COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Reference: Liquidators and administrators

FRIDAY, 9 APRIL 2010

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SENATE ECONOMICS

REFERENCES COMMITTEE

Friday, 9 April 2010

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

Substitute members: Senator Williams for 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 Eggleston, Fierravanti-Wells, Hurley, Pratt, Williams and Xenophon

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 8.59 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 practices, and the involvement and activities of the Australian Securities and Investments Commission prior to and following 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 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, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a Senate 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, 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 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 policy or factual questions about when and how policies were adopted.

[9.02 am]

BRAND, Dr Vivienne, Senior Lecturer in Law, Flinders Law School, Flinders University

FITZPATRICK, Mr Jeffrey, Lecturer in Law, Flinders Law School, Flinders University

SYMES, Associate Professor Christopher Francis, Private capacity

CHAIR—I welcome Dr Vivienne Brand, Professor Jeffrey Fitzpatrick and Associate Professor Christopher Symes. Would you like to make an opening statement?

Mr Fitzpatrick—Thank you. Good morning. Thank you for the opportunity to appear here today. We appear as a result of our submission on fit and proper liquidators. I will make some preliminary remarks, and we ask you to note at the outset that, while Dr Brand and I both teach in corporate law generally, and Dr Brand has practised in the area of insolvency law, our areas of research interests are predominantly, in my case, general business law regulation, including insolvency, and, in the case of Dr Brand, business and professional ethics. Neither Dr Brand nor I is an active insolvency professional or a specialist insolvency academic. We are, however, interested in the regulation of corporate professionals in Australia and also in the operation of tests for fit and proper conduct. Associate Professor Christopher Symes, who is on my left, will also be appearing before you in the next submission, with Associate Professor David Brown. Chris is a senior insolvency academic. Chris was a colleague of ours until very recently, and we worked together on the submission that we made to this committee.

We thought it might be useful if we summarise for your benefit the key points that we are making, but before doing so we would like to stress that we do not wish any of our comments to be taken as criticisms of either ASIC or the insolvency profession as a whole. We do not disagree with the tenor of the submissions made to this inquiry by ASIC and members of the profession that the insolvency regime in Australia largely works well. Our observations relate principally to issues arising out of the regulation of the 'fit and proper' test for liquidators. Essentially, we are concerned with how the so-called bad apples are picked out and dealt with.

As a final introductory remark, we note that the work of your committee has been very useful to us in bringing to light a range of statistics on insolvency practitioners in Australia. Sometimes the opaqueness of statistical data available in this area may stymie quantitative research.

Turning to our submission, we have five key points: the stratification idea, the committee of creditors, an insolvency ombudsman, reliance on professional bodies and the possible ASIC innovation of a flying squad for proactive surveillance of liquidators. I will ask Dr Symes to speak on the first three and then Dr Brand will speak briefly on the remaining two.

Prof. Symes—Good morning, Senators. Stratification, I note, has already appeared—with the hearing in March. In our submission we talked about stratifying and monitoring of liquidators according to the size of the companies liquidators are authorised to act for. We draw an analogy with section 45A of the Corporations Act, which looks at small and large proprietary companies. I would say that our ideas of stratification are not advanced but the idea of one size fits all with

the registration of liquidators is something we would point to as perhaps needing review. The idea of interviewing prospective registered liquidators would lead, at least in part, to identifying the experience which candidates or applicants for registration have had, although we note that interviewing performance has been well made by other witnesses as not necessarily ideal. Also, there is the regulatory cost of interviewing.

With stratification we were thinking something along the lines of restricted and unrestricted registration, that we might need to review the idea of category A and category B type registered liquidators. In this submission and in other submissions it has been highlighted to the committee that there is one registration of liquidators, which means that that person can become a liquidator to a company, an administrator to a company or a receiver in a company. Once registration takes place, it is ongoing. There is a distinct possibility of a person having an unrestricted licence—registration as it is now—and that they can embark upon any size liquidation, any size administration or any size receivership. It is possible, I suppose, to look at a stratification where you would have specialist insolvency practitioners looking at only operating in the small and medium enterprise area. It is possible to restrict on the basis of the size of the company which is going to be wound up or administered or the size of the turnover. If we were to introduce categories, I think we would have to look at differences between education, perhaps putting in hurdles for both education and supervision.

With the committees of creditors—again this is not a fully developed idea—in most external administrations we have committees of inspection or committees of creditors who speak on behalf of creditors. It seems that perhaps these committees could be asked at the end of an administration to review the performance of the liquidator, a bit like a school report. That could be done through some kind of administration survey or questionnaire.

The insolvency ombudsman is another who has had some discussion before this committee. Later, Associate Professor Brand and I will say some things about the ombudsman. What we should contemplate is that creditors who are unhappy with the liquidator or the administrator have got limited places to go to complain. We would see that the insolvency ombudsman would be a place to perhaps investigate individual complaints and make recommendations about ongoing registration or licensing of liquidators. There would need to be, if there were an insolvency ombudsman, some thought given to how the insolvency ombudsman would access information. There would be issues of privacy. The information that would sit about liquidators and administrators would be in the hands of ASIC and ITSA and would be known by the IPA and the ICA. So the ability for the ombudsman to investigate fully would need to be looked at.

One suggestion we might make about an insolvency ombudsman is that the insolvency ombudsman would be accessible to attend committees of creditors, so that, if the insolvency ombudsman were on notice that there was a problem with the liquidator, the insolvency ombudsman could listen to what the liquidator or the administrator told the committee of creditors or could even attend other creditor meetings.

Dr Brand—I will mention a couple of points. Thank you for the opportunity to speak today to our paper. The first point I wanted to refer to briefly is that we noted in our submission that there is a degree of vagueness in the definition of fit and proper in the legislation. There are now very developed industry codes which are fairly standardised internationally, and it would seem obvious to incorporate those closely in legislation or perhaps more easily in the ASIC regulatory

guide. As we noted in our submission, ASIC have indicated they are reviewing the relevant regulatory guides and we would certainly support them in doing that. We would hope that they would consider incorporating reference to existing industry codes of conduct relating to the ethics of liquidators. It seems an obvious thing to do.

The second point in our submission that I wanted to briefly refer to is that we noted what we described as essentially the reactive surveillance model that ASIC used in relation to liquidators. That was not, by the way, an original term. We were quoting a loose-leaf service—it was a description in the CCH loose-leaf service, which we referenced. A brief comparison of the UK insolvency regulatory system, and even the Australian bankruptcy trustee system, suggests there are far more active ways of regulating these sorts of professionals. While there seems to be general agreement amongst people appearing before the committee—and having read some *Hansard*, I think there is general agreement from even the committee itself—we are really talking about a few bad apples, not a bad industry. Apples can go bad, as well as starting out that way, and there seems to be a lack of ongoing active review of liquidators, which is concerning.

A brief review of the UK insolvency regulator statistics suggests that they get a far higher strike rate on identification of misdemeanours from investigations, which they have initiated on a profiling basis or on a random basis, than on the number of misdemeanours they pick up from complaints. That is, there is a far higher strike rate than from complaints. Complaints do not seem to be a particularly effective way of identifying problems. That is perhaps not surprising because there are pretty significant information and resource asymmetries between the consumers of liquidation services and the liquidators. People who are involved in liquidations as creditors often do not have a lot of expertise. They may not know when misdemeanours are occurring and, conversely, they may think they are occurring when they are not. So it is particularly important to have a very active regulator. The external body needs to be fairly involved in an industry where, if you like, there are no natural predators. Liquidators do not work with people who really understand what is going on and, therefore, they perhaps do not have the same level of supervision from their peers as they might in other industries. I could expand on that later if you like.

I noticed in ASIC's submission that they suggest that they are moving towards a more active regulatory model, and that is something that we certainly welcome. Those are the only two matters that I wish to raise from our submission.

Mr Fitzpatrick—That summarises our five key suggestions. We will try to answer questions that your committee wishes to put to us.

CHAIR—Thank you very much, Professor. I might first of all ask you a question, Dr Brand. This is about the United Kingdom system. First of all you said this wasn't a great problem—there were just a few bad apples. Is it the opinion of all of you that there is not really a big underlying problem—that it is really just a few bad apples?

