

## Chapter 6

### **The evidence of regulatory failure and the need for a more proactive approach**

*Insolvency professionals are more likely to act opportunistically and in their self-interest to the detriment of third parties when the regulatory framework settings are weak...When ASIC cannot or will not act against the repeated misdemeanours of major accounting and insolvency firms...do not be surprised if a culture of fearlessness spreads throughout the industry and gambles are taken on white collar crime.<sup>1</sup>*

#### **Identifying regulatory failure**

6.1 The previous chapter noted the range of stakeholders' views on the current state of the insolvency industry in Australia. Some submitters claimed the 'bad apples' were cases of the regulator identifying and acting on misconduct in an otherwise well performing industry. Many other submitters argued that the 'bad apples' reflected a deeper malaise in the industry, not only in the practices of insolvency practitioners but in the regulatory framework to monitor their conduct.

6.2 Insolvency practitioners are over represented in complaints made to the Australian Securities and Investments Commission (ASIC). ASIC's submission notes that between July 2006 and December 2009, it received a total of 45 162 complaints and inquiries: 1647 or 3.6 per cent of these were against insolvency practitioners (see chapter 2). By comparison, the number of insolvency firms (662) as a proportion of the companies that ASIC regulates economy-wide (1.7 million) is extremely small.

6.3 It is difficult to quantify the extent of misconduct in the insolvency industry beyond what ASIC's outcomes and the Companies Auditors and Disciplinary Board's (CALDB) findings would indicate. However, the number of complaints against insolvency practitioners is significant compared with the small number of findings against administrators and liquidators. As one submitter noted:

...a review of recent statistics on the number of liquidators under investigation by ASIC suggests the current supervision regime may bring to light fewer transgressions than might be expected given the number of active liquidators in Australia and the complexity of many liquidations. The most recent Annual Report of the CALDB indicates only one uncompleted and one new conduct matter for the report year. ASIC's Insolvency Update

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1 Mr Jeffrey Knapp, *Submission 86*, p. 2.

of March 2008 identified only nine liquidators subject to disciplinary action, out of a total pool of 1146 registered liquidators.<sup>2</sup>

6.4 The committee recognises these statistics are a fairly crude indicator of regulatory failure. One could reasonably contrast the number of insolvency appointments with the number of cancelled and suspended registrations—as the Insolvency Practitioners Association of Australia (IPAA) has done—and reach a conclusion that the industry is performing well.<sup>3</sup>

6.5 Nonetheless, the evidence gathered by this committee over the past six months strongly suggests that there have been significantly more transgressions by insolvency practitioners than those identified by ASIC and prosecuted by the CALDB. In this context, this chapter draws attention to the deficiencies of these agencies in regulating the insolvency industry and offers a course for reform.

### **Criticism of ASIC's role**

6.6 A central theme of this inquiry has been the criticism of the role of ASIC as the principal regulator of the insolvency industry in Australia. There are four areas of concern:

- ASIC's reliance on complaints instead of proactive profiling of the insolvency industry (paragraphs 6.7–6.14);
- ASIC's slowness in responding to complaints, particularly in the those cases where significant wrongdoing has been subsequently found (paragraphs 6.15–6.26);
- whether ASIC provides adequate information and guidance for the various stakeholders in the insolvency industry (paragraphs 6.27–6.29); and
- whether ASIC is adequately resourced to monitor the insolvency industry (paragraphs 6.30–6.33).

#### ***ASIC's reactive, complaints-based approach***

6.7 The first criticism of ASIC in its monitoring of the insolvency industry is that its regulatory mindset and approach is overly reactive. Instead of conducting its own surveillance of the practices of liquidators and administrators, ASIC relies on a complaints-based approach which reacts to existing problems rather than deterring future misconduct.

6.8 The committee heard from insolvency law academics based in Adelaide that the approach to regulating the insolvency profession in Australia is reactive. Dr Vivienne Brand of Flinders University contrasted ASIC's *modus operandi* with that

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2 Dr Vivienne Brand, Associate Professor Christopher Symes and Mr Jeffrey Fitzpatrick, *Submission 6*, p. 12.

