COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Reference: Liquidators and administrators

FRIDAY, 12 MARCH 2010

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SENATE ECONOMICS

REFERENCES COMMITTEE

Friday, 12 March 2010

Members: Senator Eggleston *(Chair)*, Senator Hurley *(Deputy Chair)*, Senators Bushby, McGauran, Pratt and Xenophon

Substitute members: Senator Williams to replace Senator McGauran

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Bushby, Cameron, Eggleston, Fierravanti-Wells, Hurley, Pratt and Williams

Terms of reference for the inquiry:

To inquire into and report on:

The role of liquidators and administrators, their fees and their practices, and the involvement and activities of the Australian Securities and Investments Commission, prior to and following the collapse of a business.

WITNESSES

Committee met at 8.30 am

CHAIR (Senator Eggleston)—I declare open this hearing of the Senate Economics References Committee into the role of liquidators and administrators. On 25 November 2009, the Senate referred the inquiry to the Senate Economics References Committee for inquiry and report by 31 August 2010. This inquiry will investigate the role of liquidators and administrators, their fees and their practices, and the involvement of the Australian Securities and Investments Commission prior to and following the collapse of a business. To date the committee has received over 70 written submissions.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time. I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

[8.33 am]

D'ALOISIO, Mr Tony, Chairman, Australian Securities and Investments Commission

DAY, Mr Warren, Senior Executive Leader, Stakeholder Services, Australian Securities and Investments Commission

DOPKING, Mr Stefan, Senior Executive Leader, Insolvency Practitioners and Liquidators, Australian Securities and Investments Commission

DWYER, Mr Michael, Commissioner, Australian Securities and Investments Commission

CHAIR—Welcome. I invite you to make an opening statement if you so desire.

Mr D'Aloisio—I would like to make five comments. Before doing that, I would like to indicate that we have, as you are aware, put in an extensive submission which is really focused on the terms of the inquiry, particularly the role of ASIC within the terms of this inquiry. We have given some of that material—in fact, appendix E—on a confidential basis to the committee. I would ask that, if there are questions in relation to that, it be held in camera rather than in open session.

CHAIR—We will accede to that.

Mr D'Aloisio—Thank you. Appearing with me is Commissioner Dwyer; Stefan Dopking, the senior executive, Insolvency Practitioners and Liquidators; and Warren Day, the senior executive, Stakeholder Services and the regional commissioner for Victoria. Warren has a particular role in relation to our misconduct and breach reporting, among his other activities; Stefan heads the section that primarily deals with insolvency practitioners and liquidators; and Michael, of course, you know from other appearances as a fellow commissioner.

The five points I would like to make are these. Firstly, the 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. 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.

Secondly, the legislative framework for insolvency practitioners has been evolving. Most notable in that regard are the amendments made in 2007 which cover the requirement on practitioners to issue remuneration reports, the requirement to issue declarations of interest, the requirements of an adequate PI and fidelity insurance. Those amendments also provide a greater

flexibility to the CALDB, the disciplinary board, and strengthen the protection of employee entitlements. As that legislation has evolved in recent years, so have ASIC's resources and its functions. Following the strategic review of ASIC in 2007-08, 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 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 which Stefan Dopking heads, 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. That new structure has led to important new initiatives—and in that I refer the committee to table 1, in the executive summary—on fees and independence, and other projects that we have on the go.

Thirdly, 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 that is detailed in table 1 of the executive summary and then expanded on in sections C and D of our submission. 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 and, indeed, we can get into some of the areas that we are working on, if the committee wishes, in questions. One piece of evidence that helped support our view is our complaints handling, which is set out in table C1.1. 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, and you will see in paragraph 204 of our submission the categorisation of those complaints. Notably, you are seeing that about eight per cent relate to inadequate disclosure or excessive fees, and three per cent are in terms of allegations of fraud. 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.

Fourthly, you will see from our submission that the work ASIC does falls under a number of headings ranging from education and guidance to enforcement. I will briefly mention some of the current projects and issues that ASIC is grappling with. The first of those is around the registration of insolvency practitioners. We are looking at reviewing regulatory guide 186 to see if we can strengthen the fit and proper test. You will note that in the legislation, once a liquidator is registered it is not that easy for ASIC to deregister. Registration itself and the requirements of registration are not a high hurdle; it is different to licensing. Registration and not licensing really reflects government policy in this area.

The second area to mention in terms of our role and what we are doing are the remuneration reviews. ASIC's role in remuneration is limited as I stated earlier. The prime responsibility for fees and review is with the credit committees, the creditors and the court. There is no fixed scale of remuneration. ASIC's role is to monitor these procedural requirements but, because of the importance of fees and with the benefit of the recent changes in the law, ASIC, through its remuneration project, which is detailed in our submission, is stepping up surveillance of

remuneration practices. It is seeking to improve the information that is available to creditors and their rights in relation to remuneration. It is looking at issuing a regulatory guide on what at least ASIC would consider as reasonable remuneration. It is looking at whether we can make use of external cost assessors in particular surveillances that we may undertake in relation to the reasonableness of fees.

We are also doing work on independence. As with other professionals, insolvency practitioners need to manage conflicts of interest and make independence declarations. We are undertaking further work, including selective surveillance, to assess the independence disclosures. The more difficult issue will be to assess related party transactions or at least sales of assets where less than market value may have been realised. We have recognised that surveillance in this is probably going to be the way to go in this area but our work in that regard is in the early stages.

The area of PI insurance is another one of our responsibilities. Since July 2008, PI insurance and fidelity insurance has been introduced. We have issued regulatory guide 194 and we have got ongoing work to assess how this regime is working to assess the claims made issue and run-off cover, assess how to improve notification or lapses of PI insurance. PI insurance, as in the financial industry, as you will be aware, poses particular issues as a protective mechanism for investors or creditors in this case. It has got limitations. Nevertheless, our regulatory mandate is to see how best we can make it work.

Finally, on our activities, there are the important enforcement activities. ASIC remains active in enforcement activities and we recently increased resources in our deterrence teams to improve outcomes in this area. Some of those outcomes or a summary of them are set out in paragraph 256. We have had 18 outcomes in the courts, CALDB enforceable undertakings. We have got a number of ongoing investigations and since 2006 we have banned some 243 directors.

Our visits to companies to assess early if there are insolvent issues is also a very important activity in ensuring that directors understand the laws relating to insolvent trading. In relation to this enforcement area it is important to mention that, while the McVeigh decision and some of the more recent decisions of the CALDB might seem single decisions, the McVeigh decision itself is very significant because you have the CALDB setting out very extensively the duties and obligations that it considers insolvency practitioners should follow over a range of areas. It will become a very significant piece of work or decision for both ASIC and the profession to look at and learn from in terms of how at least the CALDB will enforce these duties.

My fifth and final point is of course that ASIC works with other law enforcement agencies, most notably the Director of Public Prosecutions, the AFP, state police and the Australian Crime Commission. As part of that role, if it comes across suspicious activity of a potentially criminal nature, it will work with or refer the matter to those agencies.

In summary, the upshot of our submission is that we believe that ASIC is performing its functions responsibly and, as you can see from our forward program, we are using our regulatory powers to the maximum extent that we can to seek to improve conduct on such matters as fees, enforcement and independence. For us, this inquiry is very important because it will provide us with an ability to assess the evidence in the submissions and look at where we need to make additional improvements to work towards improving the standards in the profession. As I said at

the start, we are an important oversight body but we are not the only body that is responsible for the standards in relation to insolvency practitioners. The profession itself and the associations carry significant responsibility, as do policy and creditors themselves in this area. Thank you for the opportunity to make my opening comments. I am happy to answer any questions.

CHAIR—Thank you, Mr D'Aloisio. I might just ask you a couple of opening questions. Obviously this reference has occurred because there is concern that there is a problem with the activities of liquidators and insolvency practitioners. Do you, as the supervising organisation and body, feel that there is really a serious problem there, or is it just a few bad apples in the barrel?

Mr D'Aloisio—I think the way that it has been presented is a bit of a contrast—everything is okay or there are just some bad apples. As you would be aware, life never works in that sort of simple way. There is no question at all that there are bad apples. What we are saying is, in terms of where we are and the evidence we are seeing through the complaints and through the work that our people are doing in the field, we see areas for improvement and our forward program is focusing on those, but we are not extrapolating from that there is a major drama here.

We also look at other areas. We supervise and oversight work on financial advisors, other AFSL holders, auditors and so on. We do not see this area as being different in terms of us needing to improve and work with the industry. We are not seeing this as a standout problem or anything of that nature. I am sorry that I cannot be more precise, but we are not seeing the systemic issue. By the same token, we are not at the end of saying, 'They are just a few bad apples; don't worry.' Our view is that there are a number of issues that need to be addressed and that we need to work with the industry and the association, most notably around fees, independence, the issues that we have covered in our forward program and the points I made earlier. So we are probably somewhere towards a few bad apples, but much more towards the centre of those two extremes.

CHAIR—I see. That is a very useful answer. You have talked about the regulations and penalties. Do you think you have sufficient regulatory powers? Are the penalties sufficient? Would a different licensing system be more appropriate than a registration system?

Mr D'Aloisio—I think we would like to hear more on these issues. Certainly, had we identified real problem areas from a policy point of view, we would have raised them with Treasury and government, but we have not. So we have not to date been seeking additional powers. As I said earlier, a lot of the legislation on this, particularly the 2007 legislation, is quite recent, so there is still quite a lot of work for us to do to settle those amendments and get our forward program before we start thinking of additional changes. In answer to your question, we have not seen the need for us to provide advice to government to make those changes. Depending on how we go as part of this inquiry and the submissions that we see as it unfolds, we will definitely review that as we go as to whether good ideas are emerging where additional power may assist us. But we are not coming in with that sort of position. Our position is that we have a framework and we have to improve the way it is working. We are not seeing an immediate need to ask for further reform.

CHAIR—You also said you work closely with the Australian Federal Police and other federal agencies. Do you think they have the manpower and the resources to assist you as much as you

would like to be assisted in dealing with these sorts of problems? You talked about the need for increased surveillance.

Mr D'Aloisio—When the investigation work gets to a point where we feel we ought to bring in another agency such as the Federal Police or the state police, or go to the Director of Public Prosecutions for a prosecution or refer something up to the Australian Crime Commission,—and the chairman of ASIC is a board member of the Australian Crime Commission—we have not had any difficulty in getting the attention of those agencies. We work extremely well together. We have memoranda of understanding between us. The matter of the resources is something you would need to ask those agencies. But, from our end, we get cooperation.

Senator HURLEY—I am interested in the program of visits and what happens before there is a problem. You said in your submission that you will be undertaking 10 practice surveillances by December 2010 and you have identified those practices by way of risk assessment. I take it they are high-risk practices or are you looking at a range of practices?

Mr D'Aloisio—I will open that discussion and then ask Michael or Stefan to add to it. ASIC operates basically a risk based surveillance system not only for insolvency practitioners but for auditors, financial licence holders and other areas where we have responsibility. Risk based surveillance is a function of letting the particular teams and groups work out where they think they should be putting their efforts from time to time, depending on the issues they see emerging. Then that risk based surveillance is followed up by enforcement action or other action that may be required. That is the general framework we operate under. We do not operate under a system where we look at every single practice, every single practitioner and every single licence holder. We really have to do a risk assessment and focus in that way. Insolvency is the same. That is how we approach it. I will ask Michael and then Stefan to talk a little more about the specific surveillances we are looking at in this area.

Mr Dwyer—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 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.

Senator HURLEY—You say that some of the larger firms have better processes. Is there an educative aspect to those visits—advice that might go to those particular firms but also to others about how to operate?

Mr Dwyer—Yes. That is a good point, Senator. We do obviously pick up from our surveillance various issues which we share through our liaison activities. We meet with the profession in each state on a quarterly basis and we attend and speak at various state and national functions where we share our view with the professions. So it is communicated to the other firms and to the profession, and to the professional associations through those activities.

Mr D'Aloisio—It might be useful for Mr Dopking to talk about some of the reviews he does do.

Mr Dopking—It might benefit the committee if I give an example of how we go about selecting and undertaking a particular review and, then, flow through to what Michael has just said. 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.

In amongst the initial identification of those firms we do further work. Once those firms have been identified, and the end result of those examples are like the ones we have seen through the CALDB and other outcomes through the court, the starting point for us is similar to other agencies in that we will contact the firm and serve a notice on them. This requires them to produce documents within a week of our visit. We attend the premises. The first step of any visit is to have a discussion around how the practice operates: the type of education, the type of systems and controls they have and maintain, how their fee systems work—the sorts of issues that give us an understanding of that practice. We come to that practice with an understanding of the industry, and we also know from the documents lodged whether some of the questions have been answered appropriately.

That leads us to reviewing the files themselves. Depending on the focus of the concerns identified as part of the pre-intel and pre-visit review, we will focus on those files of particular interest to us. We also pick files at random when we are on that visit. As a result of that exercise we will sit down with the practitioner at the end of the visit and have a discussion around the sorts of issues we have identified that are of concern. You will see examples in the confidential submission in which a number of firms do appreciate that feedback. They will implement changes to their systems and confirm in writing that they have done that. For us it is an issue of whether those matters are serious enough to take to the next level, which is to commence formal investigations.

Our aim is to try to improve standards through that process initially, but we do on occasion identify practices that are unacceptable, in our view, and go to the fit and proper test of an individual. We then go through a process of building up sufficient evidence to take the matter further, either through the court or through the CALDB process.

That is one example of a visit. They can range, depending on the size of the practice, from a couple of days to two to three weeks. They are very intensive so we restrict them to where we feel they are necessary, based on the risk profile. We also undertake other types of transactional reviews which are educational as well.

As a final point, that sort of visit is supplemented by our project work, which we have set out in here, which raises standards across the whole profession, especially when new legislation has been introduced, as it was in 2007-08.

Senator HURLEY—Going to the other end, you mentioned professional indemnity insurance and some problems with it. Where it has been triggered and there has been a problem, has it been paid out and what has been the impact of that?

Mr D'Aloisio—The difficulty with PI insurance is when it is on a claims made basis. As you are aware, there are two types of insurance. You can have it on the basis that, if the insurance policy is in force when the misconduct occurs and the claim emerges three years later, you still have the insurance cover to take. The other way is that, when the claim is made, the policy has to be in force. PI insurance tends to be when the claim is made. If indeed what has happened is that the practitioner has not paid the premium or has falsified the return to us that the cover is in place or it has lapsed or it has been cancelled because of an event and we become aware after that has happened, the claims emerge after it has lapsed and you have a problem that the creditors will not have recourse to that PI cover.

It is a limitation that is built in. Normally how you deal with that is to have what is called run-off cover so that even though the policy has stopped there is a run-off cover for claims that may emerge. But that is getting into the realm of the negotiation of the particular policy by the particular practitioner or the association that works with them. There could be time lags between lapsed ASIC investigation and action for creditors. Then there would be no recourse. Indeed, as you would be aware, the Ariff case is an example of that. When the policy lapsed a lot of the activity and potential claims emerged subsequently and creditors would not have a claim. It is an issue. It is a PI issue that we are working with and trying to work with the industry to deal with. It is not only for this area but also goes across the financial advice area as well.

Senator WILLIAMS—I thank the representatives of ASIC for being here today. Mr D'Aloisio, you will discover whether a company's PI insurance is up to date in that company's annual report to you—is that correct?

Mr D'Aloisio—Yes, and that is historical in a sense, as you would be aware, because you get the form in and it is up to date at the date of the form. It does not necessarily mean if is two or three months later that it is still in force. This is the issue I was getting to with Senator Hurley.

Senator WILLIAMS—For the record, PI insurance is compulsory for liquidators, isn't it?

Mr D'Aloisio—Yes, it is.

Senator WILLIAMS—If you were to go and buy a car, comprehensive insurance is compulsory, I believe. If you let that comprehensive insurance lapse—it depends on the state?

Mr D'Aloisio—I think third party insurance is compulsory, but I am not an expert—I should qualify that straightaway.

Senator WILLIAMS—When I bought my first car a long, long time ago—probably before you were born—with the finance I had comprehensive insurance was compulsory. That was in South Australia. In those days if you did not pay your comprehensive insurance, the insurance company would notify the finance company and say, 'You haven't paid your insurance. You owe us money. Please pay your insurance'. Do you think that would be a good way to go as far as liquidators go with their PI insurance? If they do not make their payments, they let the insurance

lapse, then the insurance company should notify ASIC and say, 'This particular liquidator is currently uninsured,' and then you could act immediately instead of waiting until the end of the financial year. It could be 30 June at the end of the year; it could be August, September, October before they lodge their annual report. Do you think it would be a good thing? I probably cannot put the a question in those terms. Surely it would be an advantage that the insurance company notify ASIC that a liquidator has let their PI insurance expire. That would mean that you would be aware of it and you could take the appropriate action at the time.

Mr D'Aloisio—Again, that sort of issue is, in the end, a policy matter for government, if they want to impose that requirement on insurance. The insurance industry, I expect—they will speak for themselves—would be concerned about the additional costs associated with them needing to notify ASIC. The issue for us, if a policy were changed by government in that direction, would be that we would certainly have to put systems in place that the immediate notification would require response and action. So, again, from a resource point of view, that is another cost that would have to be weighed up.

