been resolved by his response to the questions put to him. Mr Ariff provided the IPA with substantial documentation which appeared to support his version of events, but subsequent events showed that his response included significant misrepresentations.

We point out that since 2005, the complaints and discipline processes of the IPA in relation to its members have significantly changed. The IPA introduced the independence and remuneration sections of the IPA Code in December 2007 in order to support and reinforce the corporate insolvency law changes in those areas which commenced on 31 December 2007. The complete IPA Code then commenced in May 2008. The Code significantly increased the requirements that the IPA placed upon its members.

Following on from that, during 2008 and 2009, the IPA reviewed its complaints handling and disciplinary processes as part of our commitment to maintenance and improvement of the new standards of conduct imposed by both the law and the Code. This has led to significant changes to the Association's Constitution being approved by members at the annual general meeting held on 19 May 2010. The IPA Constitution now provides for a more proactive approach to discipline matters and enables the IPA to take action against a member earlier in the process. Our discipline processes have been assisted by the creation of a full time legal position[1] whose duties include responsibility for investigation and resolution of complaints and other issues of concern about members.

The case of Mr Ariff was in fact significant in this review process in that it highlighted the limitations on our existing discipline processes and the need for a review.

The IPA and its members have in fact done an enormous amount of work in maintaining and improving standards of insolvency practitioners since the Ariff matters first came to notice in 2005.

[1] Mr Michael Murray, Legal Director

1.2 An Insolvency Ombudsman – further consideration

The IPA raised this as an item for consideration in its 12 March 2010 submission. While we continue to see such a role as one that should be considered, we are not in a position to give a final view on the question since there is not at this stage any substantive proposal to respond to. We do offer some further comment arising from our research and discussions since March.

We note that certain of the Adelaide academics supported this in their submission, giving reasons based on the fact that 'many other areas affecting the Australian community such as banking, employment and health are supported by an independent office that receives complaints and investigates behaviour'.[2] They also said that the decreased reliance by ASIC on professional body membership as an indicator of fitness for liquidators might suggest there is room for the creation of an independent insolvency ombudsman to monitor compliance more actively through response to public complaint. They say whistle-blowing can be more effective in bringing misconduct to light than extensive compliance and monitoring programs, and that a dedicated industry ombudsman may facilitate this regulatory mechanism.

We suggest that the idea is worth considering but that the whole context, as well as some overseas experience, be taken into account. We have some information on that which we can provide if required. In particular, in the Australian context, the 1988 Harmer Report[3] recommended a regime headed by a statutory board to oversight registration, regulation and discipline. We note also that the Official Trustee in Bankruptcy is subject to the Commonwealth Ombudsman and the nature of that oversight role is one that would be comparable. As well, the Financial Ombudsman Service, which directly reviews the practices of banks and other non-bank financial institutions, is said to provide "dispute resolution services for Australian banking, insurance and investment disputes" through "negotiation, conciliation or determination".[4] The role of mediation and dispute resolution is significant in the insolvency context, where issues of cost effectiveness are important. The IPA currently performs that role in its complaints handling processes, within the limits of its resources.

We consider that any such proposal needs to be looked at in the whole context of practitioner regulation and oversight. As we said in our first submission, the profession is already highly regulated. There may be areas where there are not so much gaps in regulation, but where there may be more effective and efficient regulation. At present there is a hierarchy of bodies that includes the regulators (ASIC/ITSA[5]), the Courts and regulatory tribunals (CALDB and ITSA's disciplinary panel); the professional bodies – IPA, and other accounting bodies, committees of inspection and creditors, other stakeholders

[2] Submission 6

[3] ARLC 45 para 941

[4] See www.fos.org.au

[5] There are also State insolvency regulators in relation to state based co-operatives and associations, such as State Offices of Fair Trading; and other Commonwealth insolvency regulators, such as the Registrar of Aboriginal Corporations.

such as directors, bankrupts, banks, employees, and finally the media and the community as a whole.

An Ombudsman may merely be replicating existing review mechanisms unless it were to take over some of those mechanisms. This would be on the basis that the existing bodies are not as effective as an Ombudsman would be. In that respect, while ASIC and ITSA deal with individual complaints about practitioners, in terms of their statutory and other responsibilities, an Ombudsman might deal with complaints as to process – delay, effectiveness of communication, and the more administrative processes involved. This could extend to the operations of ASIC and ITSA in dealing with practitioners.

However the existing complaints regime provided by the IPA and other professional bodies needs to be considered. The Harmer Report suggested that these bodies be given increased responsibilities and powers in this area. An Ombudsman might only be taking away or duplicating the existing work of the professional bodies.

Of course, one important feature of an Ombudsman is that it is independent. It is clear that the IPA and others are not independent of their members and there may therefore be a perception that complaints are not dealt with objectively. On the other hand, the IPA, for one, sees its complaints and discipline process as an important one in upholding the standards expected of its members, for the good of the Association and the standing of the profession. There are many other regimes, for example in the regulation of doctors and other professionals, which could usefully be examined.

On this point also, we note Mr Michael Kirby's recent comments when discussion co-regulation, to the effect that:

> *"...typically, at least in recent time, professional bodies have been harder on erring colleagues than generalist tribunals might have been because they have a keener understanding of the greater damage that reports of error and neglect can do to the whole profession"*[6]

In conclusion, we believe that the role of an Ombudsman should be further considered. Insolvency is inherently subject to complaints because its participants are confronted with the unhappy reality that their debts will not be paid, or paid in full. In addition, in the case of many participants, their conduct or prior transactions will be the subject of critical review. The practitioner's role might be seen by some as an abuse of power but in reality it is the proper exercise of legal authority over assets and creditors and the insolvent. That in itself can generate complaints. Where a practitioner is involved in alleged misconduct, an Ombudsman may not be the best person to decide upon that. While not seeking to over-emphasise the complexities of the law and practice of insolvency, we do not think an Ombudsman could effectively or properly review the legal or commercially based decisions of practitioners. These are matters for the courts and tribunals.

But in light of the existing structure, the Ombudsman could usefully operate at a higher level of oversight of the insolvency regime – dealing with regulators, the professional

[6] (2010) 22(2) A Insol J 4

bodies and their practitioners – in relation to the administration and operation of the insolvency regime.

In recommending the establishment of an Insolvency Ombudsman, particular consideration would need to be given to questions of cost effectiveness and timeliness of activities, and to ways of ensuring that the necessary level of specialist expertise in the area of insolvency would be available to it.

1.3 Further data on Insolvency write-offs

As we outlined to the Committee in March, limited data is available in many areas of corporate insolvency.

The information on practitioner fee write-offs that we provided in our first submission was derived from a survey of IPA member practitioners that we conducted over December 2009/January 2010. The responses received covered 187 registered liquidators, which is 38% of the number of IPA practitioner members. It was a single survey event, and was carried out to obtain indicative information. It was certainly not a robustly designed piece of research.