3 See paragraph 5.42.

of the United Kingdom's insolvency regulator. Based on the official statistics, she noted that the UK regulator gets a far higher strike rate on identification of misdemeanours from investigations initiated on a profiling basis than on the number of misdemeanours identified from complaints. Dr Brand told the committee that 'complaints do not seem to be a particularly effective way of identifying problems'.<sup>4</sup>

6.9 Dr Brand reasoned that the complaints based process is quite limited given that creditors often do not have a lot of expertise. Creditors may not know when misconduct is occurring or, conversely, they may think it is occurring when it is not. Accordingly, Dr Brand argued that it is 'particularly important to have a very active regulator' and that the seeming lack of ongoing active review of liquidators is 'concerning'.<sup>5</sup>

6.10 In this context, Dr Brand drew the committee's attention to the usefulness of profiling. She noted that the Legal Practitioners Conduct Board in South Australia has done profiling of its profession and found that those most likely to offend are middle aged, have been in practice for some time, and have pressures of home life and career. Dr Brand told the committee that this type of profiling could also have useful application in the insolvency context.<sup>6</sup>

6.11 In similar vein, the IPAA strongly advocated in its submission the implementation of a proactive annual review process of all practitioners through a certain number of randomly selected files. Mr Mark Robinson, President of the IPAA, argued that this type of review:

...will give a better sense of how a particular practice is running and also a sense of what the industry wide issues are. I think a proactive regular review process with a wide scope may well uncover problems before they escalate.<sup>7</sup>

#### *ASIC's view*

6.12 ASIC noted in its evidence to the committee that its investigative work in the insolvency area combines active surveillance activity developed through close consultation with the profession with the information it receives from complaints. ASIC Commissioner Mr Michael Dwyer told the committee that:

The selection of firms we choose to surveil is based around, firstly, our understanding of the industry which we maintain through close liaison with the profession and with other professional bodies. That allows us to understand what is happening within the profession. Obviously from that information and depending on other information we collect through our

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4 Dr Vivienne Brand, *Committee Hansard*, 9 April 2010, p. 4.

5 Dr Vivienne Brand, *Committee Hansard*, 9 April 2010, p. 4.

6 Dr Vivienne Brand, *Committee Hansard*, 9 April 2010, p. 12.

7 Mr Mark Robinson, *Committee Hansard*, 12 March 2010, p. 41.

complaints area, we then determine which firms we think may have issues which require further surveillance. We narrow down what potentially would be bad apples and may focus more on some of those programs or some of those firms. We select different sized firms— and we understand that processes in perhaps some of the larger firms allow them to have better quality control—and we take that into account and the other issues I have mentioned in determining which firms we surveil.<sup>8</sup>

6.13 Mr Stefan Dopking of ASIC similarly told the committee that ASIC's investigation processes combine an analysis of industry data with the evidence it receives from complaints. He explained:

In selecting the industry, we do have a good selection of data available within our systems that will help us to identify the size and the volume of jobs that a practitioner might have. So, once that reaches a certain level, it tells a certain message. Within each of those jobs we are told the age of the jobs, and documentation is lodged which we can review once we trigger that. We also have complaints that we receive. Through the liaison structure we do have whispers, and so we also have quite extensive experience within our own staff.<sup>9</sup>

6.14 The committee draws attention to the following comments from ASIC's Chairman, Mr Tony D'Aloisio, which seem to indicate the rather passive approach the regulator takes to insolvency matters. In giving an overview of the regulator's work in the insolvency area, the Chairman's first observation emphasised the role of others:

[T]he legislative framework that we working under, like the rest of the Corporations Act, is essentially self executing. Basically it is up to the people who are affected by the laws to comply with them. ASIC's role is oversight and its regulatory functions are set out in the act. Our oversight role in this industry is really complemented by the roles of others, loosely called gatekeepers, to protect creditors.<sup>10</sup>