Dr Brand—I think I would say that some re-calibration would be a nice idea. I don't think the whole system needs to be changed dramatically. There are obviously enough examples of very disgruntled creditors to suggest there is either a big education gap or there is some kind of problem, but I do not think that the industry or the system is fundamentally flawed. That is my view.

Prof. Symes—I support what Dr Brand said. If we look at what has happened in the courts, we have obviously got RIF last year, which is fraud. That is clearly a bad apple in that sense, but if we go back over, say, 10 years, there is not a lot of court activity with regard to the prosecution of liquidators for that sort of badness. There have certainly been cases involving liquidators which are much more about getting their forms in on time or something a little more serious than that, but it is much more administrative rather than conduct coming from the court system over the last 10 years and in history, really, of liquidators.

Again, I suppose if we think bad apples are we focused on something like remuneration, where I think there is disquiet across the community with regard to how much liquidators charge? I do not know that that makes them bad apples, but certainly there might be something to address with regard to how society thinks about liquidators and administrators with regards to remuneration.

CHAIR—Thank you.

Dr Brand—I would make a very brief comparison. Case statistics suggest, just as a matter of probability, we are missing a lot of misdemeanours in Australia. The strike rate in Australia is much less than the strike rate in the UK. Maybe we are much more ethical as a profession or maybe we are missing something.

CHAIR—Can I ask a question in relation to that. In the United Kingdom model, do they have a registration system with a requirement for re-registration?

Dr Brand—I think you are going to get quite a detailed comparison between the UK and the Australian model from the next presentation. That might help to flesh that out. That is from someone who knows a lot more about it than I do.

CHAIR—Okay. Thank you. We are interested in this issue of registration and reregistration.

Senator HURLEY—I am interested in that question because, as you said, we don't get that many court cases, and of course liquidations ebb and flow as the economy does. This committee is considering what we might recommend. I think Professor Symes referred to the cost—it is always a balance between what the cost is and what the result needs to be. I would like to know what you regard as your priorities. If we were to do a list of things in order of priority, what would you recommend?

Dr Brand—For me the No. 1 priority would be what I have thought of as a flying squad: an identified unit of people who will visit you without warning and who will look carefully at what you are doing. The Insolvency and Trustee Service Australia seems to have a lovely system: they interview, annually it seems. Their submission is very enlightening. It seems that the cost is justified there. Whether it is justified in relation to liquidators I guess we do not know until we do it.

Senator HURLEY—Do you think that the industry bodies perhaps might come up with their own more proactive way of addressing some of these problems? You, Dr Brand, I think were talking about administrative problems. This might be one area which would bear a lot more

looking at. That flying squad would address that as well. Do you think the industry bodies might have some more responsibility here?

Dr Brand—Co-regulation is a model that I know Professor Symes and Professor Brown strongly favour. It is not something that I have looked at in depth. You might want to ask them about that question.

Senator HURLEY—Okay.

Prof. Symes—One thing that we would probably want to say in response to that question is that, in addition to Dr Brand's flying squads, I think where I have identified that CALDB, the Companies Auditors and Liquidators Disciplinary Board, is not very active with regard to liquidators. In the year before last they spent something like 10 man hours—that is the way they recorded it in the annual report—looking at the conduct of liquidators.

Dr Brand—They said 'man hours', too.

Prof. Symes—They did. That would seem to be at least one warning for the year. We would suspect that there is probably a little bit more.

Dr Brand—Statistically, that is almost impossible.

Prof. Symes—We have had some informal chat with CALDB about that. One of their members said to us, 'Well, if we had more cases before us we could hear more.' That then leads us to think that that is ASIC driven—that they need to be bringing more cases.

One other informal comment that has been given to us is, 'Well, they are enforceable undertakings. They were used by ASIC, so therefore there is no need to take them to CALDB.' Again, our investigations of enforceable undertakings made public, it does not seem like there is a lot of activity in that area either.

Senator HURLEY—It seems that in view of that we need to find some way of identifying where there might be problems before it comes to a complaint.

Prof. Symes—That may be the flying squad.

Dr Brand—Complaints review is a very poor mechanism.

Senator HURLEY—Or perhaps an educational program that is more active that says to the people who are subject to these problems so that they might be more encouraged to actually come at an earlier stage.

Dr Brand—One problem with that model would be that you are educating new people every time. Not many people are repeat victims of insolvency, whereas if you are directing it through ASIC you have experts who are able to confirm quickly through their auditing processes when a problem might arise. Profiling of likely problems seems to me a really interesting area. I don't know how far ASIC have got with their systems in that respect. I know they are beginning to do some profiling in their markets surveillance work. The Legal Practitioners Conduct Board in

South Australia, for instance, can tell you who is most likely to offend. Anecdotally it is middle aged, been in practice for some time, pressures of home life, pressures of career et cetera. They have an actual understanding of whom then to keep an eye on. That kind of work could be very helpful, perhaps, in looking at liquidation regulation.

Prof. Symes—And that is a profile that fits Ariff.

Senator HURLEY—Okay, thank you. That is helpful.

CHAIR—Can I slip in one question before I go to Senator Fierravanti-Wells. Would a continuing education program with registration solve some of these problems and identify people who did not have the skills?

Dr Brand—I think there are two problems: one is people who simply are not following the procedures, even though they would if they were organised enough or if they had known what to do; and then there is fraud. There is a spectrum in between. Education will assist with those people who would like to do the right thing. A genuinely fraudulent operator who has backed themselves into a corner can attend any number of education programs without really changing their spots. I think there are very few of those.

Senator FIERRAVANTI-WELLS—Can I look at this from a different perspective. I looked at your way forward. One perception about liquidators is that it is very much a closed shop: it is almost a monopoly situation, they do very specialised work, and the sorts of people that can potentially scrutinise them are few and far between. Is there a case perhaps for broadening the base of liquidators—in other words, engendering a bit more competition into the industry? I just put this for consideration. And also making it such that liquidations are allocated on an expertise basis rather than just the next cab off the rank. With that, potentially, if you look at big liquidations, because ultimately there is a distinction between big liquidations and small liquidations, is there scope for some sort of tendering process, if there is a big liquidation, for their costs? Do you have any thoughts on that?

Dr Brand—I think Chris might have a couple of thoughts on the P-plate sort of idea of stratification and I am sure on other things too. I think liquidators are particular animals—it takes a particular group of skills and a particular kind of personality to do that kind of work. I do not know that expanding the pool would necessarily assist, but I have not thought it through in any detail.

Prof. Symes—I think I got lost in the series of questions there. Certainly the idea of it not just being accountants, and moved to lawyers, was looked at just a few years ago. The Law Council made a submission which suggested that there was no interest—at least not a comprehensive interest—from lawyers to move into insolvency as an area of practice. But of course if we think about deceased estates, they are done by lawyers and, if we think about deceased companies, they are done by accountants. I suppose there is an argument that says: why should it only be accountants who become liquidators? Why isn't it other people? If it is the winding up of a personal estate we find that lawyers have always done that and they can find the expertise if they need to with regard to—

Senator FIERRAVANTI-WELLS—Knowing that there are lawyers, quite a pool of lawyers, who have expertise in insolvency as well.

Prof. Symes—Yes, but they do insolvency law probably more than it is done in the practice. In some countries in the world it is lawyers who are the registered operators not accountants, so there is a potential problem, most certainly. It is hard to get numbers but we believe there might be something like 1,100 registered liquidators in Australia, but there are probably not anywhere near that many active. Maybe 60 per cent of those are active—

Senator WILLIAMS—Five hundred and sixty—

Prof. Symes—Of those 560, one would expect that they are actively busy and that they are fairly well educated and they are handling the work okay. If what we are trying to do is broaden the base to address the issue of remuneration, which it may be—so if everybody is able to charge $550 that is a complaint—then I think that is about remuneration not about broadening the base.

Senator FIERRAVANTI-WELLS—I guess my concern is the one raised by Senator Williams—the example of a liquidation in a rural setting. I used to wind up companies that did not pay their tax. It is a closed pool of people; it is the same people doing the same thing. You put a liquidator in and that is part of the problem. When you put a liquidator into a scenario they do not have the expertise in that area, and that is part of the other problem—it is not tied to remuneration. If you have got a liquidator that goes into an area where the creditors are very familiar with the situation but the liquidator knows nothing—for example, it is a horse stud or something like that and they know nothing about it—there is a cost associated with that.