While the reported outcomes must be interpreted in that context, we note that the consistency of the responses in a number of areas, such as fee write-offs, is such that some conclusions can safely be drawn.

The survey showed that almost 90% of IPA members reported they wrote-off more than a fifth of their income from liquidation work in 2009. The findings also indicated that nearly half of insolvency practitioners surveyed did not expect to recover any income from 20% or more of all their insolvency appointments in 2009.

The reason for this high level of write-off is of course because there is no guarantee when an insolvency practitioner is appointed that there will be funds to cover their remuneration and expenses. A considerable amount of work is undertaken by practitioners that is unfunded and might be seen as in the public interest. This work includes investigating director and related party offences, such as breaches of directors' duties, and insolvent trading and uncommercial transactions.

The IPA survey also showed that more than 63% of practitioner respondents wrote-off more than 30% of their income from liquidation work, and 58% of those working on voluntary administrations wrote-off more than 20% of their income.

The findings of the survey are summarised in the table below.

2009 Appointments	**NIL – 10%**	**20%**	**30%**	**>30%**
Proportion of WIP written off on liquidator appointments	11% of respondents	27%	25%	37%
Proportion of WIP written	42% of	35%	11%	12%

off on VA appointments	respondents			
Proportion of appointments where no fees recovered	51% of respondents	25%	9%	15%

1.4 Receivership in the Australian Regime

A standard term of any commercial lending is that if the company defaults on its loan, or other related events occur, the lender may appoint a receiver to take charge of the company's assets and try to recoup the lender's loan moneys. Hence, if a company is in financial difficulty, its secured creditor may appoint a receiver and "put the company into receivership". That is not an insolvency appointment but it is often a precursor or indicator of insolvency.

The powers of the receiver are set out in the loan document accepted by the borrower company and in the *Corporations Act*. If a receiver has, under the terms of their appointment, the power to manage the company's affairs, they are known as a receiver and manager, which is the most common appointment. It is possible for a company in receivership to also be in provisional liquidation, liquidation, voluntary administration or subject to a deed of company arrangement.

The receiver's role is to collect and sell enough of the secured assets to repay the debt owed to the secured creditor. This may involve assets or the company's business. Receivers also have to report to ASIC any possible offences or other misconduct.

It is important to note that the receiver's primary duty is to the company's lender, the secured creditor. The main duty owed to unsecured creditors is an obligation to take reasonable care to sell charged property for not less than its market value or, if there is no market value, the best price reasonably obtainable: s 420A of the Corporations Act. A receiver also has the same general duties as a company director.

The receiver has no obligation to report to unsecured creditors about the receivership, nor are unsecured creditors entitled to see the receiver's reports to the secured creditor.

This is a consequence of the fact that the receiver has as its client the secured creditor alone. A receiver is therefore not like a liquidator or administrator who has no direct client. However, the receiver will usually write to all of the company's suppliers, many of whom will be creditors, to inform them of their appointment.

A detailed list of the receiver's receipts and payments for the receivership must be lodged with ASIC every six months.

The most common way a receiver will obtain money from the assets they are appointed over is to sell them. In the case of a company's business, the receiver may continue to trade the business until they sell it as a going concern. A receiver will often trade-on a poorly performing business with a view to improving its prospects for sale. The reason the receiver has been appointed is often because the directors and company management have mismanaged the business. Receivers, particularly where they are experienced in particular industries – automotive, hospitality, manufacturing, retail – will

often sufficiently improve the prospects of the business for it to be sold as a going concern thereby allowing the secured lender to recoup its loan, and allowing money to be paid to unsecured creditors.

In this way any funds left over are paid to the company or, if it is by then in formal insolvency, to its liquidator or administrator.

The receiver is generally entitled to be paid their fees from the money realised from the charged assets. How the fees are calculated is usually set out in the charge document agreed with the company. Unsecured creditors have no role in setting or approving the receiver's fees but ASIC, a liquidator, voluntary administrator or deed administrator of the company can apply to the court for the receiver's remuneration to be reviewed.

If a liquidator is appointed over a company that is in receivership, they will usually review the validity of the charge and of the appointment of the receiver. Sometimes, the receiver's appointment is successfully challenged in court.

Receivership does not affect the legal existence of the company and the directors continue to hold office, but their powers depend on the powers of the receiver and the extent of the assets over which the receiver is appointed. Generally, control of the company's business is taken away from the directors. They must in fact report to the receiver on the company's affairs and must allow the receiver access to books and records relating to the charged property.

A receivership will usually end when the receiver has collected and sold all of the assets or enough of them to repay the secured creditor, completed all their receivership duties under the Act and paid their receivership liabilities. Unless another external administrator has been appointed, full control of the company and any remaining assets go back to the directors.

The prevalence of receiverships

The IPA Code imposes obligations on receivers but particular issues of independence do not apply; the receiver necessarily acts in favour of the lender, and not on behalf of the unsecured creditors.

Some concern was expressed that receivership is in some way rampant, or out of control, or that receivers are appointed at the whim of banks and other secured creditors.

This is not the case. We have commented elsewhere that corporate insolvency in all its forms is a rare event – affecting on average 0.041% of companies over the period from January 1999 to April 2010. In the last three years, the proportion of all companies involved in informal insolvency to which a receiver or receiver/manager was appointed was less than 10%, or less than 0.0041% of all registered companies.

Informal advice from a sample of banks is that they are reluctant to appoint receivers, except in circumstances where there seems not to be an alternative. In particular, they will more readily appoint a receiver when they have little trust or confidence in those in control of the company in question.

In a recent submission[7] to another Inquiry by this Committee, into access of small business to finance, the Reserve Bank of Australia confirms that the frequency of non-performing business loans (those that may become candidates for receivership) remains low, notwithstanding the GFC:

> *Non-performing business loans (that is loans that are impaired, or more than 90 days in arrears but well secured) comprised around 4 per cent of banks' total business loans in December 2009, up from a little under 1 per cent during 2005-2007 (Graph 6). The deterioration over the past two years has been somewhat less for small unincorporated enterprises than for larger corporates.*

Receivership in the UK

Considerable interest was also shown by the Committee in recent changes to corporate insolvency in the UK in relationship to receivership. Without claiming to be a comprehensive report, we note the following features of that regime.

The main reform under the UK Enterprise Act 2002 has been the prohibition on the appointment by a secured creditor of a receiver to a company in financial distress. Like Australia, England had previously allowed appointments of receivers by secured creditors to insolvent companies that would run together with an administration or liquidation. Accordingly, the position immediately prior to the enactment of the Enterprise Act was similar to the position now prevailing in Australia.

Instead, the UK scheme is that, before a company's directors can appoint an administrator to the company, they must give notice of that intention to the secured creditor. The secured creditor then has two business days to itself appoint the administrator to the company.

The administrator, once appointed, is entitled to have regard to, and act in a way so as to achieve better returns for, the secured creditor. That entitlement is supplementary to a general objective of rescuing the company as a going concern, or achieving a better result for the debtor's creditors as a whole than would be likely if the company were wound up.