### *ASIC's unresponsiveness to complaints*

6.15 A second criticism of ASIC, and a significant theme of this inquiry, has been the unresponsiveness of the regulator to the complaints it receives about the conduct of a liquidator or administrator. The committee received many submissions noting that their complaint to ASIC about the conduct of an insolvency practitioner was either not answered, answered months later, or simply filed on a database with no subsequent action. The following excerpt, in a submission from Mr Stephen Koci, gives a good sense of this inertia:

...I wrote to ASIC about the above company and the administrator on the 7th May 2009 [and] I wrote again on the 28th May 2009 as I had not heard

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8 Mr Michael Dwyer, *Committee Hansard*, 12 March 2010, p. 6.

9 Mr Stefan Dopking, *Committee Hansard*, 12 March 2010, p. 7.

10 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 2.

anything from ASIC not even receipt of my letter. I then rang ASIC on the 5<sup>th</sup> June 2009...and ASIC could...find no reference to my letter...then when they rang me back they still could...find no reference to my letter and suggested I fax the letter...

I did and then I got another call from ASIC to state...they actually did have my letter...and that it was being referred to the Melbourne office and would be done urgently. I wrote to ASIC again on the 11th June 2009, 16th June 2009 and on the 25th June 2009, 4th July 2009 and the 23<sup>rd</sup> July 2009 to state my ongoing anger at ASIC and there [sic] shockingly slow response to this urgent matter...

[F]inally I received a letter dated the 29th July 2009 from Tony D'Aloisio the Chairman of ASIC, that letter took ASIC over 2 months to send from my initial complaint and all it said was basically ASIC was going to take no action and just told me information that I knew and was on the public record. Basically...ASIC just brushed my concerns away and while they took their time the administrator was destroying the company.<sup>11</sup>

6.16 Mr Stephen McNamara, a director of a small law firm acting for directors and guarantors of companies in liquidation, was also critical of ASIC's unresponsiveness. He told the committee that in his experience:

...the only avenue that seems to be available to directors and guarantors et cetera at the moment is to go to ASIC. But ASIC is generally too slow and does not get on top of the problem quickly enough. As I said, these people have usually been seriously affected, their lives are under serious stress and they need something to happen quickly—and that just does not occur.<sup>12</sup>

6.17 Mr Duncan Ross expressed similar frustration at ASIC's lack of system and response to his complaint. He explained in his submission that in late 2008, he lodged a complaint with ASIC about an insolvency practitioner and, having heard nothing 'for some weeks', contacted ASIC by phone. ASIC advised that Mr Ross' complaint had been 'lost in the system' and asked him to relodge it.<sup>13</sup>

6.18 Mr Ross then provided ASIC with several documents relating to his complaint but was advised that the regulator would not act any further. ASIC gave no reasons why it would not investigate. Mr Ross elaborated:

General comments from speaking with a number of ASIC staff over a period of some months gave me the impression that they were very selective about choosing their battles. This appears to me to be more about taking public scalps rather than enforcing the law.<sup>14</sup>

6.19 Mr Doherty described his experience with ASIC as follows:

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11 Mr Steven Koci, *Submission 85*, pp. 2–3.

12 Mr Stephen McNamara, *Committee Hansard*, 9 April 2010, p. 36.

13 Mr Duncan Ross, *Submission 41*, p. 2.

14 Mr Duncan Ross, *Submission 41*, p. 3.

If you make a complaint against ASIC you get on their website and fill in a complaint form and hope for the best. I did that three times. Nothing really happened except that I was going to get added to their database again and again. Most of the others also had the same experience. About six months after ASIC launched their court action I thought to myself, 'I will just see how this system works', so I put in another electronic complaint. Do you know what I got back? 'Thank you for your correspondence of 1 May 2009. The issues you have raised will receive careful consideration and ASIC will contact you again in due course.' At least two companies that I am aware of have been told outright by ASIC that ASIC was simply not resourced to handle complaints less than \$10 million. That does not really augur too well for the 99 per cent of the 1.7 million corporations in Australia that they are charged to protect, does it?<sup>15</sup>