Prof. Symes—I think we are talking about some different things here. Official liquidators certainly have the cab rank principle and maybe then we are talking about the idea of maybe looking at tendering, which might address that. But do not forget that many liquidations happen because it is the creditor who chooses to liquidate. I am not so sure that that is a small pool in a sense that the creditor can choose anyone they like as the registered liquidator. I would not be so concerned that the pool is small with regard to all liquidations. It might be small with regard to official liquidations, court appointed liquidators.

As for the idea of expertise—and, Senator Williams, I have read that part of *Hansard*—I think there is merit in thinking about size. Yes, the size of something like Ansett being wound up was a huge issue for 16,000 employees and planes in 30-odd countries, or something like that, versus the small rural setting that is the wound up, and calling for expertise and asking how someone can have the expertise to do that on the one hand and a rural setting on the other hand.

I was appearing in Hong Kong at a session where there were some American insolvency professionals who were critical just after Ansett of the way we did things in Australia. They said, 'Why didn't you bring in the Americans, who were very good at bankruptcies in the aviation industry, and use them?' I think it is much more about liquidators having this ability to bring in other expertise—they bring in a valuer or an auctioneer; they do not do all those things themselves. I think that once you have got the registration process in place and you got a body of people doing the job, I am not so sure that it bothers me too much that they have to do a complicated Ansett and then a simple rural liquidation.

Senator FIERRAVANTI-WELLS—All right. If you have a small liquidation, and it is very clear that there is not many assets, why shouldn't that be charged out at a much smaller rate or there be some sort of concession made in those circumstances? Do you see what I am getting at? In the legal profession, if you go to a suburban lawyer you will get one fee—there are horses for courses.

Prof. Symes—So you are moving towards a scale, or going back to a scale?

Senator FIERRAVANTI-WELLS—I am talking about a scale. But the other thing is: why shouldn't liquidators' fees, just like lawyers' fees, potentially be under scrutiny? At the end of proceedings your fees as a lawyer get costed, on a party-party basis. There really has to be something to unlock this public perception about the costs associated with liquidations so that your small time liquidation is not going to end up eating everything with fees.

Mr Fitzpatrick—You are suggesting the idea of a taxing master?

Senator FIERRAVANTI-WELLS—I am asking you what your opinion is.

Dr Brand—I would have thought something like that would be unwieldy. Again, I am sure Chris has looked through this much more, because he and David are speaking on remuneration, but I just cannot imagine how you could reverse-engineer an insolvency. A liquidation is such a complex process that potentially the time you spend working out what it should have cost could cost more than the liquidation.

Senator FIERRAVANTI-WELLS—But if you know that you are potentially under the scrutiny of a master, like you are as a solicitor when you have to cost your party-party costs, that is going to make you a lot more considerate of the sorts of fees you charge. Whilst I read all the material about liquidators, the reality on the ground is that you go in, you do what you have to do, you walk out, you get your fees and that is it. Often the interests of the liquidator prevail. You get this nice report at the end, there is no money and that is the end of the story. Why shouldn't that liquidator potentially have some scrutiny of their fees at the end—or some report about their activities? Why shouldn't the creditors have some legislative power to be able to instigate some scrutiny?

Dr Brand—As I said earlier, in an environment where there are no natural predators, it is important to have some kind of external review. That might be via that kind of fee structure review; or the Ombudsman could be the appropriate place to put that control—or ASIC's own surveillance could audit for that kind of inappropriate charging.

Senator WILLIAMS—While you are talking on that very issue: you do agree that there needs to be some tightening of the regulations to clarify, to justify the charges so that creditors can say, 'We've been treated fairly; we haven't been ripped off'?

Dr Brand—I think across the system as a whole there is space for more external checking, but I have not looked at remuneration. Chris and David have, and I think they want to speak to that.

Prof. Symes—We will speak to that a bit later. One thing you raised, Senator, is perhaps a much bigger question—that is, is ASIC really the spot where all corporate insolvency should be, when we have ITSA doing personal insolvency? In the UK, for instance, I was told yesterday there is an insolvency service that employs 2,000 people, who look after everything about insolvency. A taxing master type role sounds like somebody who would be employed to do that job. That is probably not sitting in with the Federal Court master type system. It is therefore probably some kind of government agency, and I do not necessarily see ASIC doing that at the present time with the present structure.

Senator FIERRAVANTI-WELLS—They certainly do not have the resources or the structure to do that—that is for sure.

Prof. Symes—But if you had ITSA and ASIC corporate insolvency all in the one pool then maybe that system—

Senator FIERRAVANTI-WELLS—I see what you mean: you pool all cost issues in relation to insolvency and bankruptcy under one umbrella?

CHAIR—Under a different organisation or under the existing organisation?

Prof. Symes—ASIC seems to be picking up a lot of things consumers do not. I wonder whether insolvency is not necessarily a specialist area now and if its logical home is not ASIC.

CHAIR—That is a very good point.

Senator WILLIAMS—Thank you, Doctor and Professor, for being here today. In your submission you had a lot to say about the fit and proper person. We have seen court judgments et cetera defining that. Do you think it is essential that when ASIC issues a registration for a liquidator administrator they actually interview those people?

Dr Brand—I do not know that I am convinced by the initial interview idea. I think that people who do not have the level of competence they need would probably be picked up by checking the paperwork. The people who had genuinely fraudulent intentions would probably be quite impressive at interview, so I am not sure that that is where you would pick it up. I like that ITSA has a look at people every year, face-to-face. I think that they would then have ongoing exposure to the person and that would probably be helpful. I think there needs to be ongoing checking.

Prof. Symes—I think that is where we have come to: the realisation that any hurdles that are got over are got over and then it is registration for life. We cannot see that that is a comfort.

Senator WILLIAMS—This is one of the problems I have had with this whole industry. As Mr D'Aloisio from ASIC pointed out, when someone is a registered liquidator it is very difficult to deregister them. If we take Stuart Ariff, I think the first reports of his wrongdoings to ASIC were in 2004, but it was August 2009 until he stopped doing the wrong thing. In Australia, and in most cases, you are innocent until proven guilty, and ASIC had to go through the proper procedures to prove that he was not doing the right thing. In New South Wales if you caught doing more than 45 kilometres over the speed limit, you instantly lose your driving licence. How would you feel about liquidators actually being licensed, perhaps having to resit for that licence

every couple of years, and ASIC having the power, if they had substantial information put in front of them, to freeze that licence until the court procedure was carried out? Wouldn't that be one way to say, 'Okay, you stop doing what you are doing now'? In the Stuart Ariff case, he went on for years—if I can put it this way—milking the system before he was brought to attention.

Dr Brand—It is a policy setting issue, isn't it? In some of the parliamentary materials around the reforms to insolvency law from 1997, or perhaps slightly more recently than that, there was a clear statement that consideration had been given to a higher level of controlling regulation. The decision was made that it just was not warranted. It seems to me from this committee's existence and from the evidence that you have heard that maybe it is time to shift the policy setting. We could do that in a number of ways. Again, I do not think it needs to be dramatically changed. I think it is a recalibration that is needed, and that might be just interviewing them every couple of years and looking at their files every couple of years.

Senator WILLIAMS—Professor Symes, you made the point in your opening statement that when creditors are not happy with the job that the liquidator is doing and with what they charge, the creditors can do little about it. I have even been told by a barrister that when a court agrees to the charges a liquidator can actually go back to the court and seek more money and overhaul the committee. This must be terribly frustrating for creditors, many of whom are small business and are seeing this trail of money dwindle away on what they think are exorbitant charges—$500, $600, $650 an hour—when they just want their $5,000, $6,000 or $7,000 back that the company that has fallen over owes them. What can we put in place to see that those creditors actually have more power over the liquidators and the company that owes them money? How can we improve that sector? From speaking to a lot of people, many of those creditors on the committees are very disgruntled at the way that it all operates. I sum up by saying this: if you are an appointed liquidator you are seen to be judge, jury and executioner, to have control of everything and that those around you cannot do anything about it.