Look, if the policy behind it is that, because of the importance of PI insurance, if in fact it lapses, the insurance company should immediately notify ASIC, that is fine. Once it has lapsed, of course, it does not help either, because how do you reinstate it? If the claims occur after, you may not have dealt with the issue that you are concerned with. The issue you are concerned with I think might be better dealt with if you have run-off cover for a period of time: after the policy is cancelled there is cover for claims that occur within a certain period of time.

Senator WILLIAMS—Exactly.

Mr D'Aloisio—That is an insurance/broker/industry issue; it is not an ASIC regulatory issue. But that would deal with it. Run-off cover typically does apply to professions when people leave and so on.

CHAIR—There is a tail-end cover system.

Senator WILLIAMS—Yes. It obviously does in a lot of industries, but the point I make is that, if you owe money to an insurance company and you have not paid your premium, no doubt the light will be flashing on the computer screen. If the liquidators do not update their insurance—and I would not image there would be many of them who would fall into this category—surely it is not as though you are going to get thousands of notifications every day. You would expect a minimum number of companies did not upgrade their PI insurance or pay their premium, so it would simply require a notification from you to that company saying, 'Your PI insurance is not paid up. You know it is compulsory. You have seven days to pay or appropriate action will be taken.' You would not need huge resources to monitor that because I would not expect you would be flooded with notifications from insurance companies that companies had not updated or paid their PI insurance.

Mr D'Aloisio—It is policy matter. If that is what government does, the resource issue would follow.

Senator WILLIAMS—So you would not have any problem handling it that way. If government was to make a situation where an insurance company did notify you of a company which had let its insurance lapse, you would not see a problem with that?

Mr D'Aloisio—It is a policy matter. If that is what government does, the resource issue would follow.

Senator WILLIAMS—So you would not have any problem handling it that way if government was to make the situation where an insurance company did notify you if a companies let its insurance lapse?

Mr D'Aloisio—We do not have a problem following government policy, no.

Senator WILLIAMS—Let me take you back to the start. Usually people apply to become registered liquidators. They are usually accountants—is that correct?

Mr Dwyer—They have to be a member now. The majority are accountants, yes.

Senator WILLIAMS—When they apply to become a liquidator, you have criteria they have to meet—suitable character, honest, et cetera. Do you interview these people before you give them their registration as a liquidator?

Mr D'Aloisio—This is dealt with in some detail in paragraph 354 of our submission.

Senator WILLIAMS—Yes. I just want it for the record. I am asking: do you personally interview applicants or is it just done on paperwork put forward to you?

Mr Dopking—No, we do not interview. According to our policy—186 sets out the information we consider—it is done on the paper. It is quite an extensive process but it does not include an interview process with the practitioner who has made the application.

Senator WILLIAMS—You can put anything on paper to make it sound good and read well. It is not as though we have thousands of registered liquidators in Australia. A personal interview with applicants would seem necessary in my opposition.

Mr Dopking—You can also perform very well in interview. Whether that makes you a fit and proper person, there is a bigger picture, taking into account a number of issues.

Senator WILLIAMS—Obviously the history and so on.

Mr Dopking—Very important for us is the standard and seniority of the role of the person prior to application. That has to be set out in quite a lot of detail. If they are a member of the Institute of Chartered Accountants or other professional association, they have to attest to that person's integrity. The significance under the last law reform around two referee reports which are vetted quite extensively, so there are third-party checks about the industry. The team which undertakes this work does it quite thoroughly, not only by looking at the paper but by making inquiries of our own of people who know the industry quite well in each state and talking to those referees. The interview would be one final step in testing the quality of the intellect. I

know other agencies do that test but it is not the major reason why somebody is passed through to become a liquidator in ASIC. It certainly is an issue we are considering as part of the re-write of that particular document. PS 186 is currently under re-write within ASIC and it is one of the issues we have had discussions about—whether that would add major value to the existing process. I am happy to send a copy of that document to you. It is quite extensive. It goes through the process quite comprehensively.

Senator FIERRAVANTI-WELLS—On that question, in the submissions that were put to us by the Institute of Chartered Accountants and the IPA they both make reference to the processes that ITSA goes through and basically draw that analogy, with the suggestion being that perhaps you could adopt a similar sort of panel style interview process. Do you have any comments in relation to that? That seems to be the gist of both of those submissions—drawing the parallel with ITSA and why ASIC does not do the same thing that ITSA does in relation to insolvency practitioners.

Mr Dopking—If it is a decision to do with the change in legislation, obviously that is one for government. If there as an ability for us to do that through our regulatory guides, when we update our guides we will consider whether we need to change our procedures. We mention in our submission that we are currently updating our guide and we are considering that. It is just one extra step in an overall process of making an assessment of whether a practitioner is a fit and proper person, and it is one of those matters that we are currently considering as part of the rewrite of that guide.

Mr D'Aloisio—In the end, you have got to go back to the substance of what the registration policy is. The registration policy is really hinged on the fact that someone is a member of a professional body already. Therefore, they start with the premise that the person is a person of integrity and proper character. It then talks about the experience that they have had from being a member of that profession in the insolvency area. The underpinning of the registration system is very much for an oversight of ASIC registering so we know who in those professions is registered as an insolvency practitioner. As Stefan has said, as part of the review of regulatory guide 186 we will look at trying to strengthen the process. An interview may assist. We will have a look at it, but really at the end of the day it is the substantive qualifications that underpin it. So an interview may give you a feeling as to whether a person is being straight with you, but the checks you do in the background with the accounting bodies—the experience, the referees and the declarations that are made to you—are the substance of any application and we do look at that very thoroughly.

Senator WILLIAMS—Did you say in your opening address that it is not that easy to deregister a liquidator? Were those the words you used?

Mr D'Aloisio—Yes. It was a bit loose, but I think I did say that.

Senator WILLIAMS—There is no problem with it.

Mr D'Aloisio—It was more to contrast that once you are registered, unless ASIC has actually got good evidence and either goes to the CALDB or takes you to court, it actually has to prove a case against you.

Senator WILLIAMS—That is right, which takes time.

Mr D'Aloisio—Again, that is the policy because it is an issue of fairness. If someone is practising in the field and they are looking after clients, the law presupposes that everything is fine and, if something is wrong, as a policy matter ASIC has to prove that case. To contrast that, there is not a sort of police power to stop you at the traffic lights and issue you with an infringement notice, as we have, for example, in our continuous disclosure area where we can issue an infringement notice very quickly.

Senator FIERRAVANTI-WELLS—On that point, I just cannot help but have a look at your submission and, as a former practitioner in this area, I am amazed that it took 12 or 13 years of some action to be taken, when it was very clear in the profession when I was there that there were problems with some practitioners. I take your point about you having a framework to deal with. My concern here is that the framework with which you are dealing is not sufficiently stringent to enable you to take appropriate action. When I look at some people—I will not go into names, but I think you know the sort of people I am talking about—it has taken you X number of years to finally take action and deregister them. Then they get a rap over the knuckles in any case when some of their practices were dubious back in the 1990s, let alone the sort of action that it took. I do not expect you to make a comment. I can see by the look on your face that you know exactly what I mean. That is the real concern that I have: is the framework sufficiently stringent for you to be able to give the consumers of Australia sufficient confidence that the system is strong enough to deal with those rogue practitioners, who give advice to people and company directors who in turn send companies to the wall? Ultimately this is about people who go to that wall because of the advice that they are given to manage their companies in such a way as to send them to the wall.

Mr D'Aloisio—Senator, you have raised a lot of issues in that statement. I will comment on some, and if I do not answer it properly I am happy to go further. For us the issue is: are we moving quickly enough with the powers that we have got in terms of enforcement, looking at the complaints and so on? Clearly, in an inquiry such as this, in the submission we have given you and in the confidential part of the submission, we have looked at that in depth and will continue to. As I have said on other occasions I have appeared on other matters, we will seek to apply the law and its policy to the maximum extent that we can.

On the results we have achieved, I agree with you: we would have liked to have done some of those things quicker. Is that because we did not act quickly enough; is it because of the system? 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.

Senator WILLIAMS—We have a situation where insolvency practitioners are registered. You are saying it is not easy to deregister someone in this industry. If they were licensed with the various regulations, would that make it easier? I come back to this point: one of the infamous names in this whole inquiry is Stuart Ariff. I think you first got a complaint about him in 2004. Time goes on, and he has obviously gone on practicing. He has gutted the YCW Rugby League

Club in Armidale, Singleton Earthmoving and so on. He has taken his family overseas with moneys that should have gone to creditors that the companies owed. He has handed $400,000 to another man by the name of Karas. There are 83 admissions of wrongdoing. My problem is the time it takes. You first had a complaint in 2004, and years have gone by and he has just proceeded down the merry road of robbing people, if I can put it that way, and this is what I find so frustrating. If they were licensed, could you act more quickly?

Mr D'Aloisio—The licensing regime itself, as you know from other inquiries and in particular with financial advisers, has its own set of issues and just how it works. Certainly, with a licence regime you can impose conditions and it—

Senator WILLIAMS—Can I stop you there: so you could have conditions where, if you had clear evidence put in front of you and we had a licensing regime in this industry instead of registration, you could act immediately; is that what you saying?

Mr D'Aloisio—You could seek, if you are licensed and you want to change particular conduct and you want to make sure it is changed in the future, depending on how the power is drafted, to impose conditions in a way that they conduct themselves in the future. Registration licences are probably another step up. Again, it is a policy matter for government. Ultimately, the licensing system itself has its own issues. It is not going to be the thing that would stop issues arising as we see with the AFS licence regime. Again, it is a matter for government to look at that as to whether it wants to strengthen, if you like, the entry requirement or lift the barrier to entry to this industry. When you look at it, it is striving to be a profession as with accountants, lawyers, and so on. I think the current policy framework is in that direction. Whether it needs to be in the direction of AFS licence holders is again a matter for government.

Senator WILLIAMS—I do not want to harp on this Stuart Ariff, but the problem I see is that when you get complaints in the early days and then it continues on through CarLovers and so on, it just seems so much time goes by and his wrongdoings continue for years.

Mr D'Aloisio—It is not an issue I wish to focus on too much in the sense of the specific case, but you will appreciate that we get a complaint, and we cannot extrapolate from that complaint that this person will in the future commit further offences and therefore we should take pre-emptive action to take them out of the industry. At the end of the day, there is a right of fair hearing, there is a judicial process and there is a CALDB process in the legislation. I do not like statements that we were too slow with Ariff and so on, and certainly we are looking to see how we can improve the speed. At the end of the day, we cannot extrapolate that, because someone fails to lodge a return on independence or has overcharged on a particular matter, that person is a bad apple and should be out of the industry. It is just not in the current system. It is not possible for us to do that. Indeed, even if we had a power to suspend or cancel, which we could do just like that, we would still be subject to a whole lot of safeguards—properly so, it is a policy matter—for the individual.

Senator WILLIAMS—Geoffrey McDonald was suspended for two years from practising as a liquidator, is that correct?

Mr D'Aloisio—Yes, CALDB.

Senator WILLIAMS—What was he suspended for? What was the reason that the CALDB took the action?

Mr Dopking—The specifics of the transaction were around independence. There was a particular job that came along, they could not undertake the job so they arranged for a practitioner across the road to take the appointment but the staff of his practice undertook the work. There was a concern to us about independence so we took that matter on.

Senator FIERRAVANTI-WELLS—You may wish to take this on notice, probably on a confidential basis: how many complaints had been lodged about Mr McDonald going back to the 1990s? ASIC must have a record of that. I would really like to receive, even on a confidential basis, for both Mr McDonald and Mr Dean-Wilcocks, how many complaints had been lodged about each of those practitioners. I use them as examples.

Mr D'Aloisio—We can provide that information but we would prefer to provide it in confidence.

Senator FIERRAVANTI-WELLS—I appreciate that, because there are probably quite a number and I am happy for you to get it to me that way. That is my point, and that is the point that Senator Williams is making—they are two very good examples. I speak from a personal experience, Mr Dopking, and that is what I was referring to—in the 1990s, these people were practising and there were problems with them then. I appreciate that you are acting within a framework, which is why I asked the question before—is the framework within which you are operating insufficient to allow the McDonalds and the Dean-Wilcockses to have been dealt with earlier? That is my question, and that is really where this inquiry should be looking. That is really where I think from your perspective it would be useful. Let us be open about this, because it probably is time for the framework to be revisited. I am sure there were other people like these two, but it is a very good profession in my experience. They are absolutely fantastic, but there are those people who take the headlines. They are the ones, often, who have been allowed to practice for many years because the framework is not there, probably, for action to be taken against them earlier.

Mr D'Aloisio—In relation to the number of complaints, we will provide that to you in confidence. In relation to the system itself and the speeding up of the system, we will discuss with Treasury whether we can help them in relation to policy changes that may be needed.

Senator WILLIAMS—The Companies Auditors and Liquidators Disciplinary Board found that the Dean McVeigh failed to carry out or perform adequately and properly the duties of a liquidator during the administration of 10 companies between 2001 and 2007. He has been suspended for 18 months. Can you give an explanation of that vague summary—'failed to carry out or perform adequately and properly the duties of a liquidator'. How do you define that?

Mr Dwyer—I can give you a bit of a brief on McVeigh. As you rightly say, the CALDB suspended Mr McVeigh. Their decision and their media release sent out on 9 February 2007 detailed a string of areas in which McVeigh had failed. The principal areas where it was contended that McVeigh had failed and was found to be in breach of were in relation to six administrations on independence; seven administrations where he had carried out inadequate investigations as administrator; seven administrations where he had failed to conduct an

adequate investigation as liquidator; he failed to provide adequate report to creditors on eight administrations; he failed to provide timely and adequate reports to ASIC under section 533, which is the report that liquidators give to ASIC, on six administrations; he failed to provide to creditors adequate details on his proposed remuneration in nine administrations; and, finally, he failed to carry out his duties as a liquidator to an adequate degree of care and diligence, in the view of the CALDB, on two administrations.

Senator WILLIAMS—Okay. We are going back a time period of six or seven years, from 2001 to 2007, and I find that a little frustrating. I have a question in relation to Stuart Ariff. Has the matter concerning Mr Ariff been forwarded to the DPP, or is that too much of a confidential question to ask here today?

Mr D'Aloisio—That is an operational matter that ordinarily we would not go into.

Senator WILLIAMS—Okay.

Mr D'Aloisio—I would like to add to Michael's answer in relation to McVeigh. There is the negative, which I accept, of the amount of time taken. But one of the positive things from that, which I think is very significant, is the decision itself by the CALDB, in its publication and its potential use for the industry. Certainly we would be encouraging the IPA and the industry to have a really good look at that decision. It is the first decision we have had in this area that sets out quite clearly what the duties and so on are of the insolvency practitioners. We have the negative, and I accept that. But, even though it did take so long, and I am making no apology for that, at least we have a very clear and very good decision to help deal with conduct moving forward.

Senator WILLIAMS—I would like to go on to remuneration but other senators have questions so I will hand over to them.

Senator BUSHBY—Thank you for coming along and helping us today. In respect of PI insurance, you mentioned that run-off cover is a way that could better deal with some of the issues involved in the timing of matters, as you highlighted. Surely, as part of the registration process, licensing process or whatever it might end up being, you could insist that the PI cover include run-off protection?

Mr D'Aloisio—From memory, in our guide, I think we do; we can check that for you. The issue is not so much an ASIC one but one of whether you can get the policy written. In the end PI cover is up to the insurer, what they are prepared to put in and what they are prepared to take a risk on.

Senator BUSHBY—But underwriters and insurance companies will generally underwrite any risk if the premium is sufficiently high to cover it.

Mr D'Aloisio—But then you get the industry pushback that ASIC is insisting on conditions that industry cannot comply with and a lot of people are going to go out of existence because they cannot pay their PI. So, Senator, there are always two sides.

Senator BUSHBY—Given the existence of run-off cover in other professions, although undoubtedly premiums for PI cover in this profession, with run-off cover, would be higher, I doubt they would be so high that they would be comparable to the payouts that may occur.

Mr D'Aloisio—We will take that on board, Senator. I am not disagreeing with the point you are making. We will see if we can make a greater effort to deal with that. Clearly, if you can get policies written on a 'claims occurred' basis, in other words, on a misconduct occurred basis when the policy was in force, that is the best protection, because in the end there was a policy in force at the time the event occurred and you claim under that. But I take your point and will see what we can do in relation to lapses.

Mr Dwyer—If I could just clarify and add to what the chairman suggested, the regulatory guide that he referred to, section 1(94) in paragraph 96, requires registered liquidators—in part (b)—to 'use their best endeavours to obtain run-off cover for as long as reasonably practical'.

Senator BUSHBY—The 'best endeavours' allow plenty of wiggle room.

Mr D'Aloisio—That is the wording of the guide, but what you are saying we will take on board.

Senator BUSHBY—Also on PI cover, in response to Senator Williams' question and his example about comprehensive insurance in some states, you also noted that there will be resource implications for ASIC if you need to put in place a program whereby you respond immediately to advice from PI insurance that liquidators cover had ceased. To some extent you have raised another big issue, but there are two big issues, it seems to me, in respect of your involvement in this area. One is the regulatory structure and the powers that you have to deal with these issues. You have touched on that and you have talked about how there have been some changes and you are still working through how that will play out as to whether you have a proper regulatory structure and the powers to do everything that you need to do and to do it in a timely manner.