Secured creditors holding fixed charges over particular assets are more protected than those with floating charges - they cannot be bound by a sale by an administrator, absent consent or a Court order. Also, an administrator's restructuring proposal may not include any action that affects the right of a secured creditor to enforce its security, or give priority over unsecured debts over the secured creditor, without its consent. So, under this regime, fixed charge secured creditors still have influence in the administration process.

[7] Submission into the Inquiry into *Access of Small Business to Finance*; Senate Economics References Committee Inquiry; March 2010, p 4

We have provided the Committee with a useful and timely article from the IPA journal which explains the UK regime and how it might be applied in Australia.[8]

[8] The end of "receivers and managers" and the beginning of a streamlined and collective voluntary administration procedure? (2010) 22(1) A Insol J 7, David Walter

Section 2 Matters raised in evidence to the Committee

In a number of submissions, and in evidence, specific allegations were raised against insolvency practitioners in relation to their conduct in particular appointments. Appendix B includes a schedule of some of these submissions and the IPA's comments where we are aware of court cases or other matters on the record in relation to the person making the submission and the outcome of their legal dispute. This list is prepared with a view to assisting the Committee to understand the context in which the witness is making their submission.

We here comment in more detail on some of these matters.

2.1 Golden Chef

In Adelaide, the Golden Chef receivership was raised by Mr McNamara. Senator Williams asked about the bank which appointed the receiver and the reply was that "according to the court action, the bank did not receive anything because they were suing for 100 per cent of the amount under the guarantee".

> *Mr McNamara - "it was Golden Chef that went into liquidation. We know that assets were sold up by auction in both Adelaide and Melbourne. On estimation, the assets recovered were in the vicinity of $3 to $3½ million. Not one creditor got paid in this liquidation".*
>
> *...*
>
> *Senator WILLIAMS—So you are saying that in this example that you are putting to the committee some $3 million was collected by a liquidator through the auction of a vehicle which was an asset of the company, and the bank, which obviously the company owed money to, did not get anything and the creditors did not get anything. Is that what you are saying?*
>
> *Mr McNamara—That is what I am saying. And I am saying that the whole of it was used up in legal fees, collection fees and liquidators' fees.*

Mr Alan Scott, of BRI Ferrier, and an IPA member who is one of the Receivers appointed to the Golden Chef companies (of which there are three), has provided a detailed chronology of events that occurred in the receivership. Mr Scott has also provided copies of the final receipts and payments summaries for each of the three receiverships.

It is interesting to note the following:

- The total funds realised in the course of the receiverships was $2.58m, not $3 - $3.5;
- The statement that the bank received nothing is incorrect. The amount returned to the secured creditor was indeed low - $200,000, but not zero;
- It is indeed the case that the total legal fees and receivers' costs across the three receiverships was high - $1.1m in legal fees and $0.9m in receivers' fees – but it is critically important to note that the core reason for these high fees is the

obstructive and unlawful activity of at least one of the directors of these companies.

We also make the point that because these appointments were as receiver and manager, unlike the appointment of an administrator or liquidator, Mr Scott and his co-appointee had a direct client in the bank that appointed them. The bank would have negotiated the fee rates they charged, would have monitored the course of the receiverships, and would have been in a position to direct the receivers not to pursue legal actions that they viewed as unnecessary or ill-advised.

The Golden Chef receiverships subsequently came before the Courts on several occasions, and in those actions, the directors were unsuccessful in challenging the actions of the receivers. On the contrary, one of the directors of the insolvent companies served a custodial sentence for their actions in resisting the receivers' lawful right to seize property owned by the companies in question.[9]

2.2 Richard & Barbara Wright

Questions were asked by Senator Williams about the Wrights, who commented that the receivers:

> *"could have received much more money for [the livestock and other assets]. I believe Mr Wright took them to court and won the court case. He was supposed to get a seven digit figure settlement, which I do not think he ever received. ... Why didn't Mr Wright get the sum of money awarded to him by the court, I wonder?".*

We have established that this was because the Wrights owed considerably more to the bank than the bank was ordered or agreed to be paid to them, and that the judgment in their favour only served to reduce the amount of their total liability. This is of course properly a response that needs to be confirmed with the Wrights or the parties involved; and we assume you do not expect the IPA to have this knowledge or indeed to have what may be confidential or personal information.

In his evidence in Newcastle, Mr Wright addresses the matter. He made the point that he did not agree to the appointment of a receiver.

> *Senator WILLIAMS—Thank you for your attendance today. You have my sympathies for what has happened to you. The ANZ Bank appointed a receiver to your property; is that correct?*
>
> *Mr Wright—That is correct.*
>
> *Senator WILLIAMS—Did you take legal action to have that receiver removed?*
>
> *Mr Wright—We did not acknowledge the appointment of the receiver. The two directors of this company are in this room and we refused to sign any documentation in respect of that receiver. We knew, in our hearts, what was*

[9] *Haritopoulos Pty Ltd v Scott* [2007] VSCA

going on was wrong....We did not have to acknowledge it. We refused point blank to acknowledge the receiver.

Senator Williams makes a related point about the validity of the Receiver's appointment:

Senator WILLIAMS—Let me take you back to receivers. That is what we are interested in.

...

We heard evidence in Adelaide from professors and doctors from universities about how the UK have changed their receivers...In Australia, if a bank lends you money and they think you are not viable, they can just send the receivers in tomorrow. I do not think they need court permission or anything. They can just send them in.

As we explained earlier, the legal right of the secured creditor to appoint a receiver in circumstances of default is established at the time of the relevant lending taking place and is a standard condition in many business lending arrangements. The Wrights' business borrowed from the ANZ, and at the time of doing so, either initially or during a refinancing, would have agreed in writing to the appointment of a receiver under certain circumstances. Had they not done so, the loan amounts would not have been advanced.

Some or all of those circumstances having then come to pass, the bank had proper legal authority for the appointment that they then made. The sale of the assets for less than a true value[10] was an event that by definition took place after the appointment, and cannot affect its legality.

We do not know the details of the relevant loan agreement(s) under which the receiver was appointed in this case, and whether it required defaulting on repayments or an ongoing balance sheet assessment, or some combination of these and other criteria, but whatever the criteria, they would have been agreed to by the borrower at the time of the borrowing.

2.3 Mr Steven Koci

Mr Koci made a late submission to the Inquiry, and in it commented in particular on the IPA's complaints process in relation to a series of complaints that he made in late 2009.

We comment on his submission because we believe that in it Mr Koci has misrepresented the IPA. Mr Koci states in his submission, which is dated 6th April 2010:

Also it seems fine by the IPA that insolvency firms state that all their partners are members of IPA when they are not even members.