Dr Brand—A certain amount of that is just how it has to be. Because of the system, if you are going to have companies that get into liabilities and you are going to have some kind of professional who is sophisticated and educated enough to wind them up, there will be times when there will be innocent consumers who lose what is for them a large amount of money in the course of the ordinary operation of the system. But maybe what we can do is through an industry ombudsman perhaps increase those creditors' sense of being listened to and perhaps through some adjustments to the monitoring regime increase the level of control over those liquidators. Chris, you might want to talk about the creditors.

Prof. Symes—No, but I think Senator Williams is right. It is a disparate group—

Senator WILLIAMS—A pretty angry group too at times.

Prof. Symes—An angry group, and that is where the channel of that anger can be directed to something like an independent person who has got no sides to take but has got a listening ear, has got a dispute resolution mechanism approach so that the ombudsman or whatever we call that person is able to call in the liquidator, call in the committee of creditors and do some kind of resolution of what is happening. It has already been mentioned but it is a disparate group in the sense that the creditors of one company are not the creditors of the next company, the next

company and the next company. All the creditors in Newcastle are now aware of issues of liquidation and administration and receivership.

Senator WILLIAMS—They certainly are.

Prof. Symes—The rest of Australia now has to catch up. We cannot educate the entire public about liquidators.

Senator WILLIAMS—On your suggestion about the flying squad, I think that is a very good idea, and the ombudsman—we have got a situation now where we do have a lot of complaints and ASIC gets lumped with them all. ASIC gets a lot of complaints throughout the year and in my opinion they cannot handle them all. If an ombudsman were set up, someone can complain about the liquidator's fees or whatever. When a serious issue is brought up, the ombudsman can just handball it on to ASIC and say, 'This is too much for me.' If a flying squad were to go in and audit a liquidator when they have wound up a company, not only can they see the hours they have worked and what they have charged per hour but also see how many hours they have worked on a particular section of it and say, 'They were putting in 10 hours to do a job that you think you would do in one hour.' This seems to be in much of the attitude of the general public, that if there is a big heap of money there the liquidator seems to drag it out and out for months and even years, but if there is no money, it all seems to be wound up in a couple of weeks. It is quite amazing. So I think you have got to justify and clarify to the creditors and the general public that they are not being ripped off, and a flying squad would obviously assist in doing just that.

Dr Brand—I think general checking helps give everyone comfort.

Prof. Symes—Because you cannot rely upon a court later down the track. I do not think you have got access to the courts and a court is not going to be in a good position to value what work was done and what was not.

Dr Brand—Whichever body, ASIC or some other combined lumped-in insolvency regulator, would lead the resources, and then it is a policy setting.

Senator WILLIAMS—If that flying squad was put in place, regardless of how many liquidators it visited a year, just the presence of it would bring the industry to attention. Would you agree?

Dr Brand—The deterrence factor I think would be high, and one of the problems so far has been that it is actually quite hard to work out what is going on and what the regulatory system has been. We spent some time on the ASIC website trying to work out where things were at and we certainly found ASIC's submission very helpful in understanding quite how the system currently works. I am sure people who work every day in the industry have a much better idea, but I think the deterrence factor probably has not been as high as it could have been.

Senator XENOPHON—Would the deterrence factor be more effective if there were settings in places as to what is reasonable for a liquidator to do in winding up a company? Alluding to Senator Williams's comments that it seems there is a perception that some liquidations are more drawn out with extraordinary fees and alluding to what Senator Fierravanti-Wells said about

whether you have a tiered approach, where it is a small litigation just to get on with it and wind it up expeditiously. How do you qualitatively sort that out?

Dr Brand—Every company is different, but ASIC does issue regulatory guides. Perhaps there is space in that framework to do something where we have some kind of generic—perhaps a professional association might offer some kind of industry-standard guide. The situation is so individual.

Senator XENOPHON—Can I pick up on the issue of the taxation of costs Senator Fierravanti-Wells referred to. I think you said there is a difficulty in reverse-engineering that. Can there be a system in place so that it is not identical to the system of taxation of costs in the courts as exists now, but it would be a system whereby findings could be made that this work was excessive for the type of liquidation or it was necessary. In other words, if there are some guidelines, some parameters, in place, that could modify behaviour for some of the operators out there who are seen as being excessive chargers.

Dr Brand—Perhaps those operators could be called before a professional association panel, a remuneration review panel of experts, or perhaps, within the ASIC structure, have some kind of call to account, a please explain type of meeting where those meetings were public and their findings were made public. That alone would have a deterrent effect. That is a fairly soft setting.

Senator XENOPHON—A name and shame type approach.

Dr Brand—Yes, a fairly soft setting.

Senator XENOPHON—There is the whole issue of an industry ombudsman. Could you see the industry ombudsman having a role there in terms of the issue of costs and remuneration?

Mr Fitzpatrick—I think the industry ombudsman would certainly be able to throw some sunlight onto the issue of fees, to get back to the point being made earlier about disgruntled creditors and the point before that about the scale of fees. The ombudsman would also probably be able to have an educative role as well so that the creditors would have access to information about what is involved, what the fees are or what the fees should be so they have got some idea of what is going on.

Senator XENOPHON—Could you foresee a role for the ombudsman to have a more forensic look at it and say, 'Why are you doing this at this expense?'

Mr Fitzpatrick—Yes, that would have to be explored.

Dr Brand—You could place that role in a number of positions. It could be the ombudsman, it could be an insolvency supervisor or it could be professional bodies if you made professional membership compulsory.

Prof. Symes—The problem with professional bodies is that they have a conflict. But there may well be a recently retired insolvency practitioner being a companion to the insolvency ombudsman or someone—so sitting alongside the ombudsman saying, 'In a review of remuneration this would be the normal thing or this seems excessive' or whatever. The point has

been made that each liquidation and each administration is going to be different. It is going to involve different complexities et cetera. It is probably going to be hard to be a taxing master if you are an insolvency ombudsman.

Senator XENOPHON—Finally, in terms of what Senator Fierravanti-Wells has referred to, has anyone done a study as to the costs of a liquidation for a small business compared with a big business in terms of your bang for your buck in terms of insolvency practitioners? Has that ever been done?

Prof. Symes—I think one of the submissions to this committee is about the lack of statistics and the opaqueness of things.

Senator WILLIAMS—It is a closed shop.

Prof. Symes—I know that in my own doctoral studies about 10 years ago I was looking at working out whether employees were missing out in liquidations, and it was near impossible for me to get any figures at all.

Senator XENOPHON—Does ASIC have a role to ensure that we have better statistics so we can make better, informed decisions on policy?

Dr Brand—Yes, with the resources they would need to do that. I think they do a lot on the smell of an oily rag.

Mr Fitzpatrick—It could be on the statistics question that you might prefer an independent think tank outside of ASIC.

Senator FIERRAVANTI-WELLS—The Productivity Commission?

Mr Fitzpatrick—It could be the Productivity Commission but if you think of other examples, there is the National Institute of Labour Studies at Flinders which looks at labour statistics, there is the Australian Institute of Criminology that looks at criminology statistics, there might be the need for an insolvency unit that looks at insolvency statistics so that they can be processed in a meaningful way. ASIC is stretched to the limit and to expect them to do everything for everybody is an impossible task.

Prof. Symes—It is impossible.

Dr Brand—I suspect there is gold in the statistics.

Senator PRATT—I think it was you, Dr Brand, who mentioned the information gap for consumers and the way in which perceptions of performance match reality. Can you expand on what those things actually are?

Dr Brand—What I am thinking of there is that because so often creditors of companies are not sophisticated consumers of professional services—certainly not a question of insolvency services—they do not know what to look for and they do not know what to expect. They might well live and work in an economy where to charge $850 an hour is just unbelievable. They do

not know what the normal run of a liquidation would look like, so they cannot really tell if they are being ripped off. They do not have the information that the liquidator has. They do not have access to a full understanding of the company's operations. It is very hard for them to make an informed decision about whether or not the liquidator is doing the right thing. I think the liquidator is, most of the time.

Senator PRATT—How is that exacerbated by the initial loss which a consumer experiences, which is why they are in that situation?

Dr Brand—All of this happens in funeral homes; none of this is a good news story. Unless they get all of their money back, which happens sometimes, they are going to feel some sense of having been disenfranchised, and that will colour their sense of everything that is happening. That is perhaps where an ombudsman has a particular role, because they might be able to help those people understand: this is how it is and, in this particular case, perhaps what happened had to happen.

