Senate Inquiry

Into

the fees and behaviour of Liquidators and Administrators

Submission by

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1. The author assisted (...), formerly (...) (...) as a financial analyst from the time that (...) made his claims against Linton. The author kept ASIC informed of the behaviour of Mr T from October 2002 and drafted formal complaints for ASIC to become interested in the liquidation of CIC. Further, in his application to the Court to bring the matter to the Court's attention, he filed all the relevant documents pertaining to the liquidation. Affidavits by creditors are also on the Court files. He has researched Court precedents and personally presented the application to the Court. He is therefore intimately familiar with the liquidation and the events surrounding this liquidation.

2. The author has also interviewed a number of liquidators and he has researched the applicable laws, the application of the laws and the behaviour of liquidators.

3. The author will assist the Committee in its inquiry if asked.

References

4. *The Administration and subsequent Liquidation of (...) (...) by (...) a partner of (...) as administrator and a partner of (...), both practices are located at (...), Melbourne (...).*

5. filed in the Supreme Court of Victoria on : It is submitted that Mr T wrongfully sued in an attempt to intimidate (...) to pay for the insolvency of her husband's business that was abandoned in December 2006. A new lawsuit was filed the same week to take its place. That lawsuit was also wrongful. It was criticised by the Court of Appeal and abandoned by Mr T by agreement with (...) on or about 11 November 2007. What is worrying to the author is that Mr T thought he could get away with it. It should be of extreme concern that any liquidator could do what Mr T did with relative immunity. For this reason the author brought the matter to the attention of ASIC and the Court.

6. (...) (...) filed in the Supreme Court of Victoria in (...) 2007. This was an application for the Court to inquire into the liquidation of (...) under s.536 of the Corporations Act. This application was not supported by ASIC for reasons unknown. Section 536 permits any person to bring irregularities in liquidations to the Court's attention. The Court was hostile to Mr Vink's application on the basis that "poor Mr Harvey and Mr Edge"[i] (see next paragraph) had incurred an awful expense and did the author really wish to initiate such a time consuming enquiry.[ii] The Court was more concerned with the format of the application than it's substance[iii]. Therefore, the prima facie evidence that was presented to the Court was not considered in the decision to deny the inquiry. An appeal against the process that the Court followed was not allowed. The Chief of Justice held that the author could suffer no personal damage if the appeal was denied. An appeal to the High Court was not heard on the basis that it was not in the interest of the public to hold such a hearing. This is a terse but fair summary.

7. Statement of Claim of Martin Bernard Vink against (...) that he was not able to file despite repeated applications to the Court. This statement is attached to this submission for reference.

8. A draft affidavit that Martin Bernard Vink applied to file after the technicalities of his submission had been aired in the Court. This document was denied but was submitted to the Court of Appeal. That Court did not consider the document in its decision. The draft affidavit was to replace all previous affidavits by the author. However, the Court should not have needed more than to be made aware of the problems. It should not have been up to the author to do more than to be able to argue the prima facie case against Mr T. That case involved the admitted violations of the Corporate Act as a result of the collusion with Mr V to destroy evidence required in the Court (the business records of CIC). This affidavit is also attached to this submission.

9. *ASIC v Harvey and ASIC v Edge.* In both these cases the author submits that the violations by the liquidators should have been handled by ASIC under s.536 but were instead heard by the Court. It was an expensive duplication of effort because it meant that the Court heard what ASIC already heard. It also meant that ASIC's decision (mostly made by peers) would be second guessed by the Court. It is submitted that the politicians who drafted s.536 had intended ASIC to be able to

follow a much faster and less expensive process. Ultimately, the suspensions provided by the Court were within ASIC's power and a jail term was not even recommended for by ASIC's prosecutors in either case. It is submitted that ASIC, even without the Court, had powers to impose tougher sanctions such as a life ban on either or both liquidators.