The other issue is of course resources. In the context of—and I note—ASIC's responsibilities across a whole range of areas having increased almost exponentially in the last few years, the question is: do you actually have the resources to be able to deal in a timely manner with issues that are raised in this area as it currently stands today. I know that contiguous to the additional responsibilities that ASIC has gained across the board, you have actually received additional resources. But given the flux of trying to implement those new responsibilities, and at the same time applying those additional resources in an effective and efficient manner, in terms of being able to ensure that you have the resources in the right sections of ASIC, how are you going to be able to do the jobs that you need to do in that timely manner in each section, particularly in the context of insolvency?

Mr D'Aloisio—Firstly, on the regulatory structure, as we said, we will talk further to Treasury, but I think that I have answered those questions. 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. If the inquiry makes additional recommendations, either of a policy or of

additional responsibilities on ASIC, we would need to look at those and talk to Treasury about what additional resources would be required.

More recently, with the PJC inquiry on the financial advice industry, there are a number of recommendations putting additional responsibilities on ASIC and those went on to say that ASIC may need additional resources. I think that that is correct, and that gives us an ability then to talk to government about the new initiatives and how we will resource those.

In terms of new initiatives that ASIC has had in more recent times relating to surveillance and credit, the government has resourced us for those as we have gone along. So I work on the basis that the agency, in terms of what we have got going at the moment both in this area and other areas, is adequately resourced. If new responsibilities are given to us, we will clearly negotiate with government about the additional resources that are needed.

As you would know, you take this year by year. Budget allocations depend on a lot of factors. We will move into the next round of looking at our business plans going forward and, if we identify that we are going to need additional resources either out of this or other inquiries, we will just in the normal course take those up with Treasury.

Senator BUSHBY—But your statement in response to Senator Williams that there would be resource implications in terms of a change like the one he was proposing indicate that that is something that you are carefully watching and that you do not necessarily automatically have the ability to deliver even small things.

Mr D'Aloisio—Our resources are very stretched. Our people are working very hard. We have a lot on so as chairman clearly I have to be quite careful about taking on new responsibilities. So the resource issues for new responsibilities going forward that ASIC will be given are important. As I said, the government has recognised that and certainly in the big items of surveillance and credit they have coupled the decisions with additional resources, as has the PJC inquiry.

Senator BUSHBY—On a different matter, you mentioned earlier that creditors often do not see the benefit of the fees being paid to liquidators. To what extent is it possible to establish value in dollar terms of the activities undertaken by liquidators—that is, to demonstrate to creditors that there are benefits to them by what they are doing and presumably in the context of the fact that the whole of the regulatory regime as it applies here is to protect the interests of creditors and members where a company is basically going down the tubes?

Mr D'Aloisio—At the moment, professional fees is not just an issue for this profession, for insolvency practitioners. Indeed, being a former lawyer I am very well aware of fee levels and client response. In that sense there is a broader issues about value. Certainly when you get into an insolvency situation where assets have been dissipated and then you are see fees going out and the dividend getting smaller there is a greater concern among creditors. The regulatory regime is one of disclosure to creditors so that they can take action and look for reasonableness. It is a limited oversight for us. As part of this project going forward, we want to delve much more deeply into the level of fees to see whether we can come up with guides about relating them to the value of assets recovered, for example. If you recover 50c in the dollar but it costs you 10c to get that 50c, if you have that sort of information as a creditor, you might regard that as good value. If you have recovered 20c in the dollar but in actual fact it then costs you 18c or

20c for that, as a creditor you are going to be pretty annoyed. Going forward, as we see it, now that the framework has the disclosure, the returns and the forms which give you this information, our challenge is going to be, through surveillance and through specific cases, to delve into the quality of the remuneration, the return and the advice that was given. We think that is really to work with the professional because at the end of the day that is a reputation issue for the profession and for the practitioners.

Senator BUSHBY—Absolutely.

Mr D'Aloisio—They have to do that. They have to demonstrate to their clients, ultimately to the market, that the fees being charged in the context of what work was needed to recover assets in that particular insolvency are reasonable. I see our role in our forward program on the fees is to move from disclosure to testing the quality of the disclosure and to assist creditors to then make judgments about whether they have been treated fairly.

Senator FIERRAVANTI-WELLS—You would not have liquidations if you did not have rotten company directors. We are focussing on this end of the spectrum when I would like to take the discussion to the other end of the spectrum and look at the framework currently in the Corporations Law which does provide, regrettably, I think, opportunities for people who want ultimately to do the unscrupulous thing and set up phoenix companies—my pet subject. I will come to that in a moment.

You have got the financial framework starting from the voluntary administration. Is that framework too liberal? Is that framework one that does require some degree of scrutiny to be tightened up to ultimately preclude and prevent some of the practices that we then see at the end of the spectrum where the liquidators do have to go in and clean up the mess, if I can put it that way? Are you looking at it from that starting point of viewing the framework as it is at the moment and whether that needs to be tightened up?

Mr D'Aloisio—That is a big question for a Friday morning.

Senator FIERRAVANTI-WELLS—It has been plaguing me since the 1990s, so you can appreciate why I am here today.

Mr D'Aloisio—Let me try to assist, and I am happy to go into more detail. When you look at the framework of the Corporations Act and the obligations in the way that the law is framed around directors and around companies, the first thing that strikes you is that our corporate system is really working very well. The way that our corporations are run, the way they are administered, the way they trade on the stock exchange, the liquidity—there are a lot of factors that point to our system working well. Indeed, the way we have come through the financial crisis is an indicator that there are a lot of things that are working well. That is because you have a framework that imposes obligations on directors and there are a series of gatekeepers that then work with supporting that system. There are gatekeepers around directors, executives, auditors, accountants, lawyers, asset managers and valuers. There are a whole range of gatekeepers that go to maintaining and improving the integrity of our markets—the honesty, the fairness and the transparency—and it works well. Notwithstanding all of that, in our system there will be corporate failures. The risk and reward equation is that from to time to time there will be failures. What tends to happen is that, at the smaller end of the market, there are more failures

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.

When it gets down to the specific examples around the phoenix companies and around some of the excesses of directors, particularly at the lower end, there is definitely room to improve. The insolvency trading provisions of the Corporations Act requiring directors to look much further ahead are provisions that assist them getting into the issue of whether companies could fail earlier. One of the things that Stefan's team does is visit companies early on and help them so that they do not get into an insolvency situation. The system in that sense is working well, but it is not going to stop failure because failure is part of the system. We try our best, but it is not likely that you can always prevent fraud. There will always be an element of fraud.

Senator FIERRAVANTI-WELLS—I appreciate that there will always be failure, but my concerns are the systemic failures. I am concerned about the continued failures. There does not seem to be the stigma that once used to be attached to insolvency in this country and it now seems to be used, regrettably, as a management tool that is available to a company to screw one set of creditors and then move on to the next lot. That is where we do see the corporate failures. A liquidator goes into a company, whether voluntarily or court appointed, and prepares this 439 report—and I have seen so many of them over time—but when it then comes to prosecuting directors for insolvent trading, it just does not happen. Therefore, my concern is: where is the deterrent for these companies? If ASIC is not prosecuting for insolvent trading then that surely sends a message that you can set up a company, send it into liquidation and then start again tomorrow because chances are you are not going to be prosecuted for insolvent trading. That is my first question.

Mr D'Aloisio—That is running two threads. If a company goes into liquidation or into administration it does not follow that anybody has done anything wrong. The risk was taken; it did not come off. That can happen. Our job then is to look at that and work out whether something did go wrong—whether they were trading when they were insolvent. In other words, the system does not say that there must not be failure because everybody should pay their debts; the system says that from time to time there will be failure but, where there is failure, you should go in and have a look to see whether it was just a business failure—life—or whether it was a misbehaviour failure. Our focus is on the misbehaviour. I was brought up with the idea that you always pay your debts. That is the way life is. That ethical issue is not built into the legislation, and the policy framework allows companies who take risks to fail. It must follow that there will be people that will not be paid when those companies fail.

Senator FIERRAVANTI-WELLS—I appreciate that, but my point is how many directors, once the liquidator reports and finds prima facie evidence of insolvent trading, are not then ultimately prosecuted? My question to you is: do you have the resources to prosecute or are you prioritising the ones that you do want to prosecute and focusing on the higher end and the big profile end rather than, if I can put it like this, on the lower end of the spectrum, to prosecute directors who do trade when insolvent and who then go onto become phoenix directors? That, consequently, does not act as a deterrent to other company directors. That is my concern.

Mr D'Aloisio—The recent Somerville case which we took on phoenix trading is a good indicator of our resolve to be quite clear with the market. In addition to that, we have an

extensive program—I will ask Mr Day to speak about it—when we deal with directors and disqualify them when they are involved in more than two companies that have failed.

Senator FIERRAVANTI-WELLS—Do you have any statistics in relation to the number of company directors that have been found prima facie to have been trading while insolvent but have not been prosecuted? Do you have that sort of statistic?

Mr D'Aloisio—It would not exist because if we come to the view that there has been insolvent trading we would then take action.

Senator FIERRAVANTI-WELLS—Does that mean you take action for every recommendation that is made by a liquidator?

Mr D'Aloisio—No.

Senator FIERRAVANTI-WELLS—That is my point. How many are actually prosecuted? You can take that on notice.

Mr D'Aloisio—I would like to give you the evidence we do have and then take the balance on notice.

Mr Day—The submission contains an amount of material about the level of bannings for directors in the appendices, certainly in C3.

Senator FIERRAVANTI-WELLS—Not many get banned.

Mr Day—There are a number who get banned.

Senator FIERRAVANTI-WELLS—There are a number, but my point in respect of the number of directors that have been trading while insolvent and the number of bannings is that there are far more directors that trade while insolvent and send companies to the wall than actually get banned. I appreciate that that is a resource issue, and my question is directed to whether ASIC has a sufficient legislative framework and sufficient resources to prosecute directors that trade while insolvent.

Mr Day—The bannings I am referring to are where someone has been a director of two or more companies that have had a deficiency and have gone into liquidation. I understand what your question is aimed at. In relation to phoenix activity, I am not in a position to answer whether or not the framework is suitable. I think that is something for government but also more specifically for the commission to speak to you about.

CHAIR—Is it a mechanical process, in effect—that if a director is involved in two companies that go into liquidation they are banned?

Mr Day—They automatically qualify for banning at that point. So, yes, it is mechanical in that respect.

CHAIR—But they are not necessarily banned?

Mr Day—No. We had to take into account a range of circumstances. It may be that if you are a director of two companies that are related—say, one owns the equipment and the other provides the services—because it is a group in that respect and those two companies go into liquidation, we would not see it as a certain circumstance that requires or demands that the mechanics are put into operation.

CHAIR—Thank you for that clarification.

Mr Dopking—If I could say just one thing about the insolvent trading question. I share your enthusiasm in this area—

Senator FIERRAVANTI-WELLS—I have seen lots of people, the taxpayers of Australia, who have dipped out on millions and billions of dollars simply because the framework lets companies get to a point where liquidation occurs—everybody dips out.

Mr Dopking—The insolvent trading provisions, both civil and criminal, are there for the benefit of ASIC to prosecute and the practitioners to prosecute. When we see the situation where practitioners take on insolvent trading actions, they often negotiate a settlement. You will not see that through the court system. That is a silent outcome. I cannot put a number on that but it does exist. The criminal side of insolvent trading is a focus for ASIC. We have a number of insolvent trading matters, one of which is quite a significant one in the SME market. At the moment, we have significant resources devoted to bringing those messages that you are looking for to the marketplace that operates in this size of business. It is not something that is forgotten; it is a focus within our deterrence teams, particularly since Michael Dwyer's appointment as commissioner. I would like you to be confident that that is an area that we are working on.

Senator FIERRAVANTI-WELLS—Can I ask about your priority in terms of prosecutions. Obviously you have a budget and you prioritise the budget in relation to what you prosecute. How much of your prosecution budget is used at the high end of town rather than the small end, where it is more pertinent in terms of general deterrence? Do you understand the point that I am making? Are you sufficiently resourced?

Mr D'Aloisio—The way I would like to answer the question is to say, firstly, that I would like to take the specifics of the question on notice and come back with a detailed answer because you have asked for dollars and numbers. Secondly, as head of agency and the commission, we actually do not prioritise the resources on the basis of saying, 'We will devote this to the big end of town' or something like that. We look at the programs.

Senator FIERRAVANTI-WELLS—We have watched some of your prosecutions in the public arena. Some have been successful and some have not been very successful.

Mr D'Aloisio—Yes, but they have all had a clear message for the market.

Senator FIERRAVANTI-WELLS—It will be interesting to see what does happen thereafter.

Mr D'Aloisio—What we will do is draw together what is in our submission in terms of things like the director bannings, the insolvency practitioner bannings and so on with our programs, and we will give you the results we are achieving plus the money that is going into it so you get a

feel for how it is a serious part of ASIC's work. The deterrence team recently created in Warren's area is primarily aimed at ensuring that we cover the smaller end of town with our work. Similarly, a lot of the programs that Stefan runs are aimed at the smaller end of town. I think we can give you an answer that will assure you that we are devoting real resources to the messages that need to be given to this section of the market. But I go back to this point: when you look at international and other practice, in our system there will always be a higher rate of failure at the lower end of the market driven by economic factors than at the higher end of the market.

Senator FIERRAVANTI-WELLS—In your submission you say you regulate approximately 1.7 million companies.

Mr D'Aloisio—What paragraph, Senator?

Senator FIERRAVANTI-WELLS—I am looking at page 4 of your submission and I am drawing these statistics together. If you regulate 1.7 million companies and of those you say that in the year to 31 December 2009 approximately 2,000 companies have entered into external administration, that is the one point you have become aware of. Then you are really only talking about banning 243 directors since 2006. Do you see the point I am making? There must be a lot out there which is not being looked at.

Mr D'Aloisio—We are probably not communicating, but what I am saying is that those raw statistics have built into them the fact that a lot of these failures have nothing to do with misbehaviour.

Senator FIERRAVANTI-WELLS—Do you have those statistics? Do you keep those statistics?

Mr D'Aloisio—That is why I said we will have a closer look to see what we do and how we can better answer the question. Obviously the answer I am giving is not satisfactory. I am putting a lot more emphasis on the fact that failures do occur and it does not necessarily mean that there is misbehaviour. There is no principle of law which says, 'You must pay your debts.'

Senator FIERRAVANTI-WELLS—The reason I am interested is that the IPA, in their submission talk about improved solvency statistics. Are these the sorts of statistics you would like to collect?

Mr D'Aloisio—We would like to work with the IPA. There is a lot of information which comes in through the various forms which are lodged. There are two parts to this. The first is: is all the information being collected what the industry would like? We think it probably is. The second is: how are all the reports prepared and disseminated? We would like to work further to improve those, including more information on the issues we have been talking about this morning. Our limitation in relation to the production of those reports at the moment is connected with our star program. ASIC is in the process of a complete rejig of its technology so that it is clearly more up to date. It is quite old, so our systems and our technology do not have the ready ability to convert data, aggregate, produce reports and publish electronically. A lot of our processes are still manual, including the lodgement of these forms. With our new technology platform, which will come in progressively over the next two or three years, we expect we will be in a much better position to provide aggregated reports and data on the information we

collect, better than we are doing at the moment. It does not just apply in this segment of the market; it applies to auditors, financial advisers and so on. We are really dependent on our technology platform to move a lot of the reporting that we do and make use of the statistics.

Mr Dwyer—Whilst the forms are lodged electronically, it is a matter of mining that data and having the IT capacity to mine the data to provide us with relevant KPIs.

Senator FIERRAVANTI-WELLS—As part of your priorities going forward you mentioned in your submission that you had set up—page 83—a dedicated compliance and deterrence team in the real economy. Tell me about your priorities there. Again are there sufficient resources to effectively deter?

Mr Day—The new compliance and deterrence team rolled out of my complaints area, the people who were doing that. We have added extra resources to that group so that we can focus on the SME sector—the work we have done through our Liquidator Assistance Program, which is well recorded in the submission, our prosecutions, our assistance to liquidators in getting reports as to affairs, which do assist liquidators to more particularly scrutinise directors in relation to involvement in companies which have become insolvent, and the prosecutions work that we do there. The director banning work will be done through that group as well so that we can give more specific focus to that work and further it so that we increase it. We hear the comments and criticisms that you have made today about the number of bannings that ASIC has done and whether it is sufficient or not. We think that it could be improved, so we are looking to increase that considerably and therefore we have given a specific focus to that group.

Mr D'Aloisio—That is a ninth deterrence group. We have eight others and at least three or four of the others in the financial services area do deal with this work as well.

Senator FIERRAVANTI-WELLS—One last question, and take this on notice: in terms of deterrence, is there a need to look at greater responsibility for company directors? Failures happen but I am talking about those that are systemic, premeditated phoenix type arrangements. Are we going to see as part of this a greater focus on the whole phoenix arrangement?

Mr D'Aloisio—We have been very active in the phoenix area, but I will take that on notice and give you more specifics about what we are doing and propose to do in the phoenix area. In terms of company boards and directors as a group and their behaviour, I think in that area ASIC has been very active, particularly in recent times, in being clear on what it expects of directors. Some of the actions we have taken are large actions. The Somerville case in the phoenix area, and the major cases around James Hardie, Fortescue and so on are important cases of being clear about what we expect of directors and their behaviour. Although it might have been a large company where the duties were defined, it equally applies to the smaller companies as well.

Senator FIERRAVANTI-WELLS—Especially the smaller companies.