Mr Koci complained to the IPA in September 2009 about a number of matters. One of these was that a firm had published a schedule of hourly rates that described their

[10] The court of appeal decision is reported as *Skinner v Jeogla* (2001) 19 ACLC 1963.

personnel at the Partner level as being, among other things, "members of the IPAA." (The IPA was known as the IPAA until 2007).

In fact, the document provided by Mr Koci includes a footnote which says:

> 2. *The guide to staff experience is intended only as a general guide to the qualifications and experience of the staff engaged in the administration. Staff may be engaged under a classification that we consider appropriate to their experience.*

Notwithstanding this note, the IPA undertook in September 2009 when we wrote to Mr Koci to raise the matter with the firm and advise him of the outcome. We did raise the matter, and because the IPA is indeed engaged in the pursuit of excellence, we required the firm to redraft their document to remove any misunderstanding in relation to IPA membership.

This was done, and a revised schedule of hourly rates was provided to the IPA in May 2010. This, along with a revised internal complaints handling process for the same firm, has now been sent to Mr Koci.

Mr Koci is unhappy with the time that has elapsed in dealing with the complaints he has made to the IPA. Notwithstanding that, the claim in his submission that the IPA has not acted on his complaints, or not taken them seriously, is demonstrably false.

2.4 General comments on other witnesses and evidence

The inquiry has been assisted by a large number of other witnesses who have conveyed their experiences of the insolvency regime. In some cases, we have been able to more fully consider their concerns by examining the publicly available information in relation to court cases in which they have been involved. These cases have often involved challenge to the liquidator's actions. The court decisions give an objective account of the circumstances and a finding by the court of the merits of their concerns. As one example, in the litigation by Mr Vink against the practitioner (and IPA member) Mr Tuckwell for misconduct, the Victorian Supreme Court found that Mr Vink had made "serious allegations of misconduct, dishonesty or fraud against Mr Tuckwell without any reasonable basis for doing so". Mr Vink's appeals, including to the High Court, were unsuccessful.[11] We note that Mr Vink has lodged a submission with the inquiry.

As we said earlier, there are many instances, both covered in evidence to the Inquiry, and more generally, where the directors of failed businesses attribute improper motives or allege misconduct on the part of liquidators after they have themselves become the subject of review or investigation by the practitioner concerned. Such review and investigation is part of the duties that the practitioner must discharge and is required by various sections of the Corporations Act.

[11] [2009] HCASL 90

Section 3: General comment on areas of interest to the Committee

During the Inquiry, and in discussions the IPA has had with the Committee Secretariat, a number of areas of focus for the Committee have emerged.

We offer our general comments on these areas, where we have been able to identify them.

3.1 Liquidator Remuneration

Our main submission explained the process and regulation involved in practitioners' remuneration.

Some witnesses have said that practitioners have high charge rates. For example, Mr Nash, a solicitor, said in Newcastle that "the charge-out rates of these people [practitioners] and the leverage they get off their employed staff is unbelievable". Similar comments were made in Sydney.

The IPA's first submission includes some indicative charge out rates for practitioners. In terms of comparably experienced professionals, from similarly sized firms, average rates are comparable.

It should also be borne in mind that fee rates for insolvency practitioners will be determined to accommodate the fee write-offs that they incur when they perform work for which they do not receive remuneration because there are no or not enough assets in the administration. This circumstance has been commented on a number of times as if it were evidence of some major problem. We do not believe that this is the case.

First, the practice is recognised by the law. As an example, the Inspector-General in Bankruptcy has said that:

> *"...it has been recognised by the Courts that a trustee cannot expect to recover all their costs and remuneration in every bankruptcy and that the scale of fees set by a trustee for themselves and their staff reflect this risk".*

ITSA refers to Court authority to that effect[12].

To consider this question beyond the realm of insolvency, any business in any sector of the economy will set the prices of its goods or services taking into account the totality of its costs, which would include costs such as bad debts arising from the extension of credit, theft, loss or damage to their stock, and the costs of complying with applicable regulation. We recognise and accept that this is just good business practice across the economy.

If the Committee were of the view that this practice is inappropriate in the insolvency regime, consideration would need to be given to alternative ways of funding the level of fee write-offs by practitioners.

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[12] See Inspector-General in Bankruptcy Practice Direction No 6 - Remuneration entitlements of a Registered Bankruptcy Trustee, January 2010 at www,itsa.gov.au

Beyond the question of hourly rates, there are legal requirements for practitioners to charge only for work that is necessary and proper. The IPA Code gives extensive guidance on assessing work performed, and in reporting to creditors on the fees for which they are seeking approval. Guidance is also given by the Courts which are often called upon to review practitioners' remuneration.[13] In one recent case, the Court was ready to approve remuneration of $200,000 based in part on the practitioner's compliance with the remuneration report in the IPA Code.[14]

The IPA itself conducts education programs for its members where the IPA Code and remuneration and other issues re explained and discussed. Guidance to members is often given via the IPA website and through phone and email advice on Code issues.

As we have previously noted, there is an existing regime in corporate insolvency whereby all remuneration must be approved by creditors, or by the court. If there are disputes, apart from discussions and mediation, the only available approach is to go to court. As we stated in our first submission, we support consideration of possible alternative regimes whereby fee disputes might be resolved more quickly and cost effectively.

We note the new fee disputes regime in personal insolvency currently being proposed by the government and which has been reviewed and endorsed by a Senate Committee.[15] In a presentation given at the IPA's National Conference in May 2010, Mr David Bergman of the Attorney-General's Department explained the amendments as being designed to reinforce the primary role of creditors in fixing a trustee's remuneration, give trustees certainty concerning their remuneration, and provide a more accessible and flexible mechanism for resolving disputes about remuneration.

The review which led to these amendments,[16] was prompted by a number of factors including the difficulties experienced by some trustees in getting creditors to approve remuneration, and the cost and complexity of the current regime for taxation of remuneration claims. The Bill would introduce a new process allowing the Inspector-General in Bankruptcy to review remuneration claims on a challenge being made which is proposed as being more flexible and accessible than the current taxation process. All of these principles are arguably as applicable to the processes in corporate insolvency.

The proposed remuneration regime in bankruptcy may well be one of the alternatives that might be considered as appropriate also for corporate insolvency. It might also be advisable to observe how successfully this new regime operates in the personal insolvency space for a suitable period.

The Committee should bear in mind that fee disputes are not common, in either personal or corporate insolvency. The IPA Code and the law both impose disclosure obligations on practitioners in relation to their remuneration. Creditors are the only ones who have the authority to assess and approve remuneration in the first instance. The personal

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[13] A recent case is *Pleash v Gold Coast Property Investments & Management Pty Limited (Receivers and Managers Appointed) (in liquidation)* [2010] FCA 541, on the IPA website.

[14] *Golden Star Resources Limited & Anor v Rosel* [2010] QSC 28, on the IPA website.

[15] Report on the Bankruptcy Legislation Amendment Bill 2009, February 2010.