10. This submission can be entirely supported by documents contained in Vink v Tuckwell. To assist the Committee, the author is able to provide specific documents were needed within 24 hours (assuming any request to provide such documents is relatively narrow).

Submissions by the Author

11. **Creditors are routinely misled into believing that the liquidator is backed by large accounting firms.** Creditors are rarely given a fair chance to appoint their own administrators where the director of the company may not be investigated by the administrator he has appointed. In such cases, the possibility that the administrator has a conflict of interest is too great. The Kleenmaid administration by Deloitte is a recent example where creditors were misled into believing that Deloitte stood behind the liquidation. This appears to be of little concern to ASIC. ASIC was advised by the author of this possibility and ASIC has not responded. The author submits that the appearance that a major accounting practice is backing the administration (or even supervising it) is a major misrepresentation to the creditors who were interviewed by the author. All had thought that the accounting practice was in control of the liquidation. This matter was also raised in the author's application with the Supreme Court.

12. The author's research suggests that administrators and liquidators do not follow the clear expectations of Part 5.3A of the Corporations Act (titled "*Administration with a view to forming a Deed of Company Arrangement"*). Instead, **liquidators follow their own procedures and formats to give the appearance that the law is being followed**. The forms used by liquidators have wording that suggests that tasks are being performed when they are not. The author has confirmed this submission by checking with other liquidators. The author is confident that this can be easily ascertained by the Committee by looking at a dozen randomly selected liquidations in addition to Mr T's liquidation of CIC.

13. In the case with which the author is most familiar (CIC), the minutes of the meetings and the reports presented to the creditors were not based on fact. There were references in the Creditors' Reports to "investigations" that had not been conducted in a way that could be expected by creditors. The way that such investigations were presented to the creditors was misleading at best. Promises for further and complete investigations (made to gain the appointment of liquidator) were not fulfilled (once the appointment had been endorsed by creditor). The false promises and unsubstantiated allegations were used to mislead creditors into endorsing the

recommendations of the liquidator and to fund the liquidator to pursue (...) . Even the names of the directors of the company were misrepresented in the Report and in the litigation.

14. Had Mr T conducted investigations as prescribed by the Act, there could have been no wrongful litigation by Mr T, creditors may have been paid their invoices (of $800,000) in full (from the assets that really belonged to CIC and were held by the real directors) and Linton would still have her nest egg of properties valued at nearly $1 million. Further, there was an utter waste of public funds in the litigation that, had it been successful, would have resulted in a better payroll for Mr T and would have enabled him to settle a large legal bill with (...) . As Mr T was willing to settle for $300,000, it is doubtful that creditors would have received any more funds than those already available at the commencement of the litigation.

15. ASIC had been aware of many of the false allegations made by Mr T but were unwilling to investigate. The complaints made to ASIC are available.

16. The Court was made aware of the false allegations made by Mr T but was unwilling to take it any further, contrary to the intent of the s536 of the Corporations Act. The Courts could have implemented an inquiry when anomalies were first brought to its attention in 2003. This power was extended to the Court by Parliament through s.536 of the Corporations Act.

17. Section 536 has never been used by either ASIC or the Courts as intended by Parliament. The author was repeatedly made aware of the reluctance by the Courts to implement an investigation brought to its attention by "any person" as was legislated. Even Chief Justice Marilyn Warren questioned whether any person should be able to assist the Courts.

18. Over the years (2003 to the present) the author has made his concerns available to members of parliament in various submissions, in particular to the Joint Committee for Corporations and Financial Services. The author is grateful of the efforts of some members, particularly Jason Wood, in trying to take a closer look at these matters. I submit that ASIC did no more than to deny my allegations to the Committee. ASIC was not asked to provide specific answers to any allegations. A large submission made by ASIC and recorded by the Committee, was factually flawed. The author subsequently pointed out the flaws to the Committee. All this is on record with the Corporations Committee.

19. The evidence is there for all to see. A brief history of this case will serve to show how administrators and liquidator may act as a law unto themselves with very little fear of being prosecuted.