Mr D'Aloisio—So we are very active in the space of directors. As we have said, there are also other gatekeepers. Corporations fail and the directors, auditors, accountants and so on are gatekeepers. Our focus is on pushing everybody to play a role to minimise the risks for creditors, shareholders and employees in the system. My statement that failures occur is an economic

statement, but coming back to your point, the clear focus that we have is to improve corporate behaviour right through all the gatekeepers, not just with one group of gatekeepers.

Senator FIERRAVANTI-WELLS—To still see people out there in the corporate world who have sent company after company to the ground and in the process ruined the lives of many, many people and failed to pay their employees' entitlements does not instil confidence. That is really my point and that is my frustration coming through at having watched them in my profession over many years and at still seeing them hanging around. It is really unacceptable. Anyway, we will end on that. I knew this would get Senator Cameron going.

Senator CAMERON—Mr D'Aloisio, can I also indicate that in my professional life as a union official I have had real concerns about how workers have been treated in relation to liquidations. I am not sure whether you have the financial capacity within your organisation to deal with some of the smaller companies that end up going belly up and leaving workers almost destitute. I have had the example in my experience where the owners of one these companies have mansions with Pacific Ocean views outside Newcastle and you did nothing to investigate that approach. I know this is a slightly different issue, but it goes to the point that has been raised that there is a perception that it is not only the issue of liquidators, it is your organisation's capacity to deal with these issues effectively and equitably that will continue to be an issue. We may end up having an investigation into that.

Mr D'Aloisio—That is possible. It is a very difficult issue. In the end, ASIC cannot guarantee that the assets will be sufficient to pay out the employees, even though the employees are being pushed up in the priority. I could take that on board and have a look at it, and Mike will make some comments, but in the end there is no guarantee that when a company fails there will be sufficient to pay out employees.

We can take additional steps and perhaps work with union members if there are other things that we could do. Clearly, we would like to do that but in the end there will always be that risk sitting there.

Mr Dwyer—In the chairman's opening statement he mentioned the 2007 reforms which introduced stronger measures to protect employee entitlements. Part of those was the establishment of the General Employee Entitlements and Redundancy Scheme, called GEERS. That does provide a safety net for employee entitlements where a company goes into liquidation.

Senator CAMERON—You are on dangerous territory, lecturing me about GEERS, I tell you.

Mr Dwyer—Okay. The point was that there was law reform that provided a safety net for employee entitlements.

Senator CAMERON—I know about GEERS, and I know the history of GEERS. It is not often I agree with Senator Fierravanti-Wells on a range of issues, but I have—

Senator FIERRAVANTI-WELLS—This is a momentous occasion, Senator Cameron!

Senator CAMERON—some sympathy in the line of questioning this morning. I am glad that you are prepared to take that on board, Mr D'Aloisio. I may want to come and have a talk to you about that issue.

Mr D'Aloisio—We would be happy. Certainly, if you could give me a note on the example you have mentioned, I will look at that one specifically—make sure it is looked at and tell you what we did if it did come to us.

We are not in the business of not assisting, and we will do that. If union members or the particular unions have ways that can assist in dealing with this issue—indeed, they are very powerful organisations as well and part of the gatekeepers, if you like, for employees that we have—we are more than happy to talk to them as well.

CHAIR—Thank you for appearing this morning. We will break for 10 minutes for morning tea, then we will have the Treasury.

Proceedings suspended from 10.07 am to 10.23 am

McAULIFFE, Mr Daniel, Analyst, Governance and Insolvency Unit, Corporations and Financial Services Division, Treasury

PRESTON, Ms Kate, Manager, Governance and Insolvency Unit, Corporations and Financial Services Division, Treasury

WILKINSON, Ms Vicki, Principal Adviser, Corporations and Financial Services Division, Treasury

CHAIR—I welcome the Treasury witnesses to the table and invite you, if you so desire, to make an opening statement.

Ms Wilkinson—Australia possesses a modern and internationally well regarded corporate insolvency system. Australia's corporate insolvency system seeks to balance the interests of a range of stakeholders who may be affected by business failure: shareholders, creditors, employees—including company officers—and consumers.

There have been a number of reviews of the corporate insolvency system in recent years, including in 2004, when the Parliamentary Joint Committee on Corporations and Financial Services issued its report *Corporate insolvency laws: a stocktake*, following a general review of Australia's corporate insolvency regime.

There have been four Corporations and Markets Advisory Committee reports on corporate insolvency issues in the past five years, entitled *Rehabilitating large and complex enterprises in financial difficulties*, *Long-tail liabilities: The treatment of unascertained future personal injury claims*, *Issues in external administration* and *Shareholder claims against insolvent companies: implications of the Sons of Gwalia decision*.

In addition, there were significant reforms to the insolvency regime as recently as 2007 with the passage of the Corporations Amendment (Insolvency) Act 2007. These amendments were the first significant change to Australia's insolvency laws since 1993 and focused on improving outcome for creditors, improving the voluntary administration processes, deterring misconduct by company officers and improving the regulation of insolvency practitioners. These reforms improve the disclosure obligations for liquidators and administrators in respect of potential conflicts of interest. In relation to remuneration, there was a codification of principles and improvements in the information available to creditors and the court. This included the insertion of criteria into the Corporations Act for the court to consider when assessing the reasonableness of an external administrator's claim for remuneration.

Recent years have also seen some significant non-legislative reforms. In 2006 the then government established the Assetless Administration Fund. This fund finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets where it appears that enforcement action may result from an investigation and report. A particular focus of the Assetless Administration Fund is to curb fraudulent phoenix activity.

Most recently, on 19 January 2010, the Minister for Financial Services, Superannuation and Corporate Law announced a new package of insolvency law reform proposals. The key proposal in this package is the amendment of the Corporations Act to reverse the effect of the High Court's decision in the Sons of Gwalia case, which determined that, in a corporate wind-up, certain compensation claims by shareholders against the company were not subordinated to the claims of other creditors. This reform will reduce the difficulties introduced into insolvency proceedings by the court's decision and improve outcomes of creditors. The reform package also contains a range of reforms directed at reducing the costs and complexity of insolvency administrations, improving communications with creditors and reducing the potential for abuse of corporate insolvency law. The reforms will include the adoption of substantially all of the recommendations made by the Corporations and Markets Advisory Committee in its report on issues in external administration.

The Minister for Financial Services, Superannuation and Corporate Law has also released a discussion paper on the operation of Australia's insolvent trading laws in the context of attempts at business rescue outside external administration. This paper was issued in response to concerns raised in respect of the effects of the insolvent trading laws on work-outs. It has been asserted that the current laws may cause companies to be placed into external administration prematurely, or in circumstances where external administration is not appropriate, by directors who fear personal liability if the company engages in insolvent trading while attempting some sort of informal work-out. Reforms to reduce the inappropriate placement of some companies into voluntary administration may address a number of the concerns raised by some stakeholders in the submissions to this inquiry.

Australia's corporate insolvency regime provides for a regulated insolvency profession. Applicants for admission as an insolvency practitioner must demonstrate a high standard of formal training, extensive relevant industry experience, a proven capability to perform the task, and that they are a fit and proper person. ASIC has broad powers to investigate professional misconduct. The regime provides for disciplinary action to be taken through either the courts or the Companies Auditors and Liquidators Disciplinary Board. While ASIC is primarily responsible for regulating liquidators, the predominant professional body, the Insolvency Practitioners Association, is also very active in seeking to improve the quality of the profession, such as through the issue of its code of professional practice and various education initiatives including its insolvency education program run through the Queensland University of Technology.

While the government is not currently proposing any reforms to practitioner remuneration and conduct, Minister Bowen has publicly stated that the government will be paying close attention to the views expressed by stakeholders making submissions to this inquiry and will consider post the inquiry whether further reforms are necessary.

Senator WILLIAMS—Thank you for appearing here today. There was a significant change in 2007 to improve the regulation of the industry et cetera. Obviously the government thought then that there needed to be some changes in this industry, and they have carried some out. I want to bring up one point that you made in the statement about people who become registered liquidators needing to be a 'fit and proper person'. I put the question to ASIC: do they interview the applicants personally? The answer is no. So this judgment of a fit and proper person obviously comes from what is put on paper in front of them. As we know, we can write

anything—but they do go back through their history et cetera. Are you familiar with how the 'fit and proper person' category that you spoke about works as far as registration goes?

Ms Wilkinson—Yes, certainly my colleagues are. We are familiar with it.

Senator WILLIAMS—Do you think it is satisfactory? Can you comment on the system?

Ms Wilkinson—Are you referring to the concept of fit and proper or the fact that ASIC does not interview?

Senator WILLIAMS—I am referring to the concept of fit and proper.

Ms Wilkinson—The concept of fit and proper is a well-regarded concept that is used in a range of regulatory fora. Fit and proper comes into prudential regulatory arenas as well as into this. So, both in Australia and internationally, the concept of fit and proper is a well-regarded principle.

Mr McAuliffe—The other thing I would like to add to that is that the act itself refers only to the term 'fit and proper'. But, that said, ASIC does issue a regulatory guide on external administration liquidator registration, which clearly sets out what ASIC views the term to mean.

Senator WILLIAMS—I want to take you to remuneration levels now. Your submission says:

The Corporations Act does not prescribe the remuneration levels, rather it encourages external administrators and creditors to reach agreement on entitlements to remuneration.

Obviously in a voluntary liquidation situation of voluntary administration the fees are lodged by the liquidator to the creditors and the creditors have to agree to those fees. Are you familiar with the way that works?

Ms Wilkinson—In practice, yes.

Senator WILLIAMS—Does it work in a way where the liquidator proposes to the creditors: 'We'll carry out liquidation here. Our job is to sell the assets, recoup as much money as we can and give as much money as we can to the creditors—and of course we take our fees on the way' ? The remuneration for liquidators is normally quoted at an hourly price, isn't it?

Mr McAuliffe—It is. But, that said, the Corporations Act itself places very few restrictions on the terms of any remuneration approvals.

Senator WILLIAMS—There are very few restrictions?

Mr McAuliffe—Yes, there are very few restrictions. So it is certainly up to creditors to approve it on a time basis and with or without caps. They can approve fees on a commission basis or they can even approve fees on a fixed sum basis.

Senator WILLIAMS—Have you ever seen one of these agreements between the creditors and the liquidator about fees?

Mr McAuliffe—Yes.

Senator WILLIAMS—When they quote per hour do they have an hourly rate, say, for the manager and a lower rate for someone who has not been in their profession for so long? Do they have a step-down scale for various people who work or is it just an hourly rate?

Mr McAuliffe—They tend to have different rates for different staff levels, although, that said, it can vary from practitioner to practitioner. But the standard one is that there is difference—the managers might charge a certain rate, the actual practitioner charges a certain rate and so on. So there is a scale.

Senator WILLIAMS—Can you give me an example of some of those rates? Can you recall any? For example, the administrator might have said, 'Righto, for management it is $650 an hour, for secretarial work it is $500 an hour.' Can you recall any of those?

Mr McAuliffe—I am not able to, but perhaps when the Insolvency Practitioners Association comes on, they might be able to answer that.

Senator WILLIAMS—Yes, they might be able to answer those questions. I have concerns because I have been told by some people that an hourly rate is quoted, and that hourly rate might be for the senior officer, the apprentice or the lady who gets a cup of tea for someone there. Then we go into disbursements and we hear of charging for a room in the office for meetings with the creditors and those sorts of things. I am concerned that in this industry the fees are very expensive and the disbursements are sometimes way over the top. I have heard of up to $2 per sheet of paper for photocopying.

Mr McAuliffe—The legislative regime itself does not attempt to prescribe appropriate fee levels. It creates a regime to enable creditors to have a high level of control over what the approved rates are, and then it is left between the practitioners and creditors to decide on their rates.

Ms Wilkinson—As Mr McAuliffe said, that would be a good question to put to the profession, because obviously they know what is being charged and how that commonly occurs.

Senator WILLIAMS—Is it true that, in the case of a court appointed liquidator, the fees can be agreed to by the creditors et cetera and that liquidator can go back to the court and actually ask for higher fees? Are you familiar with that?

Mr McAuliffe—In all kinds of external administration, the courts have an overriding role in terms of reviewing and increasing or reducing fees.

Senator WILLIAMS—So a liquidator has a right to go to the court and say: 'My fees are not high enough. Even though we have come to an agreement on these fees with the creditors, I am asking you for a higher hourly rate.' Can that happen?

Mr McAuliffe—That could, but you would assume the court would take into account the views of creditors as one of the factors that they consider.

Senator WILLIAMS—I just want to take you to the area of receivers. Tell me if I am wrong, but a bank can call in a receiver, for example. Do they need a court order to do that, or can they just appoint a receiver?

Mr McAuliffe—Receivers can be appointed under the terms of the relevant security document.

Senator WILLIAMS—For example, imagine I am a bank and a lady down the corner has a corner store. She owns the building and the real estate might be worth $400,000, but she owes the bank $200,000. As a bank, I can appoint a receiver who can walk in tomorrow morning and lock the doors, sell up the assets, throw the lady out of the shop, return $200,000 to the bank and then charge their fees. If their fees are very high then the creditors that little business owes—if it is a corner store it might be the milk supplier or the bread supplier or whatever—may face a situation where they would not get any money. The receiver's fees may take away the rest of the equity in that block of real estate. Would that be right?

Mr McAuliffe—I would have to check whether or not the court does have a right to review those fees to ensure that they are reasonable and necessary. In terms of what the receiver is entitled to charge, that is determined by the agreement between the receiver and the person who appointed them.

Senator WILLIAMS—Can you take this on notice for me: how many countries actually have receivers? I believe in recent times in the UK they have actually banned receiverships. Could you find out whether the UK has banned receivers? Could you also tell me how many countries around the world actually have a system of receivership and appointing receivers?

Mr McAuliffe—We will have to take that on notice.

Senator WILLIAMS—That will be fine. That is all from me.

Senator FIERRAVANTI-WELLS—Ms Preston, I saw you in the room when I was questioning ASIC and Mr D'Aloisio floated various possibilities about the framework in place being sufficient to deal with some of these issues. Having heard some of the evidence earlier, do you have any comments? He made mention of the fact that it would be a matter for Treasury. It is one thing to have a framework in place, but it is another thing to enforce that framework and to have sufficient resources there to enable ASIC to undertake a lot of the work it is required to do.

Ms Wilkinson—As we outlined in our opening statement, there have been successive reviews of the framework over a number of years. Each of those frameworks has looked at different aspects of this regime, but it has been under review for a significant number of years. However, having said that, the government is interested in the outcome of this hearing. Obviously, we would reconsider or look anew at areas of the framework that may have been raised in the submissions brought forward to the committee and the committee's recommendations. It is not an area that has been stagnant. There have been successive reviews by CAMAC, ranging over a number of years. When we first looked at some of the issues that were being raised in the submissions, I think our initial view was that the regulatory framework does cover off on those

areas but, like all areas of the law, we can continue to look at that and refine the law to the extent that issues are thrown up.

Ms Preston—I would like to add to that. We welcome ASIC's advice and ideas at any time. If they consider that the framework is not working, we are happy to look at that advice and provide advice to government accordingly.

Senator FIERRAVANTI-WELLS—This inquiry looks at the liquidators. You may have heard the point that I made earlier that you would not have liquidations if you did not have companies going into liquidation. You would not have companies going into liquidation if the framework that surrounds directors were a little different from what it is. I expressed certain concerns in relation to the flexibility of the current framework. I would like to ask specifically about director responsibilities and requirements—about educated directors, if you like. Have you done any work on that? Is that the sort of policy that Treasury is looking at or needs to look at?

Ms Preston—Yes. We are currently looking at whether directors have sufficient information to do their jobs well. The government has referred to the Corporations and Markets Advisory Committee a reference on just that. They are due to report next month. There have been enhancements—for example, in the UK—and providing director guidance, particularly for non-executive directors, where this is just a part of what they do. The government has specifically asked CAMAC to look into whether Australia needs that sort of advice.

Senator FIERRAVANTI-WELLS—You heard the questions before about the numbers and that we have 1.7 million companies that come under the umbrella of ASIC. They said that about 30,000 of them utilise the framework of voluntary administration on an annual basis. But you have had only about 280 banned since 2006, and that is the point. Surely there must be a lot more activity that has gone undetected and unprosecuted, a consequence of which is that many lives have been ruined and many workers have not received their entitlements. Is the framework that is currently in existence sufficient to deal with that? Those are my concerns.

Ms Preston—In particular are you thinking of the director's duties?

Senator FIERRAVANTI-WELLS—I am talking about whether you have thought about some sort of default arrangement whereby, after two or three strikes, you are out as directors. Is that something you have thought about? Is it something that has been or should be canvassed?

Ms Preston—I do not think we have given any thought to it to date. We are happy to give some thought to that. The only thing that I would say, which I think ASIC mentioned as well, is that if you have two strikes and you are out, for example, there could be different circumstances affecting different directors. If you have a company and a subsidiary which both go down, as they may well do, do you then count the two strikes as being out?

Senator FIERRAVANTI-WELLS—I guess I can summarise it as a default position. The thing that troubles me, having worked in this area myself, is: is there an effective deterrence out there in the marketplace to stop bad corporate behaviour? That is really what it comes down to. You will not have liquidations if you have good corporate responsibility and good corporate behaviour. Accepting Mr D'Aloisio's point that in a market system you do have market failures—and one accepts that—my concern is the ongoing premeditated activity, which is the

sort of activity that has led to much of the angst in the cases that are before us. They are the ones really that lead to a lot of the public scrutiny, and that is where my concern is, Ms Preston.