[16] Announced by the Attorney-General in 2008 - see www.itsa.gov.au

insolvency regime acknowledges the primacy of creditors' authority to determine remuneration and hence any challenge to the amount or basis claimed raised by any individual creditor or director should be limited.

The different role of the Inspector-General in Bankruptcy and the nature of the personal insolvency regime (where bankruptcy expertise lies within ITSA in handling personal insolvency matters through the Official Trustee) would have to be taken into account.

3.2 Litigation in Insolvency

This issue has also been raised in some evidence from witnesses and comments from committee members.

There are many circumstances where it is right and proper for a liquidator or administrator to commence litigation, for example to recover assets taken from the company or to challenge transactions where for example property has been sold prior to the appointment at a low prices to company associates. Also, in many circumstances, a practitioner must be a party to liquidation commenced by other parties who seek to challenge the practitioner's action.

A question was raised by Senator Pratt in Newcastle. She said:

> *"Liquidators are doing spurious legal work without any real prospect of those actions actually returning anything to creditors but largely just for the sake of generating the fees that will use up a proportion of the assets that remain".*

It would clearly be unlawful for a liquidator to commence litigation without a proper legal basis, but a liquidator is entitled to pursue litigation that does not necessarily benefit the creditors and may in fact benefit the recovery of his or her remuneration. For example, if one creditor obtained full payment of its $20,000 debt shortly before the company went into liquidation, the liquidator may legally recover that as a 'preference' under the Corporations Act. If there are no funds in the administration, the liquidator may take legal proceedings to recover that preference – the alternative is that the creditor in question benefits unfairly, compared to other creditors, and the liquidator is unpaid. A legal authority to that effect is *Pegulan Floor Coverings v Carter*.[17]

Another aspect of this is the fact that the liquidator may pursue a claim as a means of enforcement of the insolvency laws – creditors, or any other party who unfairly make off with company assets should be legally pursued. These issues have been the subject of case law in both personal and corporate insolvency. In particular, in the well-known recent decision of the NSW Court of Appeal in *Hall v Poolman*[18] said that:

> *"14 A liquidator may legitimately and in accordance with his or her duties pursue litigation with the aid of a litigation funder even if there is little or no likelihood of recovery going beyond recovery of his or*

[17] (1997) 24 ACSR 651

[18] [2009] NSWSC 64

her own costs and expenses and the funder's fees, so long as certain provisos are met." [150]–[151]".

If by "spurious legal work" the Senator refers to the pursuit of legal claims without basis, we assume that would be without legal advice in support of the claim. Although a liquidator has to make a final decision on any litigation claim, there would have to be good reasons for not following such advice. The Courts provide a sanction against such conduct by ordering the practitioner to personally pay the costs of an unsuccessful "spurious" action. That is in fact in our experience quite rare but we give an example[19] where the court ordered the liquidator to pay costs personally because of a caveat he placed on land for which the Court found he had no legal basis.

Mr Doherty is correct in saying that the costs of any such litigation claim are generally borne by the company; but if the company does not have sufficient assets the liquidator may be responsible personally for the costs incurred. It is for that reason that liquidators will seek to obtain indemnities from creditors or have litigation funding in most cases.

3.3 Removal of liquidators

This is another issue that was raised on several occasions by the Committee. For example, in Newcastle, Senator Williams said

"We have a situation where you have a shonky liquidator taking control of your company and yet it is so hard to get rid of him. How do you see a solution to that? If the majority of creditors had a vote to remove a liquidator would that be a just and fair thing or would that be giving too much power to the creditors?"

Mr Fong in evidence in Newcastle said that creditors should have "a right to terminate the appointment of an administrator by a majority vote".

In a court appointed liquidation, it is not possible for creditors to vote to remove a liquidator, because it is the court that has made the appointment. In a creditors' voluntary liquidation, the creditors may vote at the first meeting of creditors to remove the liquidator appointed by the members. Beyond that, the creditors have no right to remove the liquidator. Similarly, in a voluntary administration, the creditors may vote at the first meeting of creditors to remove the administrator appointed by the directors, but not after that.

We note that in personal insolvency, creditors can vote to remove the trustee by majority vote, whether that trustee is appointed by the court (a "sequestration order"), or on acceptance of a debtor's petition. Section 181 of the *Bankruptcy Act* provides that:

"the creditors may, by resolution, at a meeting of which not less than 7 days' notice has been given, remove a registered trustee... and may at the same or a subsequent meeting appoint another registered trustee to be trustee in his or her place".

[19] *Bristow v McDermott* [2008] VSC 444

We are not aware of that right of creditors under that section causing any problems. A reform to the corporate insolvency laws comparable with bankruptcy may be another matter that could be considered.

3.4 Liquidator regulation overview

A significant focus of the inquiry has been on the process of registration, regulation and disciplining of practitioners. While we do not disagree with that focus as being one approach, we do point out that there are significant parties in many insolvencies who have breached the laws and an important role of our members is to report on and themselves regulate the insolvency regime. Insolvent trading, breach of directors duties, unlawful taking of assets are not uncommon in many insolvencies.

In any event, as we say in our first submission, there is, necessarily, a high level of practitioner regulation. This is comparable with, or greater than, that in many other professions. The purpose of regulation is of course to ensure compliance with the laws and also with professional and ethical standards; at the same time, over-regulation is costly in itself and can be counterproductive. Any regulation will not ensure complete compliance with the laws and proper practice, just as no amount of policing will ensure full compliance with the road rules. We consider that the level of insolvency regulation is satisfactory, but we also say that it could be refined and co-ordinated more satisfactorily.

We therefore endorse the responsibility of the regulators – ASIC and ITSA - to use the means available to them in the most effective manner. We think the effectiveness of reviews of corporate insolvency could be improved by more face to face file inspections along the lines adopted by ITSA. Apart from other things, a file inspection in the office of the practitioner allows the regulator to see the firm and observe its approach and culture; it allows some free exchange of comments between the regulator and the practitioner that establishes a relationship between the profession and the regulator; and it provides both parties with some feedback on matters of law and practice. Generally, this is the response we have from bankruptcy trustee members whose files are subject to ITSA reviews.

An aspect of the effectiveness of any regulation is to encourage co-regulation of the profession, with the IPA and other professional bodies. In his article in the IPA's *Australian Insolvency Journal*, Mr Michael Kirby says that:

> *"...in a cost-conscious age, it is important to keep in mind the advantages of a system of professional and statutory co-regulation. And when complaints are made about dividend returns, it is necessary for those who decide public policy to remember the particular advantages of co-regulation"*
>
> *which include that it*
>
> *"tends to be cheaper, quicker, more intuitive and less formalistic; [and] "if it is replaced by a larger role for public regulators, this has an undoubted cost that has to be funded. That cost becomes yet another economic consequence of insolvency...".*

The IPA has regular and productive liaison meetings with ASIC and other regulators and stakeholders. However co-regulation presupposes some level of co-ordination and co-operation on a individual matter level which is not available at present. As we explain in our first submission, ASIC is unable to provide us with information about its investigations of members' conduct; it also apparently has no or little communication with ITSA, state regulators or the professional bodies. We recommend that this lack of inter-regulator communication should be addressed to the benefit of all parties. This is so in particular now that IPA has improved its discipline regime whereby it can more promptly refer serious matters of misconduct to a regulator.