Brief History of the Liquidation of CIC

20. (...) (...) as director of CIC, appointed (...) (...) as administrator on 11 April 2002 on the advice of his accountant, (...) (...) Mr M had been the family accountant since 1994 and he was therefore aware of the circumstances of the marital separation (more than a year earlier) and the subsequent divorce of (...) , (...) (...)

21. At the time of the separation of the (...) , an agreement was recorded by Mr M in his handwriting. That agreement was provided to the Court. The agreement was formulated at five meetings between Mr M, Mr T and (...) in February 2001. It was subsequently summarised by (...) and Mr V and signed by both on 22 February 2001. Mr M was not a signature to that agreement but it is consistent with his notes. That agreement was also presented to ASIC and to the Courts.

22. As of the end of January 2001, CIC had been valued at $3 million by (...) , a business advisor, with whom I met throughout 2003. The author has not been able to contact (...) since 2004.

23. Prior to the appointment of Mr T, in February 2002, the Family Court had questioned whether (...) should not get more than had been agreed with Mr V a year earlier. This was based on both the income and the assets of Mr V in an application made by him to the Family Court to formally deny (...) access to the benefits of CIC. This is consistent with the viability and profitability of the business at the time of the marital separation.

24. As a result of this evidence, the possibility that the marital separation was a pre-meditated scam by either party to strip the company of its assets 15 months before calling in administrators should have appeared remote to Mr T. That suggestion was never made but was implied in the reports and actions of Mr T. Ms L's assets had never been assets of the company – they had been a mixture of personal assets and a self managed super fund. The author feel it necessary to remove that thought from the readers mind so that it does not taint this submission. Through cross examination in VCAT, the author ascertained to his satisfaction that both Mr M and Mr T knew of the truth of these matters.

25. The minutes of meetings between Mr V, Mr T and creditors refer to obligations to (...) by (...) that she did not have. She was not aware of the allegations and the collusion that led to the litigation against her. She was not invited to any of the meetings of creditors at which allegations were made against her as an alleged director of CIC. As (...) was alleged by Mr T to be a director of (...) at the time of its insolvency, she should have been invited to meetings and she should have been provided with minutes or reports of these meetings.

26. (...) was not at meetings where it was alleged to creditors by Mr V, Mr T and Mr M that her properties belonged to CIC. It was only by sheer luck that she was made aware that her properties had been placed on the market by Mr T. However, it was expensive to hire (...) to obtain the necessary admission from the

Commonwealth Bank **("CBA")** that the properties belonged to (...) . (...) should have been advised of such meetings on the basis that Mr T had alleged that she was a director of CIC. As owner of the properties she also had the right to be informed of decisions regarding the disposition of her properties by Mr T. It beggars belief as to how CBA allowed properties to be considered for sale without first informing (...)

27. (...) also had to obtain copies of the 29 April 2002 Creditors' Report from Mr T in order to prepare a defence for (...) This information should have been given to her on the basis that she was alleged to be a director.

28. As (...) legal costs of initial assaults on her properties by Mr T were approaching $100,000 before Mr T had filed any litigation, she found herself cash strapped for her entire defence over the next five years.

29. In October 2002, Mr T commenced to allow bank guarantees to be claimed against (...) properties in the amount of around $25,000. These claims were false but it is sufficient to say here that Mr T should not have allowed these claims to have been made because he himself had deemed them to be expired in one of his earlier letters . However, based on interviews with the Victorian Privacy Commissioner's Office (one of the claimants) the author became aware that Mr T had initiated these claims himself by calling the claimants. VCAT overturned the claims and restitution was ordered. However, that does not answer the liquidator's possible abuse of power that resulted in a drain on (...) resources.

30. On 4 December 2002, at a secret creditors' meeting (committee of inspection) was held with Mr T presiding. Mr V appeared to have called the meeting to request funding to pursue (...) in the Family Court in an application that was still to be filed but using his earlier application (mentioned above) for the Court to accept the February 2001 agreement. An application was then filed by Mr V in March 2003. Three months earlier, however, on or about 19 December 2002, the Family Court constrained (...) to use her remaining resources to defend herself.