Ms Preston—I think Treasury and indeed the government have given thought, for example, to whether there should be increased deterrence in the form of increased penalties. Currently for directors' duties in the Corporations Act we have two approaches that ASIC can take. They can go down the civil prosecution or proceedings route or they can go down the criminal route if there is dishonesty involved. The government is currently conducting a review of sanctions in corporate law both in the Corporations Act and the ASIC Act, and Treasury is continuing to provide advice to government on what measures could be taken to increase deterrence. As part of that the government has recently announced the first outcomes of that review, if you like, and these are significant increases in the penalties for market misconduct offences in which directors can be involved. They are currently being drafted and they are going to be introduced in the winter session. So this is a broad review and it will take into account not just directors' duties penalties but a review of all penalties in those acts.

Senator FIERRAVANTI-WELLS—Ms Preston, please take this on notice. When you look at the tax alone that is foregone every year in this country as a consequence of corporate failure, surely that must weigh in favour of proper equipping of organisations like ASIC to pursue a determined and effective deterrence and prosecutions. There is no point having a situation where liquidators investigate companies and go through the process—they do all that—and then ASIC does not have the resources to properly prosecute companies where directors have traded insolvent and where there have been breaches of the Corporations Law. I would be really interested to know from Treasury's perspective how much tax alone is foregone in corporate failures on a per annum basis.

Ms Preston—We can take that on notice, certainly. But the government is also acting in that sphere. You may be aware that there was recently a proposals paper for law reform specifically related to phoenix activities that are occurring.

Senator FIERRAVANTI-WELLS—Yes, I have got that.

Ms Preston—The government is currently considering its response to the submissions received and will make an announcement in due course. In terms of resourcing for ASIC, our view is that ASIC is well resourced, and we have some figures here that we could give you. I do not know whether you want me to read them out, because they are quite long.

Senator FIERRAVANTI-WELLS—No, you can provide them.

Ms Preston—Yes, we could table them.

Senator CAMERON—Ms Preston, you indicated that ASIC is well resourced. I am not sure if you heard the little exchange I had with ASIC prior to you giving evidence, but I understood that ASIC did not take action against smaller companies because of the resource intensity of taking that action. We have a submission from a Mr Bill Doherty who says that ASIC do not act against any company that is not in that $10 million range. Do you have any views or information on that?

Ms Wilkinson—Obviously ASIC gave evidence. If you asked that question, I do not think we heard the response on that. As Ms Preston said, from the resourcing point of view, ASIC's funding has increased from $130 million in 2000-01 to over $344 million in 2009-10 and the government has in the recent global financial crisis again provided additional funding that brings ASIC up to that point. I did not hear Mr D'Aloisio's comments on resourcing but I think, from the government's point of view, at this stage we consider that ASIC is adequately funded. ASIC obviously has a wide remit and how they utilise their funding within that remit is something that the commission at ASIC decides. From our point of view, to the extent that ASIC comes forward and says that it is not adequately resourced, we consider that, but at this stage, having not heard Mr D'Aloisio's evidence, ASIC has had increases both through the global financial crisis and over the last nine years that bring it up to a point where both domestically and in global terms it is a relatively very well funded regulator. But, if there were particular areas where resourcing was an issue, ASIC would bring that to Treasury and we would consider that.

Senator CAMERON—You my want to take this on notice but could you advise the committee of how many companies operate within Australia under that $10 million gross annual turnover threshold?

Ms Wilkinson—Yes, we are happy to do that.

Senator CAMERON—It would be significant, wouldn't it?

Ms Preston—I do not think we can say.

Ms Wilkinson—We will take it on notice and bring the figures back.

Senator CAMERON—It seems to me that the issue that is appearing in this committee is not so much the question of the role of the bulk of administrators; it is the mess that the administrators pick up. They are at the tail end of the problem and, unless we deal with the problem, we are going to have these issues about the role of the administrator. Does Treasury continue to assess international developments and national developments in relation to what advice you need to give government to get more corporate integrity in terms of their operations?

Ms Wilkinson—From Treasury's point of view, we do monitor international developments. We participate in the OECD steering group on corporate governance, so we are very much hooked into what is happening internationally generally and in some specific jurisdictions more closely. We participate and sit at the OECD meetings on corporate governance and obviously follow and contribute to the debate. We are monitoring and, to the extent that we see developments in other jurisdictions that are interesting and look like something that we would pursue, we consider it and feed that through to government in our advice.

Senator FIERRAVANTI-WELLS—Following on from Senator Cameron's question, in terms of sanctions that are imposed in this area on company directors, where does Australia rank? Could you take that on notice. For example, the stigma in this country in relation to bankruptcy and insolvency has disappeared and certainly is not comparable to the severity of sanctions that are imposed on directors in other countries where passports are removed and those sorts of things. We are nowhere near that. So, if you could take it on notice and give us a comparison, I would be interested in the answer.

Ms Wilkinson—Yes, that is fine.

Senator CAMERON—Has Treasury done any analysis of the implications of phoenix companies for the overall economy?

Ms Preston—I would have to take that question on notice as well. Another of our groups is dealing in the main with phoenix company activity. They may have some information on that which has come out of the ATO.

Senator CAMERON—You may have to take this question on notice: does Treasury see phoenix companies as a problem generally in the economy?

Ms Preston—Again, I am not an expert in that area. We can take that on notice.

Senator CAMERON—Thank you.

Senator BUSHBY—Thank you to Treasury officers for assisting us today. Ms Wilkinson, you mentioned the significant increase in funding allocation to ASIC over the last eight or nine years. It is true, isn't it, that that has come at the same time as there have been significant increases in the responsibilities of ASIC?

Ms Wilkinson—ASIC's functions have increased, yes.

Senator BUSHBY—A lot of functions have been added, ranging from financial services licensing to, more recently, responsibilities with listed companies and so on. With each of those responsibilities has come an allocation of new funding, and that has led to the situation that there has been a rather large increase in funding for ASIC overall.

Ms Wilkinson—Yes, and also through the global financial crisis generally.

Senator BUSHBY—That is right, but that was because of the additional workload it was anticipated would be undertaken by ASIC as a result of issues that would arise out of the global financial crisis. So it was not a general increase in allocations that occurred without an expectation; there was a need to provide it to match the workload?

Ms Wilkinson—Yes.

Senator BUSHBY—I think you mentioned that their budget is about $330 million.

Ms Wilkinson—It is $344.8 million in 2009-10.

Senator BUSHBY—I do not have the exact figures in front of me but ASIC, as a collection agency, raises well over $500 million in fees a year.

Ms Wilkinson—I do not have the exact figures, but it would be in that region.

Senator BUSHBY—So it actually raises a lot more money than it costs to run at the moment in terms of its contribution to the overall revenue.

Ms Wilkinson—Yes.

Senator BUSHBY—Another comment you made in your opening statement relates to the current plans by Minister Bowen, through his discussion paper on the business rescue plans. I think you made the comment that, if that were implemented successfully, it could go some way to dealing with some of the concerns that have been expressed in this inquiry and by some of the submitters because it may well head off the need for involvement by some of the practitioners. Could you outline what some of the options are in that respect?

Mr McAuliffe—That paper is not directed at reforming the insolvency trading laws in general. It relates to how the laws operate in a relatively narrow set of circumstances, where directors form the view that a company is best reorganised outside of external administration but, because of an inability to maintain solvency or this issue of uncertainty about whether they are successfully maintaining solvency—

Senator BUSHBY—Where directors are a bit concerned that, if they continue operating, they may fall foul of some of the provisions of the Corporations Act, even though they may inherently believe that they have a good business and that they could trade through?

Mr McAuliffe—Exactly. They may believe that the work-out is in the best interests of not only the company and its shareholders but also their creditors. The paper proposes two options, plus the status quo, about how the law could perhaps be tweaked to enable these informal work-outs to occur outside of administration. The paper recognises that it is a balancing act and that there are people who could be adversely affected by insolvent trading. It sets out a range of issues and has sought submissions on how best to balance all those difficult interests to ensure that we have good outcomes while at the same time not opening up the law to abuse.

Senator BUSHBY—You mentioned that a discussion paper has been put out. What are the time lines for moving forward on this?

Mr McAuliffe—The time for submissions has closed and Treasury is currently examining the submissions and will give advice to the government.

Senator BUSHBY—So you will give some advice to the government, and then we will wait for the government to take some action in an election year. That will do. Thank you.

CHAIR—Senator Williams, do you have any other questions?

Senator WILLIAMS—I am fine at this stage with this organisation, Chair, thanks.

CHAIR—There has been a suggestion about licensing of insolvency practitioners rather than just registration. Do you have a view about that? Would that be a more effective system?

Ms Wilkinson—I think that is something we would want to examine further before we formed a view on it. We have licensing regimes in the Corporations Act that go to other

participants. We are aware of licensing regimes and the role they could play. I think we would want to examine that more carefully before we gave any final views on it.

CHAIR—There seems to be some concern about malpractice, though. I suppose that the need to be licensed for a limited period of time, three or five years with a renewal, might provide a process of review of the record of each individual practitioner. Would you concede that?

Ms Preston—It could, yes. But, as Ms Wilkinson said, we would have to have a look at it to have a view about it.

CHAIR—I appreciate what you are saying. As there are no other questions, we thank Treasury for appearing.

[11.01 am]

NORTH, Ms Denise, Chief Executive Officer, Insolvency Practitioners Association of Australia

ROBINSON, Mr Mark, President, Insolvency Practitioners Association of Australia

CHAIR—We thank the Insolvency Practitioners Association of Australia for attending today. We invite you to make an opening statement if you would like to do so.

Mr Robinson—Yes, I would, thank you. The Insolvency Practitioners Association of Australia welcomes the opportunity to appear here today and expand on the points made in our extensive submission to the inquiry. The IPA is the peak professional body representing company liquidators, trustees in bankruptcy and other insolvency professionals such as lawyers, financiers and academics. We see this inquiry as an opportunity to inform senators and the community of the role insolvency practitioners play in the economy and to explore possible improvements to further strengthen what we consider is already a sound and balanced corporate insolvency regime.

There are five key points that we would like to make to the inquiry. Firstly, Australia's current regime is sound and it contributes positively to the economy and the community. Practitioners are closely regulated by law, regulatory authorities and the IPA code of professional practice. Secondly, insolvency practitioners play a key role in the orderly wind-up of insolvent business. Thirdly, the community must have confidence in the regime and the integrity of practitioners. Fourthly, ASIC is the body responsible for practitioner registration and discipline. Fifthly, practitioner remuneration is closely regulated.

To summarise our position and moving to the first point, our current regime, Australia has a strong corporate insolvency regime. It is well regarded internationally and it contributes positively to the legal and social wellbeing of the community. The roles and practices of liquidators and administrators are closely regulated. Insolvency practitioners are required by the law and by the IPA Code of Professional Practice to uphold high standards. The Australian regime is continually developing. It has been the subject of much reform over the past 20 years. Even now there are further reforms that the government has announced. Like any profession, there are a small number of practitioners who fail to meet the high standards required by the law and our code of professional practice. For the 10 years from 2000 to 2009 there were over 113,000 insolvency appointments. Throughout the same decade there were only 14 practitioners whose registrations were cancelled and 13 who were suspended. We do not believe that Stuart Ariff's behaviour is in any way representative of the industry. We do not believe that he would have been deterred by greater regulation. If there is one error to reform in this area, it is how unincorporated associations and entities when insolvent are administered and overseen within the same regime as corporations. Currently the law does not adequately deal with these issues, and the Ariff case highlighted this.

Fleshing out the second point, insolvency practitioners play a key role in the orderly wind-up, trade or sale of insolvent businesses. Practitioners secure and recover assets. They achieve order

for creditors and employees, and they seek to maximise returns to creditors and members in accordance with the statutory priorities. In carrying out these tasks, they are exposed to a significant financial risk and personal risk. They act in the interests of creditors and employees and in the public interest. Corporate insolvency is a relatively infrequent event in the Australian economy. Each year less than one per cent of all corporations enter into any form of external administration. People confronted with insolvency understandably experience disappointment, anger and frustration. These emotions are frequently directed at insolvency practitioners appointed to the company. But it is not the practitioner's fault that the company is insolvent. We do see a need for—and in fact, we recommend—improving the quality, transparency and accessibility of the information that is available to those affected by corporate insolvency. We also recommend that ASIC be sufficiently resourced to be able to substantially improve the scope and quality of the statistical information on corporate insolvency in Australia that they collate and publish on a regular basis.

The third point is that the community must have confidence in the regime and the integrity of practitioners. This is fundamental. Confidence must be in the regime, in practitioners and in regulators. Insolvency practitioners are in a position of trust and therefore their regulation is justified. On appointment they take full and immediate control of the assets of a business and assume a duty to deal with those assets according to the law. The IPA supports and encourages fair and effective regulation of the insolvency profession. We play an important role in building and maintaining confidence in the profession through education and via our code of professional practice. We see a need for, and we recommend the establishment of, a forum where concerns about the conduct of a practitioner can be raised through speedy, transparent and independent review. This forum could be an insolvency ombudsman.

The fourth point is that ASIC has prime responsibility for the registration, monitoring and discipline of liquidators and administrators. These responsibilities are supported by the IPA and the professional accounting bodies. The behaviour and conduct of practitioners is also subject to public and media scrutiny. ASIC registers liquidators, monitors their conduct and performance, and takes disciplinary action when appropriate to the courts, through the CALDB and through enforceable undertakings. The IPA supports ASIC in this role through its code of professional practice and through educating and informing members, receiving and considering complaints against members and referring serious matters and complaints to ASIC for their consideration and action. Our submission suggests possible changes to the registration, monitoring and disciplining of registered liquidators. We believe the process adopted by ITSA is a good model for consideration. If ASIC were to adopt this process, it would need to be appropriately resourced.

Our fifth and final point is that practitioner remuneration is closely regulated. Insolvency practitioners are skilled and experienced professionals and have a legal and moral entitlement to be fairly paid for their work. Practitioners undertake a significant amount of work for which they are not paid. The current remuneration regime is reasonable, and the rates charged by practitioners are comparable to those of other similarly qualified professionals. Creditors have the right to review and approve remuneration and to further challenge a practitioner's fees in the courts. Further, ASIC also has the power to seek a review of a practitioner's remuneration. We recommend the inquiry does consider a speedier, more cost-effective process for the review of liquidators' fees as an alternative to court action by creditors and other interested parties. An

alternative non-judicial forum for the review of practitioners' fees would address a number of the concerns raised in relation to practitioner remuneration.

In conclusion, we are happy to assist the committee in its deliberations through our appearance here today. Thank you for the opportunity to do so. We would also be happy to reappear at a later hearing if it would assist the committee in their deliberations.

CHAIR—Thank you very much. We may well call you back at the end of this inquiry, because you would obviously be the body most concerned. We will go to questions from Senator Hurley and then from Senator Williams.

Senator HURLEY—Mr Robinson, you were saying that registration is ASIC's responsibility. ASIC says that for its registration requirements it takes into account, among a number of things, a letter of membership from a professional accounting body. In other words, it requires membership of a professional body. You are advocating that ASIC does more to assure itself of the fitness of a person to be an insolvency practitioner, but would it not be better if the body of which they are a professional member were more responsible for that vetting? The body have contacts in the industry, they know the norms and standards and they are closer to the profession. Would it not be better if it occurred at that point rather than later on in the cycle?

Mr Robinson—That could be a good alternative, but the professional body being referred to in ASIC's practice note 186, in relation to registration, is not in respect of the IPA; it is in respect of the foundation bodies, being the Institute of Chartered Accountants and CPA. In terms of knowledge of the industry, we could assist the institute in that regard.

Senator HURLEY—I am aware that it is generally the Institute of Chartered Accounts in Australia that is the body. I think, as you said, you have a reasonable association and that that might be a more appropriate point at which to assess—

Mr Robinson—That would be an area well worth looking at. Looking to improve the review of whether somebody is a fit and proper person would also be by way of interview and, if somebody does not present well at an interview, it might go further, even to a written exam, which is the process through which ITSA considers the fitness of a person to be a registered trustee in bankruptcy.

Senator HURLEY—Yes, and the fact that they do that does indicate to me that probably the associations are in a better position to do that kind of vetting, rather than the government regulator. I think Mr D'Aloisio said that it is perfectly possible in an interview—even though obviously ASIC are experienced professionals themselves—to present a good front. But I think it is possible that the association may be in a better position to assess that. You also mentioned the unincorporated associations. Are they a significant group who are affected by liquidation or are they only a fairly small proportion?

Mr Robinson—They are certainly significant enough to matter. Certainly Rosebud corporation, which was affected by Mr Ariff, slipped beneath the radar as a consequence of being administered by the state cooperatives act rather than by a national regime. We also have a lot of church based schools, for example, that are under that state based model rather than under

the corporations model. So, yes, we do have a significant number of organisations of a significant size that can potentially slip under the radar.

Senator HURLEY—Indeed, this committee held an inquiry into not-for-profit organisations, which has been followed up by the Productivity Commission, so I understand that there is quite a lot of consideration of the appropriate form of regulation and, indeed, corporate structure of not-for-profits. I take it you would be involved with any discussions about that as well with this in mind—that is, what happens if they become insolvent?

Mr Robinson—Yes, we are certainly happy to be involved.