In particular, it also raises issues concerning the issue of whether there should in fact be a common insolvency regulator. In the IPA's submission to the Productivity Commission on the alignment of personal and corporate insolvency,[20] we addressed what we saw as inefficiencies imposed on the profession by the differences in the two legal regimes. We consider that this extends to the present system whereby the one practitioner or their firm will, if they are both a liquidator and a trustee, be subject to two uncoordinated regulatory regimes. We are also not convinced that there is sufficient communication between the two agencies, despite any memorandums of understanding between the two agencies.[21] Oversight of our members by each regulator appears not to be co-ordinated in terms of timing, or approach.

3.5 Tightening Liquidator registration processes

As a particular aspect of regulation, attention has been given to the process of becoming a liquidator, and to the qualifications for entry. We consider there are high level qualifications and experience required already which we have explained. We would support a requirement for completion of a course of focussed insolvency education and training as a requirement for registration. Insolvency itself is not a core subject in most accounting, law or business education; it is a specialist aspect of corporate law and practice. Full Membership of the IPA requires applicants to have passed a program that combines university based study, currently delivered in partnership with the Queensland University of Technology, as well as specialist workshop attendance and ethics based assessments. The IPA Code is addressed in these course requirements. This education regime is in fact recognised as one aspect of required study under the Bankruptcy Act.[22] Beyond that, continued membership of the IPA requires 40 hours per annum of insolvency focussed education and training.[23]

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[20] See http://www.pc.gov.au/projects/study/regulatoryburdens/business-consumer-services/submissions

[21] The then ASIC chair said at an IPA conference in Adelaide in 2002 "we are completing a comprehensive Memorandum of Understanding with our co-regulator in the insolvency industry, [ITSA]. The MOU will allow joint liquidator/trustee surveillance exercises and taskforces to examine offences where a director is bankrupt. That is a sensible development between two agencies wishing to optimise resources and information in appropriate circumstances. The MOU was signed in 2002.

[22] "On 1 December 2004, new eligibility requirements for solicitor controlling trustees were introduced. [a person] is not eligible to act as a controlling trustee if the person has not by 1 December 2006: (i) become a full member of the [IPA]; or (ii) satisfactorily completed a course in insolvency approved by the Inspector-General. The approved course in insolvency [being that of QUT, which conducts IPA's program] reflects the industry standard because it is recognised by the [IPA] as a component of its insolvency education program": www.itsa.gov.au

[23] IPA Constitution and Regulations

There may be merit in an intensive education course as a pre-requisite for registration as a liquidator, or a trustee.

3.6 Operation of Chapter 11 in the United States

On a number of occasions during evidence, and in some submissions, the suggestion was made that a process similar to the Chapter 11 provisions in the United States may lead to better outcomes for creditors of insolvent or distressed businesses in Australia were it available.

This was raised by Mr Doherty and Professor Holmes at the Newcastle hearings, and by Mr Gould at the Sydney Hearings. It also arose in the discussions held between the IPA's Legal Director and the Committee Secretariat.

While the mentions of Chapter 11 in the transcripts are brief, it seems clear that there is a tendency to regard a Chapter 11 style process as one likely to lead to lower costs, shorter timeframes, fewer ultimate liquidations, and better creditor outcomes. We perceive that these expected improvements are anticipated particularly for small to medium sized businesses.

We believe that any such expectation is a doubtful one.

Mr Doherty envisages a distressed company advising ASIC that they "are in trouble" and the company then being able to trade, with an insolvency professional only brought in at the last gasp, if that becomes inevitable.

In fact, once a company enters Chapter 11 in the USA, its activities immediately come under the detailed scrutiny of the Court. Continued trading is at the discretion of the Court, and it is not unusual for many interested parties to retain lawyers to present their particular position in those proceedings.

Also, the administrative costs of Chapter 11 are significant.

The objective of Chapter 11 is to allow a distressed business to bring about a stay that allows it to restructure and to emerge in a stronger position. The Australian variant of this process is Voluntary Administration (VA). Both processes involve the debtor business proposing a restructuring arrangement, known as a Plan of Reorganization in Chapter 11 and a Deed of Company Arrangement, or "DOCA", in Australia.

The most significant difference between the two regimes is that under a VA, control of the business passes to the administrator, with the creditors of the distressed business voting on the proposed DOCA after receiving a report on its merits from the administrator. Under Chapter 11, the directors and managers of the distressed business remain in control of the business and its assets, and the Plan of Reorganization needs to be approved by the Court.

It is important to note that in this way Chapter 11 puts the interests of the distressed business ahead of the interests of its creditors, including, significantly, its secured creditors.

In a paper evaluating the success of the US process,[24] data for companies entering Chapter 11 in 2002 are analysed, and show that of all such entries, the proportion of companies in which a Plan of Reorganization was confirmed was 33%.

In Australia in 2002, there were 2,457 appointments of administrators to companies, and 710 appointments of administrators to a Deed of Company Arrangement.[25] That ratio is 29%, only marginally lower than the US result. In neither case is data at hand to compare the eventual success of the Plan or Deed. One may want to question the value of such a small increase in formal restructuring rates – assuming it would be achieved – against the widely acknowledged increase in cost, court supervision and process complexity that a Chapter 11 style scheme would bring with it.

The question of whether Australia's VA regime should be replaced with a process similar to the USA's Chapter 11 was specifically considered by CAMAC in 200426 and dismissed. In its conclusions, the Report said:

> *The Advisory Committee has not identified any fundamental difficulties in applying the VA provisions to large and complex enterprises, or any circumstances where it is necessary to have separate corporate recovery regulation for these enterprises.*

Interestingly, the premise of that reference to CAMAC and its report was that while the VA regime was widely accepted as being appropriate and effective for small to medium companies, the question was asked about its applicability to large corporations.

In Chapter 11, data from 1994 and 2002 show a progressive increase in the size of corporation filing for Chapter 11 protection, with the median debt level in 2002 being $US1.8m, and with 49% of companies entering Chapter 11 having larger debt that the median. The median time from entering Chapter 11 to the confirmation of a Deed (equivalent to accepting a DOCA) was 1 year in 2002.

Conclusion

The IPA is pleased to be able to assist the Committee with any further information that may be required.

[24] Warren, E & Westbrook, JL; "The Success of Chapter 11: A Challenge to the critics"; (2008-2009) 107 Mich. L. Review 603 at 616.

[25] http://www.asic.gov.au/asic/asic.nsf/byheadline/2002+insolvency+statistics%3A+new+format?openDocument

[26] Report on rehabilitating large and complex enterprises in financial difficulties, October 2004.