6.20 Mr Greg Nash, appearing before the committee in a private capacity, speculated on the reasons why ASIC has been unable to respond to complaints in a timely manner. He told the committee:

I can only presume that it is either underresourced or negligent, because there are so many complaints and so little action; it can only be saying, 'We can't be bothered', or, 'We are not going to do it for other reasons' which are inappropriate, or, 'We have not got the people to do the investigation.' As I said, the difficulty with white-collar crime is that a lot of it is to do with opinion. A lot of it is to do with accounting and it is fairly resource heavy.<sup>16</sup>

#### *The lack of regulatory response to the Ariff case*

6.21 The regulator's lack of responsiveness is most damning in the Ariff case. The committee queries why both ASIC and the IPAA took so long to identify Mr Ariff as a practitioner that should be investigated. As chapter 5 noted, these agencies received numerous complaints on the matter from several parties, including:

- Mr Bernard Wood, who complained to ASIC twice in early 2005;
- Carlovers, which complained to ASIC three times between 2005 and 2007;
- the Armidale Dumaresq Council, which received acknowledgement of a complaint related to the YCW League Club, but has not heard from ASIC since;<sup>17</sup>
- Mr Ron Williams, who lodged a complaint but was told by ASIC to refer the matter to the Office of Fair Trading or get legal advice; and
- Mr Bill Doherty, who complained to ASIC on three occasions and to the IPAA, CPA and ICAA 'more than 50 times'.<sup>18</sup>

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15 Mr Bill Doherty, *Committee Hansard*, 14 April 2010, p. 11.

16 Mr Greg Nash, *Committee Hansard*, 14 April 2010, p. 6.

17 Councillor Edward Maher, *Committee Hansard*, 14 April 2010, p. 77.

6.22 The IPAA told the committee that following Mr Doherty's complaint in 2006, it wrote to Mr Ariff to seek his response which, at the time, the Association accepted as 'appropriate'. It eventually referred the matter to ASIC for investigation, but only after several subsequent complaints—'more than 10 maybe'.<sup>19</sup> Still, the IPAA rejected suggestions that the complaints were to no avail: 'Mr Ariff has been struck off, he has been banned for life, so it was to some avail'.<sup>20</sup>

6.23 Chapter 5 noted that media publicity prompted ASIC's eventual action in the Ariff matter.<sup>21</sup> In evidence to the committee, Mr Doherty lamented that the regulator only becomes involved 'once it is on the front page'<sup>22</sup> and were it not for the media, Mr Ariff 'would still be playing'.<sup>23</sup> Mr Ron Williams of the Adamstown Rosebud Sports Club expressed the same view.<sup>24</sup> Carlovers described ASIC's eventual response as 'too slow, too little, too late'.<sup>25</sup>

### *Small businesses*

6.24 Some submitters noted that ASIC and government agencies tend not to be concerned with the insolvency complaints of small businesses. As Mr Doherty argued in his submission: 'It is of concern when the peak (and only) regulator expresses to a complainant that they are not funded to deal with difficulties of value less than \$10 million'.<sup>26</sup> Mr Ron Williams presumed that the Department of Fair Trading did not take action in his case because the Club is too small and the amount of money missing or stolen too insignificant.<sup>27</sup> Mr Ian Fong of Carlovers also identified a problem with ASIC responding to small business complaints. He told the committee that ASIC should either be better resourced or there should be another division within ASIC to deal with problems of small to medium sized businesses.<sup>28</sup>

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18 Mr Bill Doherty, *Submission 9*, p. 1.