Mr Fitzpatrick—If you had an insolvency ombudsman, depending on what their brief was, they might even be able to attend insolvency proceedings to act as a McKenzie friend of the creditors.

Senator PRATT—Clearly this committee's inquiries come out of a community concern about the accountability of some liquidators. How is it that we make our way through balancing those things in terms of our own understanding?

Dr Brand—There has been general consensus before the committee that we have in Australia a very good system in Australia that largely works well. There has to be a reason why there are so many really upset creditors. My gut feeling, looking at the statistics from the UK, is we are not picking up a number of people who are not operating so well—not a lot, but enough that it might explain why there are so many unhappy creditors.

Senator PRATT—So it is not just a natural perception, because people are going to be naturally upset in those circumstances.

Dr Brand—It is a bit of both.

Senator FIERRAVANTI-WELLS—On notice, are liquidations happening because of corporate irresponsibility, and should we be tightening the legislation in relation to company directors and their responsibilities and that side of the equation so that people do not ultimately end up going into liquidation?

CHAIR—Please take that on notice and send your response to the secretariat. We thank Professor Fitzpatrick and Dr Brand for appearing.

[9.57 am]

BROWN, Associate Professor David, Private capacity

SYMES, Associate Professor Christopher Francis, Private capacity

CHAIR—In addition to Professor Christopher Symes, we welcome Professor David Brown from the University of Adelaide. They have put in a submission which has been numbered 40. Would either or both of you like to make an opening statement for this session?

Prof. Brown—Good morning, Chair and senators. I think in view of the previous submission by our academic colleagues and Professor Symes as well, who was involved in that submission, and in view of the questions that arose, we will keep our opening submission very brief and allow you to probe into the areas which have already arisen as of interest to you.

First, in terms of the previous submission, we would endorse the comments that were made in that submission, particularly with regard to the potential role of an ombudsman. That is something that we have thought about and can talk more about. The role for more ongoing monitoring in perhaps a licensing model has previously been identified in the *Hansard* transcript.

Moving on to what we want to concentrate on that has not perhaps been touched on so much today, in our submission we tried to develop a co-regulatory model for the insolvency industry, building on the developments and maturity of the insolvency profession in Australia that we have seen in recent years. I think that here we have acknowledged the role of the Insolvency Practitioners Association, particularly since the publication of its amended code of professional practice a year or so ago, because, as I think previous submitters have said, this code has been both taken up by the judiciary in court decisions and extrajudicially endorsed by some of the judges and indeed by the Commonwealth Attorney-General.

I think that the Insolvency Practitioners Association has developed and should be given a greater role in a co-regulatory model. Having said that, there is of course some way to go in developing that model because it is a small organisation and although its code of conduct is relatively detailed, particularly in areas such as remuneration and disclosure of the calculation of that remuneration that has been raised today, there is still some way to go with the disciplinary and complaints aspects of that organisation if it were ever to play a part in some sort of co-regulatory model with ASIC or some other government agency. In a submission we did a bit of benchmarking of the Australian system against other insolvency professional regulatory systems around the world and there are some international and European standards around these things. The Australian system, as the previous speakers have said, comes out reasonably well in that benchmarking but there are, of course, areas for improvement. As we have seen particularly, the area of ongoing monitoring and identifying the apples before they go bad perhaps is one area and the involvement of some sort of lay or independent elements whether through an ombudsman or at least some sort of agency independent of the profession but working with the profession.

Specifically, we suggest in our paper that the present structure could be amended so that the role of the professional body and its code of conduct should be enshrined in legislation in some way. At the moment, as we have heard, a fit and proper test is in the legislation but then there is quite a bit of discretion given to ASIC, which does it through regulatory guidelines, in how that is interpreted when it comes to registering liquidators. As an aside, it is interesting that ASIC registers liquidators and that is what the legislation requires it to do but, as we have seen, we are not just talking about liquidators these people do administrations, receiverships and of course also bankruptcy work for which there is a different registration system through ITSA. I query whether we really need two separate registration systems when both are essentially the same people wearing different hats. We think there is possibly too much discretion given to ASIC in the current system. Some of these aspects should be enshrined in legislation, particularly the requirement to either belong to an insolvency professional body as opposed to a general accounting body, for example, or at least if not a requirement to belong to a professional body then a requirement to subscribe and be bound by the code of such a body which focuses on insolvency rather than generic accounting skills. That is something that we could develop further if you wish us to do so.

On the question of the ombudsman I think that has been fairly well dealt with in the previous submission. There are models of course in Australia for different types of ombudsman. Interestingly, there is an organisation called the Australian and New Zealand Ombudsman Association which has recently signed a protocol as to what the attributes of an ombudsman or any office that bears that name should include. It contains a lot of things that we have been talking about such as a pressure valve for creditors dealing with complaints, being able to report to the government or the regulators on systemic issues which are identified through dealing with individual complaints and, of course, the required access to documents from other organisations and an ability to freely investigate matters which is to raise. There are models in Australia such as the credit industry ombudsman, which is a voluntary ombudsman, or there are various parliamentary and government ombudsman schemes as well. One issue with an ombudsman is going to be the question of the funding of the ombudsman. For example, the banking and finance ombudsman model is not a user pays but a respondent pays model whereby a fee is levied according to the number and complexity of complaints which are received about the organisation in question.

Prof. Symes—So the bank pays for the amount of complaints that the particular bank has.

Prof. Brown—So I am not suggesting that that is necessarily a good model for the insolvency industry, but I am saying that funding will obviously be one issue if an ombudsman is to be taken further. I think work can be done to identify the scope of any ombudsman role. I endorse the previous submission, particularly from Dr Brand, that the problem is creditors' perception. A lot of the complaints which are received—and the IPA receives a lot of complaints, by the way, not just ASIC, about insolvency practitioners and procedures—are based on misunderstanding the nature of insolvency work and of course, as Senator Williams says, can often involve a certain amount of anger because everybody to some extent loses out on an insolvency. There are not many winners. Therefore, a valve for dealing with these complaints plus, perhaps, an educational role for an ombudsman's office would certainly target that gap which exists at the moment in terms of creditor information and a feeling that creditors are being short-changed in some way in terms of information or having a voice for their concerns.

The other aspect of an ombudsman that was touched on earlier was remuneration. In our submission we do suggest that there is a regulatory gap when it comes to remuneration, but I think we have to be careful to identify what that gap is. I think the IPA code of professional practice devotes quite a lot of its pages to remuneration and to disclosure of the basis of remuneration of insolvency practitioners. This information is put before creditors who, after all, are the ones who normally have the decision as to whether the remuneration could be approved. However, as I have just said, creditors might not always have sufficient skills to access that information. Notwithstanding that there is nowadays more detailed disclosure both through the IPA code and through various court decisions, I think, as Dr Brand identified, a lot of creditors are not repeat victims and therefore are not able to assess the information that comes to them, so some other channel for assessing whether the remuneration rates are value for money is certainly to be welcomed. Whether that is through the ombudsman using some sort of independent assessor or whether the courts need an independent assessor when cases come to court on remuneration is something else that could be developed.

I see that it is time to wind up. In terms of what we add to the previous submission, I think it would be around the area of developing a co-regulatory model and working with the insolvency profession, because it is maturing into a separate profession. I think it might not be there yet, in terms of the disciplinary and complaints structure that would be required for it to take a more self-regulatory role, but certainly one area to explore is how the professional association can work with the government agency, ASIC, and IFSA to develop a model which does meet all the benchmarking requirements of international standards.

CHAIR—Thank you very much. Do you wish to add to that, Professor Symes?

Prof. Symes—Just to say that my colleague has been a little modest. His experience is about 10 years in the UK and about 11 years in New Zealand and he has just come to Australia in the last 12 months, so he will be able to answer your questions with regard to what is happening in the UK. He was still advising a UK insolvency law firm up until late last year.

CHAIR—I would like to ask you a question about that, Dr Brown. You refer in your submission to the fact that the UK Office of Fair Trading has recently launched a market study of the insolvency industry. I wondered how that had progressed, when it will report and whether we likely to be able to refer to it in our own conclusions?