APPENDIX A – IPA letter of 7 April 2010 to Secretary about Mr Ariff

7 April 2010

Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins

SENATE ECONOMICS REFERENCES INQUIRY INTO LIQUIDATORS AND ADMINISTRATORS

At the hearing on 12 March 2010, Senator Williams referred to the IPA submission at points 4.4 and 4.5 and asked the CEO of the IPA, Ms Denise North, if the IPA could supply a copy of its correspondence with Mr Ariff in 2006. This was in relation to Mr Doherty's then company, Independent Powder Coating Pty Ltd (IPC). Mr Ariff was at that time an associate member of the IPA.

From an examination of records from that time, we inform the Committee of the following correspondence, including emails and reports.

1 Narrative of correspondence

A secured creditor of IPC appointed Mr Ariff as voluntary administrator to the company on 13 February 2006 under Part 5.3A of the *Corporations Act*. A first meeting of creditors of the company was held on 20 February; the second and main meeting was then held on 10 March 2006. The report to creditors under s 439A of the Corporations Act was prepared by Mr Ariff and dated 2 March 2006. It showed that IPC was insolvent and had been for some time prior to his appointment; that the company had limited assets, unpaid employee entitlements, and unsecured creditors exceeding $840,000, including $174,000 in tax liabilities. There is reference to the fact that the ATO had in fact served tax penalty notices on Mr Doherty.

At that second meeting, creditors accepted the recommendation in the report that the company be wound up. Mr Ariff then became the liquidator. He proceeded to realise the assets of the business and otherwise administer the liquidation.

On 23 May 2006, Mr Doherty wrote by fax to Mr Hugh Parsons, the IPA's then CEO, complaining about the conduct of the meeting of creditors and about the alleged lack of independence of Mr Ariff. Mr Doherty copied his letter to Mr Ariff. Mr Ariff wrote to Mr Doherty on 24 May, saying he was seeking advice from his lawyers about certain issues and would respond that day or the next.

On 25 May, Mr Ariff wrote to Mr Parsons enclosing a copy of his long letter to Mr Doherty of the same date, in which he responded to the various issues raised by Mr Doherty. That letter attaches a number of documents, including his s 439A report.

By letter of 31 May 2006, Mr Doherty wrote to Mr Ariff continuing to raise concerns. On 9 June, Mr Ariff wrote to Mr Parsons and also responded to Mr Doherty, offering to meet with Mr Doherty to discuss his concerns.

We have a record of an email from Mr Doherty, dated July 2006, to Mr Ariff's then lawyers, Turnbull Hill, complaining about the sale process of the assets of the company. The focus of his concern appears to have been the fact that some assets being sold were not those of the company.

Mr Mike Lotzof took over as CEO of the IPA at around this time. On 15 August 2006, Mr Lotzof emailed Mr Doherty saying that he had "reviewed all the files and materials sent by you and received from the liquidator and cannot see any grounds for disciplinary action" etc against Mr Ariff in relation to his administration of IPC.

There were then a number of further emails between Mr Doherty and Mr Lotzof, and others. In particular, Mr Lotzof sent an email on 28 August 2006 to Mr Doherty, to which Mr Doherty responded on 5 September, copying his response to ASIC.

Mr Lotzof then emailed Mr Ariff again, on 6 September, including what he said was a formal complaint to the IPA from Mr Doherty. He asked about the relationship between Mr Ariff and Mr Mladineo.

Mr Ariff replied to Mr Lotzof by letter of 19 September 2006 giving a detailed response. In that letter, he explained the sale process in some detail, as to the assets sold, that the sale was conducted at arm's length, and in the best interest of the creditors; and he explained the relationship with Mr Mladineo. There were then further emails in 2006 between Mr Lotzof, Mr Ariff and Mr Doherty, the last one to Mr Lotzof being on 26 September 2006 in which Mr Doherty said that he hoped some action against Mr Ariff would ensue.

2 Supreme Court decision of August 2009

In the decision of the NSW Supreme Court of 18 August 2009 [2009] NSWSC 829, the Court said this about IPC:

> "19 The next company is Independent Powder Coating Pty Ltd, a company conducting a business of powder coating in Newcastle and later in Dungog. The defendant [Mr Ariff] was appointed as administrator on 13 February 2006 and as liquidator on 9 May 2006. The admitted facts include an improper communication with the Insolvency Practitioners Association of Australia in which the defendant admits he improperly advised that association that he had received an offer for the purchase of the business of the company. He admitted that he charged the company nearly $6,000 for expenses incurred as a result of an improper authorisation of his employees to enter private premises and to seize assets on that land when he knew or ought to have known that the land was privately owned and that the ownership of the assets was in dispute. The defendant also admits to failing to pay superannuation to employees and PAYG tax to the Australian Taxation Office".

This does put the correspondence with the IPA in 2006 in some context. Notwithstanding that we were provided with information from Mr Ariff that appeared reasonable, he later acknowledged to the Court that it was not.

For your information, Messrs Joseph Hayes and Jason Preston of McGrathNicol were appointed as replacement liquidators by the Court on 18 August 2009. We understand they are in the process of finalising the administration of the liquidation of IPC. They have lodged a proof of debt in the bankruptcy of Mr Ariff on behalf of IPC.

3 Documents attached

We attach copies of the letters and emails we have referred to, and most of the annexures to them, although we have tried not to duplicate copies of documents. Some annexures are not copied, for example a booklet information package for the sale of the business of IPC. We can provide copies of any documents if the Committee requires them.

4 Confidentiality, completeness etc

We ask that this letter and its attachments be kept confidential. One reason for this is that although we have gone through our records in some detail, we cannt be sure that all relevant documents have been located. Also, the IPA was often copied in on emails between others. And although we have emails from Mr Doherty to those others, we do not necessarily have their email to which Mr Doherty responds. In other respects, we may not have bene able to locate all of our paper records, some of which are in archives, although there are no apparent gaps that we can see. We also have not searched for or located any file notes or records of meetings or converstaions that may have added to this narrative.

We have however endeavoured to assist the Committee in its inquiry by way of searching for and providing these records. We think that what we have produced gives an adequate picture of the concerns being raised by Mr Doherty with the IPA, and ASIC, at that time.

If the Committee considers that more documents or information should reasonably be provided, we would be pleased to assist. In that respect, please contact me on 02 9080 5826 or by email on mmurray@ipaa.com.au.