Senator WILLIAMS—Thank you, Mr Robinson and Ms North, for your presence today and for your opening statement. I noticed a story in the *Age* on 26 November that read:

> … the Insolvency Practitioners Association denied there was a need for an inquiry. "The IPA does not consider that an inquiry is in any way warranted,'' said the IPA's president, Mark Robinson.

Do you still have that opinion?

Mr Robinson—Now that it is up and running, I think it is a process that we will look to be engaged in and contribute to.

Senator WILLIAMS—Thank you for that. Was Stuart Ariff a member of the IPA?

Mr Robinson—No, he was not a full member of the IPA. He was an associate member of the IPA.

Senator WILLIAMS—Can you explain the difference please?

Mr Robinson—Yes. In order to become a full member, you must complete a full year of postgraduate study in insolvency, including ethics. You must also have appropriate references and be in good standing.

Senator WILLIAMS—No doubt he would have failed that ethics test, in hindsight. Was Geoffrey McDonald a member of your organisation?

Ms North—Yes, Mr McDonald is a currently suspended full member.

Senator WILLIAMS—What about Mr Dean McVeigh?

Ms North—Again, he is a currently suspended full member.

Senator WILLIAMS—One of the problems I have with this industry, which you are obviously proud of as you are saying that it is world's best standard and that sort of thing, is that we look back and see people who we now know are wrongdoers, but it has taken so long to get somewhere as far as stopping their wrongdoings. We look at Mr McVeigh and he was scrubbed out for 18 months because of wrongdoings during the administration of 10 companies between 2001 and 2007. So he has obviously continued those wrongdoings over a six- or seven-year

period. How can we prevent this or make it quicker? I think your suggestion of an ombudsman is a very good idea, if it can quicken up the process. We have got this problem with Stuart Ariff. He was first reported in 2004. He has gone on for years and he has admitted to 83 counts of wrongdoing, including overseas trips and taking money where he should not have taken money. My question is, when there is something wrong, how can we stop that wrongdoing today instead of having to wait for years until we finally pull them up for what they have done wrong?

Mr Robinson—I guess the expression is: to prevent the train smash. That is what we are talking about. We strongly advocate in our submission for the implementation of a proactive annual review process of all practitioners through a certain number of randomly selected files such that it is not just a reactive investigation based on complaints. A proactive annual 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.

Senator WILLIAMS—Who should carry out that annual review?

Mr Robinson—The IPA is a very small organisation with a small membership base, so we physically do not have the resources. We look to a comparable regime being administered by the Insolvency and Trustee Service Australia for registered trustees, and we see parallels between ITSA and ASIC. So we would probably look to ASIC to run such a regime.

Senator WILLIAMS—Just coming back to Mr Ariff: you received complaints about him in 2005 and 2006 and I think you wrote to him. Is that correct?

Mr Robinson—I will address this as best I can and then pass to Ms North. Our first complaint was received in 2006. That complaint was from a creditor and was referred back to Mr Ariff for his explanation as to the grounds of the complain.

Senator WILLIAMS—What was that complaint about?

Mr Robinson—I will have to take it on notice as to what the nature of the complain was.

Ms North—I am sorry, I do not have the specifics of that original complaint. It was from Bill Doherty. It was about Independent Powder Coating and it was about his behaviour as the administrator in that company. I do not actually have in my records the detail of what that was about.

Senator WILLIAMS—You wrote to Mr Ariff after a complaint from Bill Doherty.

Ms North—My predecessor did.

Senator WILLIAMS—What did you ask Mr Ariff to explain when you wrote to him?

Ms North—I joined the IPA in 2008. My predecessor was looking after this. Again, I am not 100 per cent certain of the details.

Senator WILLIAMS—You have not seen that correspondence?

Ms North—I have not, no. Our normal practice is to say to a practitioner: 'So-and-so has raised these concerns about the way you have done things. What do you have to say about that?' And we require the practitioner to come back with an explanation or an account.

Senator WILLIAMS—Do you know what his reply was to the IPA?

Ms North—I do not know the detail. I do know that at the time it was accepted as an appropriate response to the particular matters in that case and that further concerns were raised with subsequent complaints that came in. At a subsequent date, after a number of complaints had been received, the IPA decided that was serious and referred it to ASIC for their investigation.

Senator WILLIAMS—So from the first reply from Mr Ariff you are saying that you were satisfied with his reply. You have Bill Doherty lodging a complaint to you on the one hand. You have got Stuart Ariff giving a reply on the other hand when you have written to him. You have obviously taken Stuart Ariff's word in his reply.

Ms North—What he said in that reply at the time was judged to be an appropriate account of the matter. One does not know whether what was said in the reply was accurate.

Senator WILLIAMS—As time went on, you received more complaints about Stewart Ariff.

Ms North—Yes.

Senator WILLIAMS—Many more?

Ms North—A number—I think in total more than 10 maybe, over a period of time. Some complaints were still coming in a couple of years ago.

Senator WILLIAMS—What was the basis of those complaints—that he was not doing his job properly, that he was taking money? What was the basis of those complaints in general, do you know?

Ms North—Various amounts of wrongdoing. Many of the complaints would have been about the matters that were subsequently admitted to, I would say, in that case. One of the things that changed along the way, from my understanding of reading what I have available to me, is that at a point of time he ceased to give an account of the things that were raised with him—which changes things.

Mr Robinson—And it was referred to ASIC in 2007.

Ms North—That is right.

Senator WILLIAMS—I take your point about the registration by ASIC of liquidators. We have heard today that when someone applies to ASIC to be a liquidator they do not actually get interviewed personally by ASIC. They do by ITSA—is that correct?

Mr Robinson—Yes, for a different style of registration.

Senator WILLIAMS—Do you think ASIC should carry out personal, face-to-face interviews of people who apply to become liquidators?

Mr Robinson—That is my view at the moment.

Senator WILLIAMS—You have no problem with that?

Mr Robinson—No.

Senator WILLIAMS—We get back to this type of character, this fit and proper person that is in your code of conduct and ASIC's, yet I find it amazing that ASIC does not actually carry out a personal interview with someone who is applying to be a registered liquidator.

Mr Robinson—I might add that we have previously recommended, in a previous forum, that an interview take place.

Senator WILLIAMS—Mr D'Aloisio from ASIC said today it is time consuming to deregister someone if they have evidence of wrongdoing. Of course, in this country you are innocent till proven guilty, except in New South Wales when it comes to land-clearing laws where you are guilty until proven innocent—that is a different case. If there was a licensing regime by ASIC instead of registration and if ASIC had some clear evidence there had been wrongdoing by someone in the insolvency practitioner industry, would it be easier for ASIC to suspend or cancel a licence instead of going down the road of deregistration?

Mr Robinson—In Mr D'Aloisio's evidence he indicated that there were also issues with the licensing regime. I am no expert on the licensing regime but what attracts the IPA to the concept of a licensing regime is two things. On the initial licensing of a person who is reputedly of good standing but whom we have not seen actually operate in the market let us put some terms and conditions to see how they run for a period of time. Maybe we could put some speeding restrictions, if you like, in terms of the number of matters they take on. What also attracts our organisation to a licensing regime relates to the comment that the chair made that, if it is on a three-year to a five-year basis, you virtually have to go through a re-application cycle, so your history and past conduct can be taken into account in terms of whether the licence will be renewed. So, in summary, the IPA supports a licensing regime.

Senator WILLIAMS—So you would not have a problem if the system were changed from being registered to being licensed? Given that you represent the industry, you do not see that as a huge problem for industry?

Mr Robinson—No.

Senator WILLIAMS—That is good. One of the regular complaints I get is about the fees and charges that liquidators and administrators charge. Obviously they have to be approved by creditors. I have never been involved with the creditors' one. A couple of people who owed me money fell over and, because of my lack my confidence, I just wrote the money off and threw it in the bin. When I got the letters I just threw them in the bin. I could not be bothered wasting time because, for the couple of hundred dollars that I was owed, I knew that it would probably take me time and paperwork to retrieve a bit of it.

Can you give the committee a brief example of fees and charges. As an appointed liquidator I say to the creditors, 'These are my fees, at $650 an hour.' How does it work? Do they break down those fees into different areas—for instance, staff in their company according to their experience et cetera? Is it just the one hourly rate?

Mr Robinson—Our code of professional practice talks to what way you would like to be remunerated, be it a time charge, a percentage of realisations or some other basis. Our code of professional practice also provides a template report that has to be completed and given to creditors when considering an appropriate way to be remunerated. That template does in one section provide an area where you break down your level of staff, from the most senior, such as the appointee, down to the most junior and the respective hourly rates to be applicable—$90 an hour up to $500 an hour, depending on the experience of the practitioners and the level of work that needs to be done at those levels. We are also required to include, within seeking approval of remuneration and in that initial report to creditors, a sense of how much the job would cost. If there are too many variables, too many unknowns, then, in an overall way, it would be a sense of what it would cost to get to a significant milestone. At that milestone, creditors would need to be brought back to consider what would be an appropriate level of fees to take it to the next milestone.

Senator WILLIAMS—In the IPA's code of conduct: 'A practitioner must attend to their duties in a timely way.' One of the biggest complaints we get is when there is a company that appears to have a lot of assets and money available but there seems to be an attitude that the liquidators are just dragging it out. That is a complaint I get: when there is no money in a company it is amazing; it is wound up in a week or two. But, when there is a bucketload of money and a large company, whether it be Ansett, HIH or whoever, it seems to be dragged on for a never-ending period. Do you have complaints put to your association about the timely manner, as you have noted in your code of conduct?

Mr Robinson—We get some queries and concerns, and sometimes complaints. We find that it is more about educating the creditors around what is involved in the administration. The biggest impacts on extending the time of an insolvency administration are lack of cooperation from the directors, poor books and records, complex business structures and difficult or poorly maintained assets that take time to polish and prepare for the market and sale.

Senator WILLIAMS—Due to time, Chair, I will hand over to another senator.

Senator FIERRAVANTI-WELLS—Having seen a range of those sorts of liquidations, I want to just put that into context. Normally, practitioners involved in this can get a court appointed liquidation—the next cab off the rank—or it can come to them through the front door, via the directors. It comes in roundabouts. Effectively, you often do work for which you know you are not going to get any remuneration.

Mr Robinson—In respect of court appointed work, in particular, because you do not know what is in the company at the time of your appointment, you certainly run that high risk.

Senator FIERRAVANTI-WELLS—Yes, and I think it is important to put this into context. I know we have been focusing on the negative parts of this, but I think it needs to be underlined that you do take, and the liquidator does take, a personal risk. He effectively stands in and runs

the company based on the principles of public interest and benefit of the creditors. I think it is important to afford you, Mr Robinson, the ability to make that point.

Mr Robinson—That is correct. In terms of risk going forward, all future liabilities—and liabilities in respect of OH&S and those sorts of things—are the personal liability of the practitioner. We recently conducted a survey of our members in terms of write-offs and 90 per cent of our members expect to write-off 20 per cent of their time.

Senator FIERRAVANTI-WELLS—That is the other side of it. It would be useful if you could provide us with some statistics—you do refer to those things in your submission—in relation to that sort of financial component.

Mr Robinson—Yes, we will. It will be basically driven out of internal questionnaires that we ran because there is, unfortunately, a lack of that sort of information out of ASIC records.

Senator FIERRAVANTI-WELLS—In your submission you talk about improving insolvency statistics and about ASIC. Could you elaborate on that?

Mr Robinson—Yes, certainly. The sort of information that can be produced is evidenced by an ASIC report of 2008, which ran up to 30 June 2007. This excellent report gave information such as the average dividend per matter, the industries the liquidations were in, whether they were SMEs or big companies involved, the average time taken to conduct the administration and the number of offences recorded against directors in terms of 533 reports. All of that sort of information is pretty key to understanding where the industry is currently at and where it is trending.

Senator FIERRAVANTI-WELLS—You would have heard the evidence that Mr D'Aloisio gave in relation to resourcing and those sorts of things. How many times have we seen liquidators prepare reports in relation to companies—the creditors are not going to throw bad money to pursue insolvent trading—and then find that ASIC is not going to pursue it as well. That has an effect on morale from a liquidator's perspective, and I would like you to talk about that, but what sort of message does it send to not only the practitioner industry but also the company director industry?

Mr Robinson—And the regulatory framework, generally. There has been an improvement in that regard of ASIC support, in recent times, through the Assetless Administration Fund. To be fair there is access to government funding but it is only for offences. Insolvent trading breaches and directors' duties fall into that. Whilst we as an industry do avail ourselves of that Assetless Administration Fund, and ASIC is very helpful in trying to get us across the line, it does require us to have access to detailed books and records to be able to reach the evidentiary threshold that ASIC requires in order to spend that public money. Given that, particularly in the SME sector, poor books and records or lack of books and records is often what we are confronted with, that presents us with a difficulty in availing ourselves of that fund.

Senator FIERRAVANTI-WELLS—Of course it is open to you to go to court to get books and records but there is the prospect of spending money to go to court to get that access. Having the tax office as the main creditor is one thing but, but you have got ordinary creditors who are not disposed to even getting to that particular point.

Mr Robinson—Certainly going to court is expensive. If we do not have the resources then we cannot do it.

Senator FIERRAVANTI-WELLS—That effectively means that perception perpetrates through the industry, and it gets back to the point I was making before that company directors probably know that they are going to get away with it, so they will start up again tomorrow, and there is very little that you as an industry can really do.

Mr Robinson—We maximise what we can do with what we are given.

Senator FIERRAVANTI-WELLS—You mentioned that Senator Williams took you through the comparison and the suggestion that you made of ASIC potentially doing what ITSA does, and I will not trawl through that as it is in your submission. You also mentioned the industry ombudsman. Tell us a little bit about how you think that would work.

Mr Robinson—In terms of concerns or complaints about practitioner behaviour it might well lead to a less costly, speedier and more transparent process in addressing creditor or director concerns about an insolvency practitioner's conduct. We would only advocate that ombudsman type role if it does in fact achieve those outcomes of speed, transparency and lack of cost.

Senator FIERRAVANTI-WELLS—How much power do you think they should have?

Mr Robinson—We have not thought it through to a great degree, but we would be more than happy to be involved in any discussions about how it might work.

Senator WILLIAMS—How about you do think it through and perhaps give us some ideas. If an ombudsman wants to be set up, what sort of powers, regulations and authority should that ombudsman have.

Mr Robinson—I am happy to do so.

Senator FIERRAVANTI-WELLS—As liquidators you are required to conform to a specified set of obligations when you take on a company, whether it starts from a VA and right through to the end when it is being liquidated. In your submission you touched on the question about perception and the need to better educate the stakeholders in this area. Could you elaborate on that because you are often in a position where you are, obviously, being pushed to balance different concerns and different emotions? Can you tell us a little bit more about that and put that part of it into context for us?

Mr Robinson—In answer to the first part of your question—and you might have to pick me up if I miss certain parts of it—it is competing priorities in what we are required to do. We are beholden to a number of stakeholders. Creditors are just one stakeholder. In fact we are required to report under the statute on a number of public interest matters. Essentially that means that creditors are paying for things that would not directly benefit them. It frustrates creditors in that they see a fair chunk of what would otherwise go back to them as a dividend being expended on meeting regulatory requirements such as producing large and detailed reports on the prior history of the company and how the company came to be where it currently is and the conduct of the directors and officers. We get some tension in and around that.

Senator FIERRAVANTI-WELLS—Especially, Mr Robinson—if I can just interrupt—you get that tension if all that history comes to nought because ASIC is not going to prosecute for insolvent trading. Assuming that there was insolvent trading and the history of that company led to evidence of insolvent trading, you are doing all this work, the creditors are being billed for it because there is a statutory requirement and then ASIC does not turn around and prosecute for whatever the breach of the Corporations Law is, that makes it doubly so.

Mr Robinson—Yes. I cannot argue with that. In terms of educating stakeholders, certainly at the moment there are a lot of resources available on ASIC's website, IPA's website and also in flyers and the like. It could well be that a more proactive style of education may be focused on special target groups such as SME practitioners, but in targeting that resource it gets back to the question of having expansive and quality statistics so that you know where to get your bang for the buck in the education dollar.

Senator FIERRAVANTI-WELLS—Can I just take you back to the previous discussion that I was having with Mr D'Aloisio this morning on corporate responsibility. As Senator Cameron earlier said, liquidators are dealing with the 'mess at the end'. How can we better prevent the mess happening and how can we better the framework at the beginning so that companies do not go into liquidation, in particular the sort of premeditated, phoenix type companies that we are talking about? Do you have any views? Please take this on notice. You may suggest changes to the framework at the beginning to ensure that there are greater sanctions against company directors wanting to act in this particular way, such as a 'two strikes and then you are out' type policy. Do you have any thoughts in relation to that?

Mr Robinson—My first reaction to that is that the best way to get the perception out there not to do the wrong thing by directors is to allow and enable insolvency practitioners to fully enforce the law—and that is to provide the tools and the finances et cetera, if there have been breaches, to be able to enforce the law. In terms of whether an appropriate director is a fit and proper person, there is no fit and proper person test or education for people who want to become a director, as far as I am aware. It may be that in a broader policy context that needs to be looked at.

Senator FIERRAVANTI-WELLS—Yes, and we take that point. Just go back to the previous point you made. Do I read into your comments that liquidators themselves should be given the power to prosecute for insolvent trading? I am not saying it is one way or the other.