31. Simultaneously, and without first issuing a letter of demand, Mr T served (...) with his false application in the Supreme Court of Victoria. That application falsely referred to a letter of demand. In fact, everything in that writ (like the creditors' report) was false. Over the next four years, (...) had to make interim applications to clarify the writ in preparation for her defence as it was misunderstood by lawyers and judges. Each interim application resulted in the removal of part of the writ. Ultimately the writ was withdrawn in its entirety.

32. In January 2003, Mr T and Mr V colluded to destroy the business records after (...) had advised them that she sought to rely on these documents in the Family Court. This is fully documented in both the Family Court and the Supreme Court. Judges in neither Court showed any concern for due process to Linton and the mounting cost of her applications to obtain the business records. As an alleged director and as a former director (...) had the right to access the business records of CIC under s.278 of the Corporations Act. Moreover, Mr T had been advised of Court Orders

requiring the production of the business records of CIC. Mr T continued his lawsuit without supporting documents.

33. During 2003, the Family Court, after many interim applications, restored to (...) her ability to defend herself. All of this cost around $50,000 and her inability to find work.

34. No sooner had the Family Court lifted its injunctions than Mr T applied for a Mareva injunction in the Supreme Court (on or about 9 December 2003). Justice Mandie held that (...) ought to have access to her funds to defend herself and to pay for her family's living expenses. Mandie J stated that the allegation by Mr T that Linton had acted irresponsibly with her assets was without foundation.

35. In 2005 (...) successfully obtained cost orders against Mr T that stayed Mr T's action against her for a year until Mr T decided to pay the taxed costs. (...) then filed for further costs on the basis of abandoned claims relating to the orders of Justice Dodds-Streeton in December 2007. These claims against Mr T were in excess of $70,000. Mr T's new claims were bound to fail. His new claims made no logical and legal sense. They were inconsistent with the previous claims and he was unable to calculate the amount claimed. They were entirely without foundation.

36. As stated above, (...) and Mr T agreed to abandon their respective lawsuits (to the chagrin of those who had helped Linton at their own expense and who wished to see her assets restored and Mr T facing a prison term).

37. In July 2007, knowing that creditors would not be paid by Mr T, the author filed a complaint with the Court to initiate an investigation of Mr T's administration and liquidation of CIC. Support for this application was provided by a number of creditors. As indicated above, the Court did not wish to hear it.

38. These matters are now brought to the Committee's attention as an example of the possible abuse of powers by liquidators and the difficulty that creditors and others have in reversing the momentum that this abuse sets in motion. The timeframe imposed on liquidators does not allow for abuse as creditors are bound to suffer from the delay of decisions.

39. It is entirely possible that administrators and liquidators, by and large, do not act according to the law. ASIC and the Courts in this instance were not willing to take any initiative in looking at the facts. I submit that facts may have little to do with liquidations and that liquidators are able to use liquidations for their own purposes or for goals stipulated by the directors appointing them.

40. The cases of Harvey and Edge suggest that cases against liquidators would have to be extremely serious before ASIC decides to act. Even then, the penalties imposed by the Court (simple suspensions) would not deter other liquidators from doing the same. ASIC did not even apply for appropriate penalties.

41. Finally, it is unlikely that ASIC is supervising liquidators' compliance with the Corporations Act. It would appear from the author's research that ASIC is only looking to see the reports filed but not reviewing the substance of these reports. In the case of Mr T and CIC, he was effectively able to file the same semi annual reports for five years. To the best of my knowledge, ASIC accepted all of the reports and financial statements without question.

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i Justice Robson

ii Justice Whelan and Justice Dodds-Streeton.

iii Justice Dodds-Streeton questioned the format of the affidavit and Justice Robson did not allow a statement of claim to be filed to clarify how the evidence was to be used.