19 Ms Denise North, *Committee Hansard*, 12 March 2010, p. 42.

20 Ms Denise North, *Committee Hansard*, 23 June 2010, p. 13.

21 See also Jeffrey Fitzpatrick, Christopher Symes and Vivienne Brand, *Submission 6*, p. 12.

22 Mr Bill Doherty, *Committee Hansard*, 14 April 2010, p. 14.

23 Mr Bill Doherty, *Committee Hansard*, 14 April 2010, p. 10.

24 Mr Ron Williams, *Committee Hansard*, 14 April 2010, p. 28.

25 Carlovers Limited, *Submission 26*, p. 2.

26 Mr Bill Doherty, *Submission 9*, p. 5.

27 Mr Ron Williams, *Committee Hansard*, 14 April 2010, p. 32.

28 Mr Ian Fong, *Committee Hansard*, 14 April 2010, pp. 45–46.

*ASIC's view*

6.25 ASIC's Chairman has recognised that the complaints handling process generally is an area that ASIC needs to improve. He also accepted that it took too long to respond to the McVeigh and Ariff cases.<sup>29</sup> Mr D'Aloisio told the committee:

...when we look at this industry overall we think that improvements are needed, as is clearly evidenced by our work in progress and the forward program...But we do not have evidence of systemic failure or widespread abuse. In saying that, we are not in any way taking away from those who have suffered where there has been misbehaviour. We need to also, I guess, bear in mind that creditors are upset when money is potentially lost and do not readily appreciate the value of money going to a liquidator as fees rather than as dividends to them. All in all, we do not feel there is widespread abuse or systemic failure, but we certainly feel that there is a need to make improvements...One piece of evidence that helped support our view is our complaints handling...In the 3½ years from July 2006 to December 2009 there were some 47,085 insolvency appointments. We received 1,647 complaints or 3.6 per cent on practitioner misconduct...We are not suggesting that this evidence is conclusive and that everything is all right; we are simply saying that there is a need to improve and our forward program and our current work is aimed in that direction.<sup>30</sup>

6.26 In its submission to this inquiry, ASIC noted a number of new initiatives it is conducting to improve its complaints handling process. In particular, ASIC's forward program includes the continuing upgrade of its online portal including the online complaints facility on ASIC's website.<sup>31</sup>

***Lack of communication with creditors***

6.27 A third and related area of concern with ASIC's (and the IPAA's) role in insolvency matters is the lack of communication between the regulator and creditors. The committee received evidence that creditor education has been a neglected area.

6.28 In their submission, Carlovers Carwash (see chapter 5) recommended that the government pass laws to force insolvency practitioners and their industry bodies to educate the public about the administration process and their rights and obligations. It argued that this information should be accompanied by clear and adequate warnings. Mr Ian Fong, representing the company, explained to the committee that this information need only be:

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29 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 15.

30 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 3.

31 ASIC, *Submission 69*, p. 16.



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...a simple sheet where, No. 1, you say creditors have a right to terminate the appointment of an administrator by a majority vote. That would be good. It is just what you can do to protect your rights.<sup>32</sup>

6.29 Mr Nicholas Bishop argued in his submission to this inquiry that there needs to be much better publicly available information about creditors' rights. He noted that it is not feasible in many cases for creditors to obtain professional advice, because of cost, and most creditors will be unfamiliar with the process. Mr Bishop identified the need to publicise and clearly explain the following issues:

- it is possible for creditors to vote to replace the administrator at the point of voting to go into a Deed of Company Arrangement (at the second creditors' meeting);
- it is possible for an administrator to seek an extension of time for the second creditors' meeting from the Supreme Court;
- the meaning of a Deed of Company Arrangement and what is permissible and prohibited;
- the priorities in Schedule 8A of the Corporations Act need to be stated in simpler language; and
- the possibility that during a Voluntary Administration, a major creditor could put the company into receivership.<sup>33</sup>