Mr Robinson—Our primary role, which we take a direct hand in, is a commercial return for creditors. Insolvent trading action can result in a commercial return being compensation from the director personally for that insolvent trading. So we would definitely get directly involved there. In terms of an offence against the act, our role is restricted to reporting that offence to ASIC and then ASIC determines from their internal criteria where they take that referral.

Senator FIERRAVANTI-WELLS—In other words, what you are saying is: potentially widen the scope for liquidators to prosecute breaches of the Corporations Law. Is that right?

Mr Robinson—No. What we are saying is that we get more runs on the scoreboard against the breaches in what is already there in the regulations—that is, in our current regulatory framework we refer it to ASIC to do that. If ASIC is given the appropriate resources to be able to

do it we will have more scalps on the end of the stick in terms of inappropriate behaviour, and that should act as a deterrent.

Senator FIERRAVANTI-WELLS—And your view is that at the moment ASIC does not do as much of that as it should?

Mr Robinson—I think it does a good job with the resources that it has got.

Senator FIERRAVANTI-WELLS—But clearly inferred is the fact that to do the job completely they need to have greater resources.

Mr Robinson—If we are heading towards nirvana it would be a bucket that could never be filled. It is a government policy role to work out how far they can actually fund that, but I think it would be good to have some more successful prosecutions up there as a deterrent.

Senator FIERRAVANTI-WELLS—As a substitute for prosecution perhaps there could be a framework or consideration of a framework that included some mandatory sort of example—a two-strikes-and-you-are-out type of thing against company directors—or a much more mandatory framework so that you did not have to prosecute as such. So look at the range of offences and perhaps beef up the sanctions that are available in relation to a whole range of offences under the Corporations Law so that you do not have to instigate prosecutions. It is much more of an automatic sanction.

Mr Robinson—You are talking about a process where you are preventing liquidations and preventing failure through improper behaviour so that we would not get to see it—do I have your question correctly? Two-strikes-and-you-are-out would be an ASIC consideration, not one for our members, for example.

Senator FIERRAVANTI-WELLS—Certainly—I appreciate that—but, in the big picture of the number of breaches of the Corporations Law that occur and the number of breaches where some sort of sanction is imposed, I think we all agree that many, many more breaches go unpunished, if I can put it that way, and many, many more could be punished. That is the point I am making.

Mr Robinson—It is about having clear rules which are adequately resourced and prosecuted.

Senator WILLIAMS—In your submission between points 4.4 and 4.5 you have a case in point about Stuart Ariff and correspondence et cetera. Could you supply a copy of the correspondence you wrote to Mr Ariff and the responses. The committee can do it in confidence, if you are happy with that, but I would like to see a copy of the correspondence when you first wrote to Mr Ariff and what happened after that. Would that be possible?

Ms North—I will check. In about 2005-06 the IPA introduced a new database and record-keeping system in terms of the computerisation of records, so it is possible that the records you speak of are on paper in a storage box somewhere, but we will see what we can find. If I can, I will just go back to a question you asked earlier, which I think I did not answer as well as I might have. You asked about the actual complaints we received subsequently about Mr Ariff. In fact, I can give you a summary of those. They were complaints about excessive and/or

unapproved remuneration, excessive disbursements, delayed finalisation of administrations, limited information and dividend returns to creditors.

Senator WILLIAMS—Okay. On another point, Mr Robinson, you said at the start that liquidators are highly skilled people. Have you read the submission by Mr Richard Wright to this inquiry?

Mr Robinson—No, I have not.

Senator WILLIAMS—Can I suggest you read it, because he was a farmer up near Armidale. An administrator was sent in who had no idea of running a property. The Wright family had had decades of breeding stud stock, cattle—they used to sell 90 bulls a year, stud cattle—and that administrator, the liquidator, sent those cattle off to the abattoirs.

Mr Robinson—I understand. I am certainly aware of a court case.

Senator WILLIAMS—Then they had stud horses, stock horses, and the administrator sent them off to the knackery for dog food. It is said that they are skilled and professional people but, as far as I am concerned, they have gone into a field they knew absolutely nothing about and they gutted the asset in the way of livestock; they could have received much more money for it. 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. I have a serious problem here. Liquidators and administrators are sent into an industry they know nothing about. Coming from the country myself and spending most of my life on the land, I cannot see why the local accountant could not carry out the selling up of assets and distribution of funds to creditors. This is a problem I see in that it is a specialist field and many of the people have no idea what sort of field they are working in.

Mr Robinson—I will answer in two parts. Firstly, in respect of Mr Wright, that was certainly taken to the court. I think in about 2000 a judgment was handed down. Certainly there was a judgment in his favour. That practitioner is no longer practising. I think he has retired out of the industry. That certainly is an issue that arose that has been dealt with by the court. In respect of that practitioner, yes, that is what occurred as detailed in the judgment for that court case. In terms of specialisation in an industry, I can talk to my firm in particular, which is like many other large firms. I have 20 agricultural specialists within my firm. I also have different specialists for different industries. We are very much in this day and age recruited on our expertise and specialisation within industries. If we were going in a beauty parade in terms of whether we were to be the party selected either by directors or by a financier to undertake a job, certainly one of the questions that we would be grilled on would be what our industry expertise is.

Senator WILLIAMS—Back to Mr Wright, the liquidator took control. The liquidator was obviously appointed by the ANZ bank. Did that liquidator not have any idea of the agricultural industry, especially the sheep, cattle and horse industry?

Mr Robinson—I do not know.

Senator WILLIAMS—Did that person not have specialised people in that field to actually manage that property and disburse assets properly? I have spent some time talking to Mr Wright,

and some of the things he tells me are simply disgusting in relation to the way the money was wasted. When they had feed up to their briskets for the cattle walking through the paddock, the administrator was buying in stockfeed, fodder and things like this. I find it very concerning, and I hope this is not an ongoing practice.

Mr Robinson—It is one instance. There are probably a few other not too dissimilar instances in an industry in which there have been close on 114,000 appointments in the last 10 years. The facts of the matter I am not close to. Certainly those sorts of issues would have been disclosed in the reasons supporting the judgment in terms of whether or not the practitioner or his staff had the appropriate level of experience. Even if they did have the appropriate level of experience, the court has found that they did not do a good job. That was why the court found against the practitioner.

Senator WILLIAMS—Why didn't Mr Wright get the sum of money awarded to him by the court, I wonder.

Mr Robinson—I do not have any background or knowledge on that.

Senator WILLIAMS—It is something to chase up. It would be interesting.

Ms North—On the Wright matter, it was a receiver appointed by the bank. My understanding is that the receiver relied on advice of a stock and station agent, which was poor advice, and the receiver was appropriately held responsible, notwithstanding the advice. Clearly, as Mark says, this is a case where that particular practitioner did not have the appropriate experience in that particular industry. The case was successful, as you know, in court and the case is now in the textbooks under receivers not doing their job properly.

Senator WILLIAMS—Thanks, Ms North. That reaffirms my opinion of receivers.

Senator BUSHBY—In respect of your suggestion that a forum such as an ombudsman could be utilised to help less formally deal with complaints, is there any current process for dealing with complaints other than the formal regulatory complaints to ASIC that you run?

Mr Robinson—Yes, certainly through the IPA. I think Ms North is best placed to respond to that.

Ms North—We do have a complaints system. We receive complaints about member practitioners. We would probably receive something like 30 or 35 complaints per annum that come to the IPA.

Senator BUSHBY—Are they all dealt with formally within the IPA or do you have a mediation process? How does that work?

Ms North—I will outline our process. When a complaint comes in, the first thing that happens—and our legal director has primary responsibility for carriage of the first stages of this—is that we make contact with the person complaining, obtain any appropriate information and seek to understand the detail of their complaint. With the complainant's permission, the practitioner concerned is then contacted and told about the complaint and what has been alleged.

The practitioner is then required to come back with an answer and explain. There were 35 complaints last year. Of those, 25 came back to a situation where there was no evidence of any wrong doing, that is, nothing that had been complained about was wrong. That goes back to the education question. Many people affected by insolvency do not understand how a corporate insolvency works. Sometimes the complaints are, 'I don't think X should happen.'

Senator BUSHBY—In those cases, do you go back to the complainant?

Ms North—Yes, absolutely.

Senator BUSHBY—On the whole do you think you satisfy them in the end by educating them of the reality of it? Or are they still disgruntled?

Ms North—Some of them are disgruntled and are going to be disgruntled because they may have lost their property, money, job or whatever.

Senator BUSHBY—And looking for somebody to blame—and you are in the firing line.

Ms North—But in many cases they are satisfied with the response. In many cases they are quite grateful for the information that they have been provided with, and the fact that their complaint has been followed up. There are other cases where our view is that the practitioner is not doing quite the right thing. If it is a relatively minor thing we will liaise with the practitioner and explain what we think needs to be done differently. Sometimes that will change. I have written to practitioners and firms saying, 'I think you need to change x and y.' They have come back and done that. There are further cases where it looks like there is something quite serious, or at least on the face of it evidence of something quite serious. If it looks like we are getting into a serious investigation where we might need to compel evidence and have investigative powers we pass the case on to ASIC and/or to the larger professional bodies because we do not have those resources or powers.

Senator BUSHBY—I would like to ask more questions about that but I do not have the time. Are there any requirements in your licensing of members of IPA that they have IP insurance, and if so are there any requirements to have run-on insurance?

Ms North—There is no requirement on members that they have insurance. Any full member has to be a member of the Institute of Chartered Accountants or CPA, or a law society if they are a non-practising member. It is the legislation that sets down the insurance requirement. As far as the run-on insurance goes, to answer a question that you asked earlier of ASIC, our information at the moment is not that the insurance industry is saying that run-on insurance will be expensive; they are saying they will not offer it. That is our current advice from them.

Senator BUSHBY—That is interesting given that they do offer it in other professions.

Ms North—Indeed. As a side comment, perhaps, I am aware that the insurance question comes up again specifically in relation to Mr Ariff. No professional indemnity insurance will cover someone for fraud or deliberate wrongdoing.

Senator BUSHBY—True. Thank you.

Senator CAMERON—I do not know who wants to take these questions, but it seems to me that what is coming out in the questioning is that the professional standards might be an issue, from my perspective. First of all, 'knackery' is a National Party technical term that they use quite a lot when they are talking about the Liberal Party leadership.

Senator FIERRAVANTI-WELLS—Oh! I was just waiting for something like that. We almost got to the end of the hearing.

Senator CAMERON—Seriously, I want to go to some issues that have been raised by Dr Vivienne Brand, Dr Christopher Symes and Mr Jeffrey Fitzpatrick of the School of Law at Flinders University. Their evidence basically goes to the issue that the whole model that your profession operates under is a reactive model. There has been some question as to how you can ever deal with the issue of a reactive model. I will just put a few points to you. If we do not get to the answers perhaps you can take them on notice.

Mr Robinson—In terms of being proactive rather than reactive, I think that having a positive auditing regime where all members are visited once a year with random files selected and reviewed by appropriate school parties would add some proactivity into the regime.

Senator CAMERON—They also raised the issue of what they have described as stratification, which I think goes to the point that Senator Williams was raising, that you could send a receiver to a farm, someone who has never been on a farm and has absolutely no understanding of how a farm operates. Why wouldn't your organisation be working to set some standards in terms of sending a liquidator in who actually understands the industry, knows the region they are operating in and can bring that experience to bear? They talk about stratification, not sending people in to that type of liquidation without that experience and understanding. How would you fix that?

Mr Robinson—Within our IPA code we certainly require practitioners to be appropriately resourced.

Senator CAMERON—The voluntary code.

Mr Robinson—It is a voluntary code but, having said that, it has gained a lot of acceptance in the courts and by regulatory authorities as being a precedent by which our performance will be measured. So de facto, it is becoming law and certainly we have a very strong statement there that you have got to be appropriately resourced, and that includes relevant industry skills.

Senator CAMERON—Can you have a de facto law?

Mr Robinson—It has been out there since 2007; it has now been favourably reported on or referred to in some precedents, if you like. Then you can rely on the legal precedent to bring in some of those concepts as law.

CHAIR—Ms North, do you wish to make a comment?

Ms North—Regarding the stratification, Mark has addressed the question of industry experience, which is very important. I think Mark also mentioned earlier some concepts of

limiting an inexperienced practitioner to a certain number of jobs or doing them in concert with an experienced person or something like that as matters that could be considered.

Senator CAMERON—Given that the code of practice is voluntary, and you say that de facto is given legal recognition, why wouldn't you actually build it into the technical standards for training for receivers? Wouldn't that go a long way to helping this issue as well?

Mr Robinson—Certainly we have specific training in our code and, further, the new accounting standard APS 330 which becomes effective in April this year adopts a great majority of what is in the code as well. So we have got the next level up being an accounting standard. Our organisation, the IPA, is fundamentally an education organisation. That is where we devote most of our dollar spend and a big part of that is in around the code.

Senator CAMERON—Right now, could a young graduate receiver finish their course in Sydney, get a job in Armidale and go out to a farm in Armidale and make decisions about that farm in Armidale?

Mr Robinson—In order to get registered in the first place you have to be experienced, so before being registered you would have to have worked for a minimum of five years in the last 10 under the direct supervision of a senior practitioner, and that is after you have done your pre-graduate and postgraduate. So you had been in the industry for 10 years before you even get your ticket.

Senator CAMERON—So you have actually worked under an experienced person?

Mr Robinson—Yes, that is right.

Senator CAMERON—So you could actually work in Sydney and deal with manufacturing receiverships for five years, and suddenly you and your wife make a decision to go up to Armidale. You go up to Armidale and you have got five years experience and be classified as experienced, but you would not know the back end of a cow from front end. Wouldn't that be right?

Mr Robinson—That is possible but I think unlikely, because we are in a competitive market for work and one criterion that either directors appointing us or a financier appointing us would want to know is what we are going to do to maximise, to get best value out of, a certain appointment, and they would be looking at industry experiences being one of the criteria.

Senator CAMERON—That did not solve the problem in Armidale that Senator Williams has been raising with you.

Mr Robinson—Not in that instance.

Ms North—It may not be much comfort to the Wrights, but arguably, after that case many of the banks are much more careful about their appointment—

Senator CAMERON—We are depending on the banks being careful, are we? That is an interesting concept.

CHAIR—In relation to the issue of training, do you have ongoing training and revalidation?

Mr Robinson—Yes, we certainly have. In the last year we held 80 training courses, ranging from national conferences, to local conferences, workshops et cetera. To maintain our membership you are required to do 40 hours of professional development relevant to our industry. That is over and above what we are also required to do in terms of our foundation body, such as the Institute of Chartered Accountants. It is an environment where there is a lot of education and in fact, because it is a competitive environment, my experience is that most practitioners engage in a lot more training than the minimum just to maintain the competitive edge.

CHAIR—And if they do not engage in that training, what happens?

Mr Robinson—There is certainly a regular statement. We are compulsorily required to report back to the IPA executive in terms of our training et cetera and that is verified and audited. I might pass to Ms North about where it goes to from there.

Ms North—If a member failed to complete their professional development, we would take action on their membership. We could suspend their membership.

CHAIR—Do you do that very often?

Ms North—I do not recall a situation where membership has been suspended for noncompliance with CDP. My understanding is that we require every member every year when they renew to make a statement about that. We do not audit every member; we audit a percentage, which is a normal process in this manner, and we do not come up with too many problems in that area.

Mr Robinson—And if we did we would give them the opportunity to get the required education.

CHAIR—Because of the kinds of issues that this inquiry is about, is there an argument in favour of having a limited period of registration for three or five years, or licensing for three or five years, which has to be revalidated on the basis of continuing professional development?

Mr Robinson—We are supportive of a licensing regime that would be for a set period of time, and your conduct during your current period of time would be taken into account in terms of whether you get re-issued a licence.

CHAIR—Including professional development?

Mr Robinson—That would be one of many criteria, but a good one to add.

Ms North—It is also worth noting that currently many of us have spoken about looking at the ITSA model of how they regulate bankruptcy trustees. That is currently a registration not a licensing model as well. So there is definitely the licensing model, but there is also a range of ways you can do the registration model.

Senator FIERRAVANTI-WELLS—You obviously have a panel of liquidators that are appointed by the court, and of course I assume that that continues and that under the court appointment liquidators are appointed depending where the company is and the area that they go to. In terms of your registered liquidators, do you have somewhere where somebody could go in and find out where they operate, and their experience—and I do not want to say my liquidator thing, but you know the sort of thing that I am talking about.

Mr Robinson—On our website there is some information.

Senator FIERRAVANTI-WELLS—So if somebody is looking for a practitioner—a bank, for example—in a particular area with particular expertise, then they could come to your website and have a look at what is on there and just say, 'I am looking for a receiver or a liquidator in Armidale who has got experience with running a stud.' Do you know what I mean?

Mr Robinson—Certainly the practitioners that are located in that area will have their contact details there and a certain limited amount regarding their experience. I would not encourage anyone to make an appointment until they have at least spoken to the prospective appointee about their experience.

Senator FIERRAVANTI-WELLS—Obviously, but there is at least some preliminary information there.

Mr Robinson—Financiers already have their preferred panel of providers; they know who they are and what skill sets they have. But in terms of somebody who is confronting insolvency for the first time that is certainly one way that they can get the required information.

Senator FIERRAVANTI-WELLS—For companies that are faced with insolvency and the various stakeholders, do you have material that is readily available to facilitate their appreciation of what is happening?