Prof. Brown—Yes. Just to explain, the UK Office of Fair Trading has launched this inquiry into whether insolvency practitioners are delivering value for money, but it is part of a broader international exercise conducted by the World Bank into the costs of doing business, and part of that is the cost of closing a business. So there is World Bank evidence about the costs in various countries; in fact, I think they did look at Australia. I am not quite sure who they asked in Australia and what the basis of the information was. It came down to one figure in the end, comparing the cost and allowing for different exchange rates.

In terms of the UK work, my understanding is that it is due to report about now. So certainly an answer will be available. But, of course, different countries have different systems and therefore it will be very hard to take anything from that other than the methodology and that we could conduct a similar exercise here if we had the information.

Senator WILLIAMS—Chair, in the previous hearing there was a question about administrative receiverships and receiverships being removed in the UK. Perhaps Professor Brown can explain that as well.

CHAIR—Would you like to do that, Professor?

Prof. Brown—If you would like me to.

CHAIR—Yes, we would.

Prof. Brown—I think Senator Williams raised the question about receiverships in the previous hearing in Canberra. The answer to the question is that receivership has not been abolished in the UK. In 2002, in the appropriately named Enterprise Act, they abolished something called administrative receivership. It is an important change and it emphasises a change towards a rescue culture in the UK where they are channelling most insolvencies through the administration procedure, which is very similar to our voluntary administration. So, for example, if a bank is appointed under an all-embracing charge where they would normally appoint a receiver, now in the UK the bank has to appoint an administrator. The bank can no longer veto or effectively kill a rescue procedure by appointing a receiver. In Australia we still have the ability for the bank to say, 'We want to appoint a receiver' and effectively prevent the administration progressing. I can give you more information about that.

Senator WILLIAMS—I think the receivership issue is very important. The way I see it in Australia, you may have a business in trouble and the bank can appoint a receiver. They go in the next morning and lock the doors. Is that possible in Australia?

Prof. Brown—They may well change the locks. Otherwise you would have all sorts of people trying to remove things.

Senator WILLIAMS—It gives a lot of power to the receiver. You are saying that in the UK, instead of coming in with a big stick approach, they still leave the administrator in charge to try to keep some life in the business. Is that the difference between our current system in Australia and what the UK has introduced? How would you explain it in layman's terms? It can be much more severe in Australia as far as shutting down a business and liquidating everything goes. With the changes in the UK now, they still have receivers but it goes on to try to rescue the business or perhaps not just kill it overnight. Is that the difference as you see it?

Prof. Brown—I think the main difference is that the duties of a receiver are primarily to the person that appointed them; namely, the bank. That is their overriding duty although they may have statutory duties as in Australia to creditors generally to get the best price on the sale, for example. But the overriding duty is to the bank to get in and recover the money for the bank, whereas in the UK the administrator, as in Australia, has a duty to all creditors, not just the bank.

Senator WILLIAMS—It is a big difference, isn't it?

Prof. Brown—It is a philosophical difference. It is a shift in the mindset towards putting the rescue of the business at the forefront. We already have that in Australia in the voluntary administration procedure. What we have done here is preserve the right of the secured creditor

to, if you like, override that. That is a huge cultural and political question about the rights of secured creditors. There are all sorts of consequences of altering that balance. I would not necessarily be doing that overnight without a lot more thought. In a situation where you have had two reasonably large inquiries into the corporate insolvency framework in Australia through CAMAC and the parliamentary joint committee a few years ago, that would be an issue that they would have raised. In fact, they found that the present system, in terms of the procedures, was pretty much okay. I am not saying it is not an issue that should not be explored. I am wondering whether it is necessary within the terms of this inquiry.

Senator FIERRAVANTI-WELLS—But there was still protection within the framework of voluntary administration. If a company cannot be saved it then goes through the next phase—voluntary administration. If they cannot save the company it then goes into liquidation. But then there is the same situation: a secured creditor has a degree of protection because of where they stand in line in terms of recovering existing monies.

Prof. Brown—That is right. It is the same in the UK. Obviously, secured credit banks are still given recognition of their security in the administration procedure. The only change is that the bank is not necessarily putting someone in whose primary duty is to the bank. They have got an administrator, who has to consider all creditors. And therefore, as Senator Williams said, they might not be so inclined to just get in and out quickly and recover what they can in a fire sale.

Senator FIERRAVANTI-WELLS—But that would necessitate taking the next step of looking at the voluntary administration laws. History has shown that that these laws have been subject to abuse in this country as a debt management tool rather than what they are supposed to be—a way of attempting to salvage a company and get it back on its feet. Following on from your scenario, that would mean we would have to look at the provisions of the current voluntary administration legislation and make sure it is beefed up to do what it is supposed to do and not used for debt management.

Prof. Brown—I agree with that. Any problems with abuse of the voluntary administration system have been looked at by various committees since the system came in in 1993. The problems are not necessarily to do with banks appointing receivers; they are more to do with the directors appointing the administrators. So it is a different problem.

Senator FIERRAVANTI-WELLS—Absolutely, and that is my point. You made a very valid point about the licensing of voluntary insolvency practitioners. We are talking about liquidators but we really should be talking about insolvency practitioners. You suggested that the licensing parameters should be amended to look at insolvency practitioners in totality. From what you are saying, I take it that you are talking about a common registration system for all insolvency practitioners. Do you see that as an effective reform?

Prof. Brown—As we have seen in the course of this inquiry, there are issues around ASIC's ongoing monitoring of the practitioners that fall within its remit. In contrast, ITSA, even in its own submission to, has shown that it is pursuing that ongoing monitoring—not only in respect of trustees and bankruptcy, who, as I said, are often the same individuals wearing different hats, but also in relation to debt agreement administrators as an alternative to bankruptcy. ITSA is now regulating debt agreement administrators on an ongoing basis and requiring them to be interviewed and have an exam. If they do not come up to scratch in the interview, they have to

sit an exam. So it seems that ITSA is pursuing that sort of ongoing monitoring and initial entry into the door to a greater standard than ASIC is doing, at least on an ongoing basis. So, if you are an insolvency practitioner in the provinces who is doing a bit of insolvency and bankruptcy work and also liquidations and receiverships, you would be asking yourself why you are subject to the different regulatory bodies.

Senator FIERRAVANTI-WELLS—Should we have one body to simply regulate insolvency full stop?

Prof. Brown—The question that has been asked over the years is: should we have one harmonised insolvency law rather than having bankruptcy and—

Senator FIERRAVANTI-WELLS—Yes. That is the next question I was going to ask you. If we collapse the licensing system and look at the commonality—we are dealing with a company and we are dealing with a person but the principles are basically the same—should we just move to the one body? There are lots of nods from you, Professor, and I take that to be a yes.

Prof. Brown—It is not necessarily the case that the question of harmonising insolvency law is a separate question from the regulation of insolvency practitioners, because regulating insolvency practitioners is, in a way, like regulating any other profession where there are public interest concerns and stakeholders who cannot necessarily regulate themselves. So it is not necessary to conflate those two questions. Harmonisation of insolvency law is a bigger issue, which is not necessarily one that we have to address to solve the problems of how to identify the apples before they go bad.

Senator FIERRAVANTI-WELLS—I have just two questions. Firstly, you talked about international comparisons. It seems to me one thing in Australia is that insolvency does not have the same stigma as it had in the past and certainly has in some countries. In the corporate world in some cases—and it goes back to the question of corporate responsibility—it is used as a debt management tool, and often personally, in the bankruptcy area, it is really used as: 'To wipe my debts I'll go bankrupt.' It has now become very commonplace in this country. Do you think that perhaps there needs to be some return to something more? Stigma is the wrong word, but you know what I am trying to say. There does not seem to be the element of responsibility in relation to debt that there once was in these matters.

Prof. Brown—That is a very big question. Obviously stigma is a word more associated with personal insolvency. I could talk a lot about that because it is one of my pet subjects. Looking at corporate insolvency where companies are effectively artificial shells, of course it is very easy to take that approach to debt. It is partly a reflection of the change towards what is called, in simplistic terms, a more 'debtor friendly' model in corporate insolvency as well; we have rescue procedures where we are trying, hopefully, to preserve jobs and viable business. With that comes the incidental risk of abuse of that system. But largely that question is being addressed through matters such as the suggestions around phoenix companies, which you are aware of. So I am not sure whether, again, looking at insolvency practitioners, we can really take on the whole question of the moral stigma or perception of debt and the approach to debt in Australia.