### *Is ASIC under resourced?*

6.30 The fourth criticism made of ASIC during this inquiry is that it is under-resourced to perform the job it is required to do in the insolvency area. At its first public hearing for this inquiry, the committee asked ASIC's Chairman whether the regulator has the resources to meet its responsibilities in insolvency. Mr D'Aloisio gave the following response:

In relation to resources, at a broad level, clearly, we have a program and we are implementing the program across a range of areas and, as I have said on other occasions, we are resourced to do what we are doing. That applies to this area as well.<sup>34</sup>

6.31 Mr D'Aloisio explained to the committee that ASIC had increased the resources devoted to insolvency matters over the past few years. The catalyst for this increase was the 2007 legislation, which was followed by ASIC's 2007–2008 strategic review. In that review:

...insolvency or liquidation was identified as a key area of focus, particularly as we were then planning on the basis that at some point there

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32 Mr Ian Fong, *Committee Hansard*, 14 April 2010, p. 45.

33 Mr Nicholas Bishop, *Submission 74*, p. 5.

34 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 16.

would be a downturn—which, of course, would lead to a greater number of insolvencies. That led ASIC to recommend that a dedicated commissioner be appointed, and subsequently the government appointed Commissioner Dwyer. It led to the IPL—the Insolvency Practitioners and Liquidators, a dedicated team of some 30 full-time equivalents...and it led to additional resources from other areas, such as in misconduct and breach reporting; the office of Chief Legal Officer and deterrence teams were directed to assist.<sup>35</sup>

6.32 Although stating that ASIC is not under resourced, the Chairman admitted that he was unsure as to whether ASIC's slow response times could be attributed to the regulator simply not acting or whether it indeed lacked the resources to do so. On this matter, he told the committee:

I am not in a position to give you a concluded view on that at the moment. The position we took when we did the strategic review of ASIC and put addition resources in this area and, as you can see, from the forward program, is that we should be doing more. We are doing more and trying to be quicker with the deterrence mechanisms. I am not in a position to make a judgment at the moment as to whether the regulatory system itself needs further overhaul; I am just not sure. I think we need to do a lot more work ourselves in enforcing the existing law.<sup>36</sup>

6.33 Mr Doherty argued that there is a disconnect between Mr D'Aloisio's statement that ASIC is adequately resourced and its lack of responsiveness to complaints about insolvency practitioners. He interpreted this incongruence as:

...simply an admission that he does not have a clue what is expected by the public of ASIC. What did ASIC actually do in the case of Ariff after being forced to act by the press? I have to say that their actual investigators, when they were finally assigned to the task, were very good and dedicated people. But they obviously lacked resources. I was getting calls at 11 o'clock at night. I cannot understand how they can keep their morale to the level that they have given the conditions they work in.<sup>37</sup>

### **Criticism of the Companies Auditors and Liquidators Disciplinary Board**

6.34 As chapter 4 discussed, the role of the CALDB is to investigate conduct matters referred to it by ASIC pursuant to section 1292 of the *Corporations Act 2001*. A panel is appointed to conduct confidential hearings to discuss whether a registered liquidator: has failed to carry out their duties and functions adequately and properly; is not a fit and proper person to remain registered; is subject to disqualification; or is otherwise ineligible to remain registered. The panel has the power to cancel or suspend a liquidator's registration; and/or admonish or reprimand; and/or require the liquidator to give an undertaking.

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35 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 3.

36 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, p. 12.

37 Mr Bill Doherty, *Committee Hansard*, 14 April 2010, p. 10.

6.35 The CALDB has no power to investigate cases. Rather, ASIC is responsible for investigating complaints and, where it thinks appropriate, will refer a matter to the CALDB for adjudication.<sup>38</sup> By statute, the CALDB is independent of ASIC, although it receives its funding from ASIC's budget.