Mr Robinson—Certainly. We have drafted, together with ASIC, a number of information sheets, which are required, under the various practice statements, to accompany our notice of appointment and notices of meetings of creditors.

Ms North—On top of that, the IPA takes maybe half-a-dozen telephone calls a week on a regular basis from people affected by insolvency asking: 'What is going to happen? How does this work?'

CHAIR—Thank you very much for appearing.

[12.11 pm]

GLEESON, Mr Bruce, New South Wales Regional Chairman, Institute of Chartered Accountants in Australia

WHITE, Mr Lee, General Manager, Leadership and Quality, Institute of Chartered Accountants in Australia

CHAIR—I welcome witnesses from the Institute of Chartered Accountants. I am sorry we are a little bit over time, but there were questions that the senators wished to ask the previous witnesses. Would you like to make an opening statement?

Mr White—I would, thank you, Chair. I will keep it quite brief, given time constraints.

CHAIR—Say what you need to say.

Mr White—Thank you for the opportunity to appear here today and thank you as well for considering our submission. The Institute of Chartered Accountants reaches across a wide range of service delivery by accountants. I am here in a leadership capacity to say what accountants provide, one of the services being in insolvency practice. Sitting next to me is Mr Bruce Gleeson. Bruce comes here with a great level of experience in that particular field of practice.

You will see that in our submission we have put forward four recommendations, some of which we have touched on already with previous speakers and some of which perhaps warrant further expansion. Interestingly, I noticed some comments earlier on how there can be more preventive work done, which is a very useful point for discussion, as is the speed with which things should move once a difficulty is identified. They are a couple of aspects, outside of what we have already presented, that I thought might be useful.

CHAIR—That is certainly very brief, so thank you very much. Point 2 of your recommendations is to:

Create an ASIC inspection program, similar to that in place for registered company auditors, for registered liquidators.

Do you want to expand on that for the record?

Mr White—If we go back in time perhaps five or six years, the regime across auditors was one in which ASIC primarily dealt with an issue when there were enough complaints or information from the markets that an auditor was in trouble. If we go back a couple of years further than that, there were a number of significant global corporate collapses and there was a sense, in setting the right public policies, that waiting for complaints or information from the market meant that there was sufficient time for difficulty to arise with auditors. So the public policy setting around auditors was changed, and ASIC introduced an audit inspection program. In fact, the latest work of that is actually in the papers today, so this discussion is quite timely. The most important aspect of that is that it is quite a proactive piece of work. It is not a matter of

waiting for information to come to ASIC in terms of complaints but actually reaches across a wide proportion of the registered company auditor population.

It is quite an extensive piece of work. If there is a visit to an auditor there might be four or five people from ASIC and they look at the organisation as well as the individual. From the perspective of a policy setting, when I see what is happening in this neck of the woods I put forward the suggestion that there is a piece of work already occurring in another part of the accountancy profession that could be used to add considerable value in this element. The IPA spoke earlier about an ITSA type program, and I see some similarities with that as well. Really, we are perhaps coming to the same conclusion, with them being driven a bit closer by what they have seen with ITSA and us saying perhaps look at what ASIC is already doing in the auditor program.

CHAIR—That is very interesting. Undoubtedly it would help reduce the incidence of malpractice and problems.

Mr White—I would put to you, Chair, that when practitioners know that they might get a knock on the door, rather than waiting for complaints to happen, it actually smartens everyone up. I think that is actually a good message.

Mr Gleeson—I would add one point to that from certainly what I know of a practice that our firm engages in. Because we are also registered trustees in bankruptcy, when we receive our annual review and we get feedback from ITSA on that, there is actually a staff briefing on what the result of that review was. I think that, as Lee has already indicated, it acts as a very good guide as to what alterations might need to be made within the practice to deal with some of the review.

Mr White—Remediation of weaknesses is a really important element to continually improve the standards of a profession.

CHAIR—Thank you.

Senator WILLIAMS—Thanks, Mr White and Mr Gleeson, for your presence today. I will take you to one part of your submission where you say:

> Our submission also includes recommendations to review the use of enforceable undertakings and the … (CALDB) process. We are supportive of ASIC referring matters to the CALDB, however we are aware that this process is not operating effectively.

Would you expand on where you say ‘we are aware that this process is not operating effectively’?

Mr White—Primarily it would appear to be the length of time. That is what I am referring to there.

Senator WILLIAMS—So ASIC gets a complaint and by the time action is taken, you say, there is a delay.

Mr White—The length of time is a concern in some of this, and obviously you have presented some examples today. It has a broader reach there as well. What I was trying to do, in looking at the consequence, how to get the heads on the sticks, was this. There is a couple of different ways that the system operates, one of which we see but we are a little unclear how effective it is. It is around the enforceable undertaking. That is a type of arrangement whereby ASIC and a practitioner reach an agreement about a particular issue of malpractice or something of that sort. The difficulty is when you are not part of those two parties but are looking in with keen interest. Very little is actually said on the public record. Therefore sometimes you will find instances with so little said that I think getting a clear message out to other practitioners, that this type of behaviour is not tolerable and it will be dealt with effectively, is somewhat minimised. Going back to your original question as to CALDB, we would put to you the length of time in particular but also we would put forward that we think there needs to be an alternative to enforceable undertakings as well.

Senator WILLIAMS—Perhaps licensing instead of registering might be one solution towards that—

Mr White—It could be.

Senator WILLIAMS—as far as giving ASIC power to act quicker. As I see it, this is the problem: people report wrongdoings to ASIC and by the time ASIC has to go through the proper legal procedure and research and build their case this could take years. If we have someone such as a liquidator-administrator doing the wrong things, those wrongdoings can continue for years, as we have seen in the case of Stuart Ariff.

Mr White—Understood.

Senator WILLIAMS—In your submission you raise a very interesting thing. You talk about receiverships. For the record would you explain to the committee the difference between a receiver being appointed and a liquidator-administrator being appointed by a court?

Mr White—Yes. I will pass to Mr Gleeson on that as he is a little tighter as to that particular differential. The point I made in the submission was that for completeness we felt that receivers should perhaps have been part of these terms of reference.

Senator WILLIAMS—I agree with you, yes.

Mr Gleeson—The inherent difference between those types of appointment is that, generally speaking, the receiver is appointed under a debenture charge, so typically would be appointed by a bank or other financier. There are instances in which a court would appoint receivers, but, generally speaking, the instances of where that occurs are not that significant. In the main the reference in the institute's submission is to privately appointed receivers.

Senator WILLIAMS—So in the case where a bank appoints a receiver, for example, the bank might hold the mortgage over some real estate, the business running that real estate is going down the tube, the bank can appoint a receiver and the receiver can go in, lock the doors, kick the business people out and then proceed to sell off the assets et cetera. So obviously that is how it can work?

Mr Gleeson—In an extreme example that is how it could work. The receiver is typically either a registered liquidator or an official liquidator, so certainly they come to the table with that background and those skills. Obviously, the receiver has obligations under the Corporations Act to comply with insofar as being able to satisfy anybody that wants to inquire about the way that they have conducted themselves with respect to dealing with assets. The key point that perhaps you are touching on is that primarily, whilst the receiver has those statutory obligations, their prime focus is on returning moneys to or recovering moneys for the secured creditor.

Senator WILLIAMS—Yes. Would it be likely in many cases that the unsecured creditors would not get any money out of that business? Or is that too general question?

Mr Gleeson—That is probably too general. In a lot of instances, and this comes back to the heart of some of the concerns that are raised typically by your mum and dad creditors, people would confuse the terminology between liquidators, administrators and receivers and perhaps suggest that it is the liquidator that is the reason why there has been no return, when in point of fact there has been a receivership occur before the actual liquidation of the company. That is one of the reasons why there is no distribution of assets or there are no assets available to the creditors.

Senator WILLIAMS—Do you know if any other countries have the receivership appointment system? I have been told that the UK has recently abolished receiverships and receivers. Have you heard anything about that?

Mr Gleeson—We would need to take one that one on notice and come back to you.

Senator WILLIAMS—I have a couple of other points. In your submission you say:

We suggest the Inquiry review the results of three recent court/tribunal cases in terms of the outcomes and implications for insolvency practitioners.

You mention a few cases. Are you familiar with those cases in your submission?

Mr White—If there is the one referring to Vanda Gould.

Senator WILLIAMS—We have here:

First, the High Court of Australia decision in the case of Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board …

Are you familiar with that case?

Mr White—I am not that familiar with it but I was advised that that is a very helpful case to understand the reach around duties. I think the Vanda Gould one is the second.

Senator WILLIAMS—You have:

The liquidators challenged the ability of the CALDB to suspend registrations of liquidators. We note that the case includes a good description of the roles of liquidators and the CALDB in the judgement. The second case is the decision in the Administrative Appeals Tribunal of Australia (see Gould and Companies Auditors and Liquidators Disciplinary Board …

Can you explain anything about the second case, for instance?

Mr White—Yes. I believe there has been a submission to this inquiry from Mr Gould. That would probably give greater evidence. It is my understanding that he had gone through a process of examination regarding a range of charges. I think there were in excess of 40. That went through a process via the CALDB to the administration tribunal as well and I think ultimately to the High Court. I think the final outcome of that was that only two of those charges were upheld at the end of the day. So that member, who is a chartered accountant, was saying clearly, 'I had the determination and fortunately the resourcing to see this case through. Somehow something has gone off the rails here for 48 charges to get down to two at the end of the day.'

Senator WILLIAMS—Yes, there is a big difference. Of course he was lucky he had the resources because in many cases people who seek justice in the courts simply run out of money and cannot get justice.

Mr White—That was Mr Gould's point to us.

Senator WILLIAMS—A very valid point. Finally, you say it is critical that the CALDB process operates effectively, efficiently and focuses on important matters. We have had the idea raised today of an ombudsman in this industry of liquidators and administrators. Do you have anything to add on that idea?

Mr White—I actually think that needs to be explored a bit further. I heard you ask the IPA for some suggestions or further detail. I think we would like to contribute to that as well. At times I am a little concerned that we do not just create another body that adds oversight without being too effective, but I think this might be an opportunity to actually do something quite substantial.

Senator WILLIAMS—People lodge a lot of complaints against insolvency practitioners, and I would say a lot of those people are very angry—they have lost a lot of money, they might have lost their life's work, et cetera. Perhaps if they went to an ombudsman they may be able to get a quick result or quicker attention. We have heard of so many cases where people have complained to ASIC and have not had any result. That is a common complaint through many of the submissions to this inquiry. Perhaps an ombudsman would be someone closer on the ground that could at least respond to some of those complaints and give many of the people some sort of satisfaction.

Mr White—Clearly, and equally there are some good models around for an ombudsman in some other industries. It does have quite a bit of attraction if it can deliver the effectiveness, but also timeliness. I think that is quite an attraction in what we are looking at here.

CHAIR—If you could put in an additional submission on that to the secretary, we would appreciate it.

Senator FIERRAVANTI-WELLS—Insofar as the terms of reference do not specify receivers, what more could you add to your submission if they did include receivers and managers? Are there additional comments that you could usefully have made if we did include that?

Mr White—We have not explored that enough to really answer that question here. I think we were just generally saying, as Mr Gleeson indicated, at times if you reach out to the business community, let alone further out to taxpayers and the mums and dads, these terms liquidation, administration and receivership are quite interchangeable. Even people like me, as someone who has been in the accounting profession for some time but not specifically insolvency, would have to remind themselves.

Senator FIERRAVANTI-WELLS—And of course you can appoint a receiver and then the court can appoint a liquidator. It can run concurrently and you can then have subsequent action, and the creditors wonder why they are paying two sets of fees and that sort of thing. I note that Mr Robinson is still sitting here, and I thought we had someone from Treasury and ASIC. If our terms of reference also included receivers and managers, what additional comments could be made to contribute to this inquiry? I think that might be useful comment and I would invite perhaps ASIC and Treasury and Mr Robinson to put in additional comments to do with receivers and managers. We can deal with that at a later time. I am sorry to do that this way but I think, Mr White, your comments in relation to receiver-managers are very timely. Can you elaborate on the preventative work that you foreshadowed in your opening statement, as a consequence of some of the evidence you have heard today? That would be very useful for us.

Mr White—The reflections were coming from a couple of perspectives, one of which concerned ASIC adopting that inspection program, so, ideally, that needs to be struck in a manner in which practitioners in these fields will understand that they will get a visit on a regular basis and that their firms' processes as well as their individuals' processes will have some level of inspection. I think that is quite a good way to keep the momentum going. Equally, there is an element in there—and that is what I was also referring to with the media today—that ASIC then puts something publicly out about what it is finding from doing that work. It is all well and fine for the regulator to have an understanding, but it is really important that that understanding, at least in an aggregated manner, be put onto the public record as well.

Senator FIERRAVANTI-WELLS—You heard some of the evidence today and some other comments that I made in relation to the responsibilities of company directors. Equally, with the sort of preventative work that could be done, we are dealing with the end of the process.

Mr White—Yes, that is the bit that is tricky.

Senator FIERRAVANTI-WELLS—Let us go back to the beginning of the process: prevention is better than cure. As a profession, how do you see the framework could be changed, altered or bettered so that we do not get into those sorts of circumstances? You heard my earlier comments about phoenix companies, and I am sure your members have come across a lot of those. Can you shed some light on those concerns?

Mr White—I can. It might not be the most easiest of responses, but it seems to me that where the committee is heading on that is actually a really good place. Instead of dealing at the back

end you are trying to get as much up the front end as you can in terms of minimising impact. Yes, we have the director community involved in these discussions. Yes, I think we should also have the accounting profession involved in that. By that I mean more around the individuals—our members who would be in CFO positions or the financial controllers, the purse strings of the organisation. They have an important role to play as well. We work very hard with our members around the importance of ethics and general governance behaviours. That is not to say we cannot do more, but I think it is an element that we would push. With regards to the audited community, not all organisations are audited but most are. Again, we as a body believe we can reach out to that community in quite an effective way to encourage their work and dealings in this space as well. I come back to the committee and say: in considering your public policy settings right at that front end, let us identify all the relevant stakeholders and see whether we can get some consistency in what we can do in this space. If it were concentrated too much on just one, and the obvious one would be the directors—and I am not walking away from the fact that they have very important obligations.

Senator FIERRAVANTI-WELLS—They are a part as stakeholders.

Mr White—Correct. So let us work together to try to get as much messaging in there. It is really tough when you do get into this phoenix space because, clearly, you are dealing with individuals who are just out and out wanting to misuse the system and find loopholes to do things. I think all of us in this space have to be clearer and swifter in trying to work at that angle, because the behaviours of all people work against confidence in the markets.

Senator FIERRAVANTI-WELLS—We were having a discussion earlier about a much more mandatory based framework. We were referring to the parlance: 'Two strikes and you're out.' You heard the discussion this morning with ASIC along the lines of debarring. Clearly, if you have a much more mandatory element to a system like that there obviously has to be some sort of flexibility. But you start with that as the default. What is your view in relation to that? In other words, corporate responsibility and directors' responsibilities so that, with breaches of the Corporations Law, once you have had one, two, three—whatever number of breaches—then you are, putting it bluntly, debarred. Then there is a process of either you go to purgatory or you go to hell. That is putting it bluntly.

Mr White—It does have some attraction and, again, not trying to sound a bit bureaucratic in saying this, but I think we would want to understand exactly how it would work. I would put that to you, Senator, in a way that, even if we had that, you will still find people in this industry who will work around that. If you have a good brother, a good cousin, a mate from somewhere that person will then be the front piece of what you are trying to do. As I said, I think there is some attraction to it, but I would like to understand it more fully to see how it would work.

Senator FIERRAVANTI-WELLS—That is a very legitimate point. I have come across that as well in the many companies I have wound up.

Mr Gleeson—I guess the concept around phoenix transactions is that very rarely is one individual at the top of it. It is usually a group and, quite often, that group can involve some advisers as well. I guess the initial concept of phoenixing the business time and time again very rarely comes from a director. We saw through the Somerville case that that has probably been somewhat timely as far as what you are talking about.

Senator FIERRAVANTI-WELLS—Very complex.

Mr Gleeson—Because it explains that, more often than not, an adviser is part of the whole idea and the whole scheme.

Senator FIERRAVANTI-WELLS—If I read into what you are saying, it means that the web of culpability, if I can put it that way, is not just on the director who is ultimately—

Mr Gleeson—Correct.

Senator FIERRAVANTI-WELLS—What has been some of the fallout after the Somerville case?

Mr Gleeson—It is certainly well understood amongst the insolvency profession what it is and what problems it brings. Where it is still probably not well understood is in certain elements of the accounting profession, and even the legal profession, that have played the system for a while. There is a level of: 'Let's just roll it over again, again and again.' So, hopefully, if there were another couple of cases like Somerville it would send a clear message to various professions that their involvement or participation in it would be taken quite seriously.

Senator FIERRAVANTI-WELLS—That was my point to ASIC before: 'With 1.7 million companies under its umbrella and 30,000 that go into voluntary liquidation per annum, and then you end up with 280, whatever, debarring—there's a big gap there—don't tell me that there are not anymore Somervilles there which ASIC should be properly prosecuting.' That is not a comment for you, but I am just making that observation.

CHAIR—Thank you very much for appearing. We look forward to your additional comments. You might contrast with receivers. I thank the staff and Hansard and close this particular hearing.

Committee adjourned at 12.38 pm