Yours sincerely

Michael Murray
Legal Director

APPENDIX B – IPA Comments on certain submissions to the Senate Committee from creditors, directors etc

Submission Number and Source	Issues Raised	IPA comments
11. Mr Antal Bittmann, the secretary/director of Antal Air.	Mr Bittmann complained to ASIC about the manner in which controllers and liquidators of an unsecured creditor of Antal Air discharged their functions. In letters from 2003-2006, ASIC said it did not intend to take any action on his complaint.	Mr Bittman to review ASIC's decision; he was refused by the AAT - *Bittman v ASIC* [2006] AATA 732 and the Federal Court *Bittman v ASIC* [2006] FCA 1786. The judge found his appeal "plainly defective".
13. Mr Andrew Garrett, The Andrew Garrett Group	Mr Garrett makes complaints against the banks and practitioners. His wine making business failed in 2003, the NAB appointing receivers to it, and he ultimately became bankrupt.	Mr Garrett has engaged in extensive litigation since then about his claims. He has been declared a vexatious litigation by the SA Supreme Court: *Attorney-General for SA v Garrett* [2009] SASC 19.
15. Richard and Barbara Wright, owners of rural cattle stud farm.	They complain about the appointment of a receiver by the bank and actions taken by the receiver. They took successful action against the receivers under s 420A Corporations Act – failure of duty to sell for a price (breeding cattle).	There are many matters raised by the Wrights. They successfully challenged in Court the conduct of the receiver appointed to their company and received a settlement. The decision in *Skinner v Jeogla* in 2000 resolved the matter at the heart of the complaint. Orders were made in favour of the Wrights for $1.2m, plus costs. Receiver had failed to discharge duty in relation to a sale. However, we understand the Wrights owe many millions to the bank.
39. Martin Vink, raising issues about the conduct of the liquidation of Corporate Interior Constructions Pty Ltd (in liq).	Mr Vink's complaint is about inaction by ASIC, and how the Courts handled his complaints. Principal complaint appears to be in relation to the administration of Corporate Interior Constructions Pty Ltd (in liq) and how it was handled by the liquidator Mr Colin Tuckwell.	Mr Vink has been unsuccessful in his applications against liquidator Colin Tuckwell. The Victorian Supreme Court found that Vink made "serious allegations of misconduct, dishonesty or fraud against Mr Tuckwell without any reasonable basis for doing so": *Vink v Tuckwell (No 2)* [2008] VSC 206. The Court recommended law reform whereby ASIC should be able to vet applications like Mr Vink's – he had no interest himself in the liquidation. Mr Vink appealed to the Victorian Court of Appeal and ultimately to the High Court, which refused him leave.

Submission Number and Source	Issues Raised	IPA comments
41. Mr Duncan Ross, and Mobilesoft	Mr Ross complains that the administrator was not independent – administrator took on the administration of a company – Mobilesoft - that appeared to be in competition with or the same market as a company – IceTV - in which he was both the major shareholder and director. All claims of conflict of interest rejected by administrator. ASIC did not respond to his complaint. IPA is now examining his complaint	Mr Ross has complained to the IPA. It is being investigated in the usual manner and we have had contacted with Mr Ross and inspected the administrator's file and have discussions with him. We note that in *IceTV Pty Ltd v Ross* [2009] NSWSC 980, Mr Ross was found liable for having breached his duties as an employee. The administrator was a director of the plaintiff company - IceTV. This judgment is subject to an appeal by Mr Ross, being heard in July 2010.
50. Bevan Crowley, a bankrupt whose trustee is Mr Ken Sellers, BRI Ferrier	Mr Crowley makes complaints about 'standover tactics' by his trustee in relation to permission to travel for work outside of Australia and income contribution assessments.	Mr Crowley was made bankrupt in 1997, filed his statement of affairs five years late, in 2002. An objection to his discharge was lodged by Mr Sellers as his trustee. He remains a bankrupt til October 2010. The IPA complaint from Mr Crowley about Mr Sellers was received in February 2010. IPA is investigating and has had discussions with Mr Crowley and obtained more documents from him. Mr Sellers has himself responded to the Inquiry about this and has sent IPA a copy.
51. Steve Taylor, whose wife went bankrupt	Complaint to IPA about the bankruptcy trustee (Paul Leroy - Hall Chadwick) of his wife. Mr Taylor offered to pay out all creditors and trustee's fees to annul the bankruptcy. He alleges there were high costs and delays by the trustee in finalising the matter.	We understand Mr Leroy has spoken with Senator Williams about this and has sent IPA details of the conduct of the bankruptcy. The IPA has discussed this with both Mr Leroy and Mr Taylor and has inspected Mr Leroy's file. Decision on complaint is to be made shortly.
55. Stephen McNamara, SA lawyer	Mr McNamara provides a number of case studies demonstrating problems with liquidators, administrators and receivers.	He raised issues about the matters of Golden Chef and of Viscariello but much of his evidence was *in camera*. We have given information in our submission on Golden Chef.
74. Nicholas Bishop	He encloses his earlier 2003 submission and refers to Open Telecommunications, Mobilesoft, and Swish Group.	**Open Telecommunications** In *Re Open Telecommunications* [2003] NSWSC 1198, the NSW Supreme Court gave the administrator directions on how to proceed and approved his then proposed course of action. 4 The mechanism proposed by the deed administrator is quite ingenious. ...

Submission Number and Source	Issues Raised	IPA comments
		5 ... On the evidence [the administrator] is firmly of the view that the proposed scheme is viable and offers a better commercial solution than the present scheme under the DCA. ... if the implementation of the new scheme fails, the situation will revert in effect to the present situation and the creditors will be no worse off than they are at present. The administrator approaches the Court for assurance as to the legality and propriety of his entering into such arrangement in the light of doubts which may conceivably arise as to whether he is justified in taking the considerable sums of money potentially involved (in the vicinity altogether of $2m) out of the ambit of the CA to be clothed in the legal garments which I have described. 6 ... In my view there can be no objection on the ground of legality or propriety to the course he proposes to follow. I propose to give directions accordingly. Those directions need to be read in the light of the fact that the arrangement must be approved by the creditors to be implemented and the fact that the provision of the directions that the administrator is justified in following the course. ... **Mobilesoft** The IPA is handling a complaint from Mr Ross about the administrator of Mobilesoft. See no 41 above. **Swish Group** We do not know the details of this, a 2002 administration.
78. Jeffrey Bradford	Mr Bradford says that he and his colleagues "are extremely concerned at the actions of xxx. We have been advised by prominent lawyers that had the matter been allowed to be tested in the Supreme Court as the Trust had originally intended it would have taken possibly 1 to 2 days and involved a cost of some $10,000-$20,000. However, as a result of actions, the matter ran for 13 days and ended up costing the DLALC literally millions of dollars" etc "I respectfully request this Committee to enquire fully into the circumstances of this matter and to take this scandalous mistreatment of Aboriginal people into account in forming its views on the proper role and function of liquidators and administrators".	We understand this concerns Mr Peter Hillig, the insolvency administrator of DLALC, with whom the IPA has spoken. The issues are complex and long-running. We note that in one court decision, the Judge referred to the "perception of strong antipathy between the first defendant, Mr Bradford, and Mr Hillig, who is the administrator of DLALC appointed under the *Aboriginal Land Rights Act* 1984": *Hillig v Darkinjung Pty Limited* [2008] NSWSC 409. We have not assessed all the court judgments or the outcomes but we do note that there has been extensive litigation about this matter.