Senator FIERRAVANTI-WELLS—I have one last question. You make the point about abolishing the separate category of official liquidator, basically—and I must say that I

wholeheartedly agree with you—so that all insolvency practitioners become eligible to take on court appointed liquidation so the load is shared. In effect it means that you make on one and on another. That is very much a point to be made.

CHAIR—Senator Hurley has some questions.

Senator HURLEY—Actually, a lot of my questions have been covered in what you said, Professor Brown, so I have just got one quick question about statistics. You mentioned, in passing, the World Bank report. In your experience, in places like the UK and New Zealand where are the statistics required for that kind of information obtained?

Prof. Brown—The way the World Bank, the IMF and others conduct these types of inquiries is that they normally send a questionnaire to the government and get someone to provide information. But it is fair to say that in the UK there are a panoply of regulators and self-regulators in the insolvency industry and there is no shortage of statistics kept by the government insolvency service and by the separate regulatory professional bodies. So I would not think that it is a problem in the UK. In New Zealand there is not any regulation, really. Again, it would be the government supplying the statistics.

Perhaps I could reinforce the point that has been made about statistics in Australia. One of our academic colleagues at QUT, Dr Colin Anderson, made a submission to you, and the whole of his submission was about the lack of statistics available in Australia for academics and others to find out the answers to many of these questions. So I think that, as Dr Brand said, one problem we have here is knowing what the size of the problem is. We see a few cases coming to court, we see a few enforceable undertakings being accepted by ASIC and we think that that must be, if not the tip of the iceberg, surely not the extent of the problem. Therefore, it would be good if the statistics reflected that. But I acknowledge that ASIC's response is that they are getting a new IT system and that statistics will be better managed in future. As academics, we have the frustration of trying to find information, even if it is just to talk to our students about the number of administrations in 2009 or something like that. The statistics are not presented in a user-friendly manner. If you are a member of the public or anyone else wanting to do research in this area, it is not made easy for you. Even the statistics that are available are not presented in a very user-friendly manner.

Senator HURLEY—Do you think that ASIC, then, would be the best body to maintain those kinds of statistics that are needed for the information?

Prof. Brown—At the moment ASIC is the one that should receive the information from insolvency practitioners.

Senator HURLEY—So, given that we do not want to go from a situation where we have a level of regulation to having regulators everywhere, is it your view that the ASIC area should be beefed up a bit?

Prof. Brown—Our view in our submission, as I have said, is that there should perhaps be more of a co-regulatory model and that the professional association has a greater role to play. That is subject to the fact that, at the moment, its resources are limited. It needs to be a partnership really.

Senator WILLIAMS—While on the issue of professional associations, that is surely not the answer to everything. Look back at the inquiry into Storm Financial. They were a member of the FPA, but that did not stop the Storm model from collapsing as the stock market collapsed, with thousands of people losing their life's income. They were a member of the Financial Planning Association. Being a member of those bodies is not a magic bullet.

Prof. Symes—No, and as we have said in our submission, the IPA need to go further now, to disciplinary, enforcement and investigation type roles, which they are not presently doing. We do not see ASIC doing a lot of that.

Prof. Brown—There are professional associations and professional associations. Also, insolvency practitioners are subject to statutory duties and duties of common law. They are not just governed by the professional code of conduct. Some of those other bodies are not subject to the same history and degree of legal scrutiny.

Senator XENOPHON—Can I follow up with Professor Brown what I just discussed with Professor Symes. How do you deal with the matter of excessive fees? Senator Fierravanti-Wells referred to the fact that sometimes, for small businesses, fees wipe out whatever assets are there, depending on how the liquidation is done. What regulatory oversight can there be? Do you give the Ombudsman more powers? Do you have a more forensic look at the issue of fees—that is, whether the work done is reasonable or not in the circumstances? How do you deal with this vexed issue? It is something that Senator Williams has been quite outspoken about. He has mentioned the complaints that have come to him.

Prof. Brown—I think it is not an intractable problem, but it is certainly a problem that is being faced around the world, even in countries like the UK, where there is a high degree of regulation of the profession. Ultimately, it ends up in court, and even the courts sometimes throw up their hands when deciding how to assess what is a reasonable fee to charge. As Senator Fierravanti-Wells said, it is quite a small profession and it is specialist work. It is quite hard to subject it to some sort of reasonable market price. For example, if you compared it with auditing work, you could ask: should insolvency practitioners charge more than auditors? I do not know.

Some courts and regulators around the world have been wrestling with this problem. The types of ideas they come up with are things like having an independent assessor, perhaps attached to the court, when it is hearing the case or through some sort of independent ombudsman or some other body to which appeal can be made. But, as I said earlier, it is creditors who actually get to approve the remuneration, or then it goes to court. The problem is, however much disclosure you have about the basis of calculation of the fees and how much time was spent by the partner as opposed to, you know, the oily rag, at the end of the day how do creditors get the information, the knowledge, to assess whether that is reasonable? I do not have a solution to that.

One thing I would say in response is about small businesses. At the moment, as you say, under this cab rank principle, official liquidators take on a lot of small liquidations and they do not necessarily get paid for those. It is a bit of a loss leader, I guess, because they do okay on the bigger jobs. But whether there is a basis for small insolvencies being dealt with by the government, for example, as they do with bankruptcy—

Senator FIERRAVANTI-WELLS—You can tell immediately. It does not take very long. You can go into a company—these guys are very skilled and they have been doing it. There should be some sort of mechanism whereby they can go in fairly quickly and know that this is not a company that has got assets. Can we look at this with a tiered system? If you are dealing with Ansett, it is one thing but, if you are dealing with the corner store, there has to be some other way that we can look at this with a quicker or a more scaled-down version. But the reality is that, in dragging that through and preparing all those reports that liquidators are required to prepare and still having their professionalism to match, there must be some sort of system.

Prof. Brown—I think there are some sorts of shortcuts in the legislation where there are insufficient assets, for example, to hold creditors meetings. The liquidator can get in there and say, 'It isn't worth holding a meeting because there are no assets anywhere.' In terms of whether you have a separate procedure to deal with these small estates, as you might do with personal insolvency, for example, because there are just no assets there to cover the fees, let alone any return to creditors, that is a different question again. In terms of insolvency practitioners' remuneration, we cannot expect insolvency practitioners to work for nothing. We might expect them to take on some sort of public interest role on a cab rank principle, as a sort of pro bono thing, provided they make up the money on other jobs, but the main problem is: how do we ensure that value for money is being obtained from insolvency practitioners' fees in cases where they are able to—

Senator XENOPHON—Just following up on that: you have said that perhaps they can make up their fees on bigger jobs.

Senator FIERRAVANTI-WELLS—That is the whole point.

Senator XENOPHON—Thank you, Senator Fierravanti-Wells. Isn't there something fundamentally wrong with a system where, if it is not economic for them to do a small insolvency, they need to make up their fees with a bigger insolvency? We talk about the odd rotten apple, but isn't the system rotten to some extent? Isn't there a deep problem in relation to that? How do you deal with that? Is there a role for the ombudsman forensically to look at fees and whether or not they are unreasonable? If insolvency practitioners know that an ombudsman, properly constituted, would have the facility to say, 'What you're doing here is excessive and unreasonable,' and do the naming and shaming that I think previous witnesses have referred to, is that a way forward to try and fix things up? Sorry, there are two or three questions there.

Prof. Brown—I am not suggesting that insolvency practitioners should overinflate their fees on the bigger jobs to make up for the little jobs.

Senator XENOPHON—But they are, though, aren't they, in some cases?

Prof. Brown—I agree with you that there should be some external and independent check on the fee levels.

Senator XENOPHON—Sorry; my question was: given your expertise, is there a reasonable suspicion that in some cases the practitioners on the bigger jobs tend to make up for the lack of remuneration in smaller jobs? You may be reluctant to say it, but would you dispute that in some cases that would occur?

Prof. Brown—I do not have enough evidence for a reasonable suspicion of that.