6.36 In his 2007 ruling on the High Court appeal cases of Mr Vanda Gould and Mr Richard Albarran, Justice Michael Kirby noted that a professional disciplinary board might not have been the only way to provide discipline for company liquidators. However, in Justice Kirby's opinion, 'it offered advantages over the courts of cost-saving, speed, flexibility and specialist knowledge'.<sup>39</sup>

6.37 The committee's evidence is that, on at least some of these scores, the CALDB has been found wanting. There have been various criticisms including that the Board lacks independence from ASIC, takes a prolonged time (and cost) to reach a finding, has few cases referred and makes few findings, and is often referred inconsequential matters.

### *Independence from ASIC*

6.38 Mr Donald Magarey, Chairman of the CALDB, confirmed that the activities of the Board are 'totally contingent' on what ASIC may or may not direct it to do.<sup>40</sup> However, he stressed that under statute and in practice, the Board is 'completely independent' from ASIC.<sup>41</sup>

6.39 Mr Vanda Gould argued in his submission that the CALDB sees its role as little more than an enforcement arm of ASIC and that ASIC is highly selective as to whom it prosecutes.<sup>42</sup> He elaborated on this view in his evidence to the committee:

...it is important to understand that ASIC is highly selective as to who it prosecutes. Some practitioners have a relationship with ASIC which in practical terms precludes prosecution. The truth is that any practitioner in a fishing expedition, like I experienced, would arguably have blemishes of the type found in the 46 charges...laid against me by ASIC. Whilst I successfully defeated the 46 charges, it took more than eight years until I

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38 ASIC operates a national 'Auditors and Liquidators Watchlist' ('Watchlist'). It is an intermediate measure for dealing with conduct, which in ASIC's opinion is culpable but not sufficiently serious to warrant taking the case to the CALDB. The Watchlist is periodically reviewed and entries removed after three years if no new matters of concern have been detected. Liquidators whose names are entered on the Watchlist are informed of that entry but it is not open for public inspection.

See Dr Brand et al, *Submission 6*, p. 12.

39 *Albarran v Companies Board* (2007) 231 CLR 378, 95 (Kirby J).

40 Mr Donald Magarey, *Committee Hansard*, 13 April 2010, p. 9.

41 Mr Donald Magarey, *Committee Hansard*, 14 April 2010, p. 15.

42 Mr Vanda Gould, *Submission 4*, p. 3.

was wholly exonerated, subject to making a small qualification, at the end of 2009.<sup>43</sup>

6.40 Mr Geoffrey McDonald, a former insolvency practitioner (see chapter 5), was also critical of what he saw as the CALDB's subservience to ASIC. He told the committee that:

...when ASIC picks you as the one that they want to target and can find one of the things that go wrong and you are not one of the chosen ones, they will put you up to CALDB and they will rubberstamp it. It would be interesting to see how many cases before CALDB have been lost. I understand it is 100 per cent in favour of ASIC. I do not know of any tribunal that goes 100 per cent to nil over years. So I would be very interested in seeing that statistic. It was told to me by the people at CALDB. After two years of that particular person being there, they knew of statistics where ASIC had a 100 per cent success rate over two years.<sup>44</sup>

### *A protracted process*

6.41 Mr Geoff Slater, a barrister, argued in his evidence that the CALDB process simply takes too long. He noted one case that took 12 months to resolve, adding:

...if...I am a fisherman and I run a commercial fishing boat and I have got a few hundred thousand dollars worth of fish in my hold that are frozen and the electricity is about to be cut off or something like that, 12 months just is not good enough. There needs to be a system in place operationally in the course of insolvency where people can get immediate relief before the farm is sold or whatever is about to happen. I think that is something that shows that CALDB is a complete policy failure.<sup>45</sup>

6.42 The committee heard criticism that the appeal process is also protracted. Mr Gould has argued that the disciplinary framework leaves too much to the discretion of ASIC and provides practitioners with no direct access to the Federal Court.<sup>46</sup> Associate Professor David Brown and Associate Professor Christopher Symes from the University of Adelaide have expressed their concern that complex issues of insolvency law, practice and remuneration, once decided by the board, may be appealed to a generalist single judge of the Administrative Appeals Tribunal.<sup>47</sup>

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43 Mr Vanda Gould, *Committee Hansard*, 13 April 2010, p. 19.

