

Chapter 4

The role of the regulator, disciplinary body and industry representative: ASIC, the CALDB and the IPAA

4.1 This chapter briefly outlines the intended role of the main agencies overseeing the insolvency industry in Australia. Subsequent chapters critique the way in which these agencies have performed their roles.

Australian Securities and Investments Commission

4.2 The Australian Securities and Investments Commission (ASIC) is the main regulator for insolvency practitioners and stands above what it calls other 'gatekeepers':

Our oversight role in this industry is really complemented by the roles of others, loosely called gatekeepers, to protect creditors. You have, of course, the professional associations such as the IPA, and the objective certainly seems to be that insolvency be administered as a profession—like accountants, auditors and lawyers. ASIC has worked with the IPA on the development of its code of professional practice, and ASIC supports IPA's work in improving standards. You also have the courts: court-appointed liquidators play an important supervisory role. You have creditor committees that are elected for certain insolvencies. They play an oversight role in providing advice and approving remuneration. You also have creditors themselves, who play a pivotal role in appointing administrators and maintaining the administration process.¹

4.3 ASIC describes its oversight responsibilities as including:

- administering the registration of liquidators to ensure that applicants meet the minimum entry-level statutory criteria;
- encouraging compliance with the law by working to improve guidance to insolvency practitioners regarding ASIC's expectations within the legal and regulatory framework in which they operate;
- monitoring the compliance of insolvency practitioners with the regulatory regime, through monitoring and acting on complaints and undertaking reviews of registered liquidators and their conduct;
- taking enforcement action where it appears there has been misconduct; and

1 Mr Tony D'Aloisio, Chair, ASIC, *Committee Hansard*, 12 March 2010, p. 2.

- educating, informing and assisting stakeholders to ensure that they are properly informed about insolvency laws and processes and their rights and obligations.²

4.4 ASIC describes a relatively minimalist regulatory approach:

The economic philosophy underlying the Australian regulatory regime is that markets drive efficiency and that markets operate most efficiently when there is a minimum of regulatory intervention. This philosophy can loosely be called 'efficient markets theory'.³

Insolvent trading and ASIC's role

4.5 A company is insolvent if it is unable to pay all of its debts when they fall due. Section 588G of the *Corporations Act 2001* states that a director has a positive duty to prevent insolvent trading. A debt must not be incurred if the company is already insolvent at the time the debt is incurred or if by incurring a debt the company becomes insolvent.⁴

4.6 One of ASIC's key responsibilities is to prevent insolvent trading: it can take a director to court on a claim that he or she has traded insolvent. A registered liquidator or creditor of a company may also bring proceedings against a director to recover compensation for loss resulting from insolvent trading.

4.7 In July 2010, ASIC published a regulatory guide to help directors understand and comply with their duty to prevent insolvent trading. The guide noted that directors should actively monitor the solvency of the company, investigate financial difficulties, obtain advice from an appropriately qualified person where necessary, and consider and act appropriately on that advice.⁵

4.8 The committee notes that the number of 'windings up' will depend to some extent on the way in which directors of a company exercise corporate responsibility. This, in turn, will depend on the adequacy of structures to encourage this responsibility and deter companies from becoming insolvent. Mr D'Aloisio was asked for his opinion as to whether the current framework was adequate to promote corporate responsibility and prevent insolvencies. He responded:

...in our system there will be corporate failures. The risk and reward equation is that from time to time there will be failures. What tends to happen is that, at the smaller end of the market, there are more failures

2 ASIC, *Submission 69*, pp 8-17.

3 ASIC, *Submission 69*, p. 19.

4 ASIC, *Regulatory guide 217: Duty to prevent insolvent trading*, July 2010, p. 6, <http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/10-164AD%20ASIC%20releases%20guidance%20on%20a%20director%E2%80%99s%20duty%20to%20prevent%20insolvent%20trading?opendocument> (accessed 27 July 2010).