44 Mr Geoffrey McDonald, *Committee Hansard*, 13 April 2010, p. 43.

45 Mr Geoff Slater, *Committee Hansard*, 13 April 2010, p. 47.

46 Mr Vanda Gould, *Committee Hansard*, 13 April 2010, p. 20.

47 Associate Professor David Brown, *Submission 40*, p. 5.

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***Few cases and few findings***

6.43 Dr Vivienne Brand, Mr Jeffrey Fitzpatrick and Associate Professor Symes have observed that CALDB's workload and output have not been great. They noted in their submission that:

The CALDB Annual Report for 2008 reveals that there were no new applications before the Board for liquidators conduct, one uncompleted matter at year end, and one matter appealed to the AAT. In the 2009 Annual Report there was one new application and one uncompleted matter at year end. While these numbers appear sparse, especially in light of the number of registered liquidators in Australia, further research on these matters is required before any sound conclusions can be drawn.<sup>48</sup>

6.44 Associate Professors Brown and Symes drew attention to the fact that few cases—especially under the 'conduct' category—are brought before the CALDB by ASIC. He added:

...we doubt that this is because there are hardly any cases of practitioner misconduct or default, and therefore it must be surmised that ASIC is not devoting sufficient time and resources to the monitoring and investigation of insolvency practitioners. We do not have access to any evidence to support this however, but recommend that the Inquiry should focus on...the policy and operations regarding referral of cases to the CALDB. In any event, we recommend a review of the jurisdiction and operation of the CALDB in relation to insolvency practitioners.<sup>49</sup>

6.45 Mr Magarey was asked whether the Board's role extended to pursuing liquidators suspected of misconduct. He gave the following response:

I do not see it as part of our purpose to get rotten apples off the street. If we were created for a different purpose or if our purpose were changed by legislation to give us those powers, we would exercise them. We might have to be differently resourced if we had to start investigating complaints that came in, and we might have to conduct our proceedings differently. We would then do that. That might then produce the sorts of results that you are talking about, about rotten apples. We would be able to do that and we would do it. I do not want to say whether that is a better policy result than the existing system.<sup>50</sup>

***Trivial matters***

6.46 Mr Gould described some of the allegations made against him by the CALDB as 'technical to the point of triviality'.<sup>51</sup> The Institute of Chartered Accountants of

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48 Dr Brand et al., *Submission 6*, pp. 13–14.

49 Associate Professor Brown and Associate Professor Symes, *Submission 40*, p. 4.

50 Mr Donald Magarey, *Committee Hansard*, 13 April 2010, p. 10.

51 Mr Vanda Gould, *Committee Hansard*, 13 April 2010, p. 19.

Australia (ICCA) argued in its submission that the CALDB should be reserved for auditors and insolvency practitioners who have made serious breaches of the Corporations Act. It considered that the referral of inconsequential matters to the Board 'might negatively impact on how the CALDB process is perceived'. The ICCA held that minor breaches relating to administrative matters should be dealt with through the use of enforceable undertakings where ASIC's evidence is not tested and the accountant may not admit or may disagree with the concerns.<sup>52</sup>

## Summary

6.47 This chapter has canvassed various criticisms of the role of ASIC and the CALDB in their oversight of insolvency practitioners. It is concerned that ASIC's mindset is insufficiently proactive and that it is slow and unresponsive in handling complaints. It is not clear what has contributed to this situation. However, one can reasonably speculate that the causes lie in a mix of outdated regulatory structures, the regulatory culture within ASIC and the various competing priorities for ASIC's time and resources.

6.48 The committee is also concerned that the CALDB is not strictly independent from ASIC and that it takes too long to adjudicate on matters. Chapters 10 and 11 discuss these issues further.

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52 Institute of Chartered Accountants of Australia, *Submission 66*, p. 5.