5 ASIC, *Regulatory guide 217: Duty to prevent insolvent trading*, July 2010, p. 9.

because the risk taking, cash flow management and so on for those companies probably is not as strong as it is with the large companies. I think overall the system is working well.⁶

Companies Auditors and Liquidators Disciplinary Board

4.9 The role of the Companies Auditors and Liquidators Disciplinary Board (CALDB) is to determine the appropriate disciplinary action once ASIC has identified some wrongdoing:

Our purpose is basically the protection of the public interest in relation to the disciplinary function over auditors and liquidators...We have no investigative powers ourselves. Cases are referred to us either by ASIC under the act or by APRA. In dealing with those cases and making our orders we are totally reliant on evidence presented to the board and on the expertise of members of the panel.⁷

4.10 The Chair of the CALDB described the Board's role as being:

...to protect the public interest by ensuring that the regulatory system for disciplining members of the auditing and liquidating professions who fail to perform their professional duty adequately are appropriately dealt with.

Firstly, so that the particular person concerned is properly dealt with and deterred from engaging in further conduct of the same or similar nature.

Secondly, so that the other members of the profession can see that that particular conduct has led to that particular result...detering them from engaging in the same or similar conduct.

Thirdly, to reassure the public that the regulatory system is there and that it is working effectively...so that the public can have confidence in the services provided by auditors and by liquidators...⁸

4.11 After receiving an application from ASIC (or the Australian Prudential Regulatory Authority) the CALDB panel organises a pre-hearing conference (usually by teleconference) to allow the issues under dispute to be refined and agreed upon by the two parties, and a hearing date is set.⁹ The evidence is then gathered, with the parties exchanging documents so that the hearing can be as efficient as possible. The process leading up to the hearing itself generally takes around six months to complete.¹⁰

6 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, pp. 18–19.

7 Mr Donald Magarey, Chairman, CALDB, *Committee Hansard*, 13 April 2010, p. 2.

8 Mr Donald Magarey, Chairman, CALDB, *Committee Hansard*, 13 April 2010, p. 6.

9 *CALDB Manual of Practice and Procedure: Conduct matters*, pp 7-10. Available at <http://www.caldb.gov.au/CALDB/CALDBWeb.nsf/byheadline/Procedures?opendocument>

10 Mr Donald Magarey, Chairman, CALDB, *Committee Hansard*, 13 April 2010, p. 4

4.12 The hearing can take 2–3 weeks, after which the panel gives its determination. If the determination is against the respondent, a final, short hearing is held to determine what order the board should make. The whole process should generally be completed within 12 months.¹¹ If the respondent is unhappy with the decision, they can refer their case to the Administrative Appeals Tribunal to be reviewed. It can subsequently be referred to the Federal Court of Australia.¹²

Insolvency Practitioners Association of Australia

4.13 The Insolvency Practitioners Association of Australia (IPAA) is the peak membership body for the industry. It has over 1700 members including over 500 registered liquidators and 185 bankruptcy trustees.¹³ This represents 85 per cent of registered liquidators and bankruptcy trustees in Australia as of December 2009.¹⁴ Membership is voluntary, and the IPAA is not involved in the registration of liquidators in Australia. All IPAA members are affiliated with either:

- the Institute of Chartered Accountants in Australia;
- CPA Australia; or
- the Law Societies in each state.

4.14 The IPAA's regulatory role has three elements:

- the setting of standards (guides and codes);
- the delivery of education through member training programmes; and
- the disciplining of members who are proven to have breached IPAA standards.¹⁵

4.15 The IPAA's Code of Professional Practice states principles of conduct and gives detailed practice guidance, in many cases setting a standard above the legal requirements. The IPAA also offers guidance to its members on the law and practice of insolvency, through telephone and email guidance, web and journal notifications, and training and conference sessions.¹⁶

4.16 The IPAA has no formal investigative powers. If investigations by other bodies establish that a member has breached the law, or professional codes of conduct, the IPAA's primary sanction is to remove the member's IPAA membership.¹⁷

11 Mr Donald Magarey, Chairman, CALDB, *Committee Hansard*, 13 April 2010, p. 4

12 *CALDB Manual of Practice and Procedure: Conduct matters*, p. 18.

13 IPAA, *Submission 36*, pp 27-28.

14 IPAA, *Submission 36*, p. 28.

15 IPAA website, *Regulating our Members*, <http://www.ipaa.com.au/default.asp?menuid=169> (accessed 17 June 2010).

16 IPAA, *Submission 36*, pp 15-16.

17 IPAA, *Submission 36*, p. 28.