Senator XENOPHON—I think Professor Symes pointed to it.

Prof. Symes—It is difficult, obviously, because we would not see the reports that go in from the liquidator which talk about what the liquidator's fees were. We would just be having a gut feel if we were to answer that. I think the other thing is perhaps then to turn that around and look at it from the point of view of the insolvency practitioner: would you get out of bed in the morning knowing you were not going to get paid today for the companies that do not have any assets?

Senator XENOPHON—Again, it goes back to the question from Senator Fierravanti-Wells: do we need to have a better system in place?

Prof. Brown—The bankruptcy system is there as a model in that it handles most bankruptcies because most of them are for pretty small estates. Private trustees will only get involved if there is enough money to at least cover their fees.

Prof. Symes—So if we were to think that through further we would then say: let's make ASIC the person who is going to look after no-asset liquidations.

Senator FIERRAVANTI-WELLS—Yes. So it is asset value based. The liquidation and the course of the liquidation would, to some extent, be determined by the value of the assets, or there could be other criteria such as the number of employees in the company—that is, a defined set of criteria that determine what a non-viable liquidation is as opposed to what a viable liquidation is.

Prof. Symes—Again, maybe if the statistics were there we would know that no-asset liquidations might involve very few employees because the employees may well have gone.

Senator PRATT—Fortunately the last two sets of questions cover most of my issues. If you were to pursue an ombudsman model in relation to fees, do you suspect that once you started to get some cases through it would impact across the sector in that it would begin to flow through with greater transparency as to what is value for money? And is that one of the things we should be looking for in how we pursue this?

Prof. Symes—I would expect that. If we think about the banking ombudsman—who is now the Financial Ombudsman Service—what the banking ombudsman's reports annually do is to describe very well issues against banks and behaviour like that, which I know has been used in teaching and education of banks. So I think there is a benefit in having an ombudsman who does pursue those sorts of things, because then there is a flow-on effect.

Senator FIERRAVANTI-WELLS—Professor Brown, in the section where you talk about remuneration and the regulatory gap—just following from the point that Professor Symes was making—you could almost have a schedule of asset values as a yardstick of measurement of the company. If we did use the ITSA model, how would you see that being translated over to corporate insolvency?

Prof. Brown—I am not informed of the current state of affairs on that. I know at the moment there is a provision for the taxing of bankruptcy trustees' costs, but I am also aware that there are currently some amendments going through in the Bankruptcy Legislation Amendment Bill which beef up the scrutiny of trustees' remuneration. So I am not 100 per cent sure how it is proposed that the new system would work.

Prof. Symes—Senator, it is quite different in the sense that we have got 90-odd per cent of the bankruptcies happening being done by ITSA, and then registered trustees doing up to 10 per cent or whatever, as opposed to—

Senator FIERRAVANTI-WELLS—I know. It is not just about money, Professor, because there is the question of insolvent trading—there are other issues that you do have to take into account when you are dealing with a company that goes into liquidation. It is not just the assets and the money and what can be recovered. There is the investigative component of it. You make the point, Professor Brown, about the value of this work being addressed. At the moment there is only time based charging as a method of fixed remuneration. Could you just expand on that. Does this dovetail into the sort of point that we have been talking about?

Prof. Brown—I think that, as I said earlier, now we do have a fair bit of information about how fees are calculated, and time based charging is the predominant method but it is not the only method. The IPA's code of conduct sets out other methods, such as a fixed rate or a percentage of the assets recoverable. So there is quite a bit of detail about how those options work, and the courts have given a couple of important rulings in quite a lot of detail about what practitioners should disclose to creditors in terms of how they are going to charge during the insolvency. So it is not just time based charging, but that is the predominant method.

Prof. Symes—Because the IPA code is fairly new, it will be interesting to observe that over the next, say, five years, to see just how that impacts on this question of remuneration and perhaps a regulatory gap. But, in addition, we have to keep in mind that the IPA does not include every registered liquidator; its membership does not cover that. So I think one of the points we would make is that, even if we have some comfort in that the IPA code is very good with regard to setting out 20 pages of remuneration detail—

Senator FIERRAVANTI-WELLS—It does not cover everyone.

Prof. Symes—it does not cover everyone.

Senator FIERRAVANTI-WELLS—One last question: you made a point on the last page of your submission about a published scale of remuneration. That was interesting. I did not realise that in the past ASIC had published scales. Do I infer from your comments there that you think we should go to some sort of published scale?

Prof. Brown—Yes, and I think the IPA had a recommended scale until a few years ago as well. In bankruptcy, there is a scale for official receivers.

Senator FIERRAVANTI-WELLS—But a published scale or a scale that is in some sort of legislative form would apply to everybody, with regard to the point you just made about some and not others being members of IPA.

Prof. Symes—It would be in the regulations of the act.

Prof. Brown—Reading between the lines, I think we are suggesting that we return to some sort of scale as a basis, but of course you have to have exceptions to it.

Senator FIERRAVANTI-WELLS—Yes, just like you have scales in court proceedings, and the taxing officers follow the scales—

Prof. Brown—There has been a move away from that. There are scales that take into account market factors, obviously, and the size and complexity of jobs.

Senator WILLIAMS—I am fine with the scale, but once again we come back to the thing about the hours spent on a job. If you did a scale of the hourly rate, that would be fine, but that is perhaps where a flying squad could say, 'Look, you had better not overcharge on your hours, because we're going to look at your books.'

CHAIR—I think we will have to finish there, so thank you, Professor Brown and Professor Symes, for your appearance this morning. It has been very useful evidence and we very much appreciate what you have said. Thank you.

[10.45 am]

SPARGO, Ms Kate, Chairperson, Accounting Professional and Ethical Standards Board.

WIJESINGHE, Mr Channa, Technical Director, Accounting Professional and Ethical Standards Board

CHAIR—Welcome. Would you like to make an opening statement?

Ms Spargo—Thank you for asking us to attend. We will endeavour to make a short presentation to you, to answer questions if we can and then make a few suggestions of how we see this area going. We are an independent company under the Corporations Law but we are funded in three equal parts by the professional bodies—the Institute of Chartered Accountants, the CPAs and the NIAs. This was a feature where two or three years ago the professional bodies, not just for the insolvency area but for all areas covered by their members, wanted to create a greater independence in terms of the setting of standards for their behaviours and so this company was set up. I am not an accountant; my other board members are. Purposely I am not and therefore I have less of a vested interest in the accounting profession and some others might otherwise have.

We cover the professional and ethical standards of accountants generally and our jurisdiction is restricted to those who are members of one or other of the accounting bodies. In the context of insolvency practitioners, our coverage is pretty high because most insolvency practitioners will belong to one or more than one professional body. The consequences are perhaps not as great as we might like to see. It is not within our remit to create those consequences. For the consequences for a breach of our professional standards we are reliant on the professional bodies within their disciplinary jurisdictions and on what they will do in terms of a breach. We have a close relationship and they are fairly aware of what we do and we are aware of what they do. We have no jurisdiction to punish anyone. We are reliant on others and, of course, we are reliant on ASIC is well.

If I could pitch at the high level, which is what we are about, our total purpose is really to contribute to the professionalism of the accounting profession—that is what we are there for in that is how I see it. We have the overriding mandate that we are required to do everything we do in the public interest and so the standards that we set have to consider the public interest first. Accountants are required under our standards to act in the public interest. It is an interesting concept and it is not very well-defined—even globally it is not well-defined, but that is what we are therefore. We follow what the International Federation of Accountants do and our code of practice, the fundamental code which we follow, is the international one which promotes concepts of integrity, sound judgment, care and diligence and so on—the usual thing you would expect in professions.

My interest and my comments relate to professionals, how professionals behave and how you encourage professionals to behave in a professional way. Having said that, I think it is a very difficult area. It does not matter whether it is the accountants, the lawyers or the investment bankers, or doctors et cetera. We rely substantially on people's willingness to do the right thing

and, to put it at a commercial level, in a general sense we rely on professionals to understand the concept that in the long term—and we work on this basis—if you behave in a professional way it will equal a better outcome for that person, for their firm and so on.

To illustrate that, we all know professionals about which we would say, 'I trust that professional, I can rely on them and they are expensive but fair in what they charge,' and so on. You get a group that cluster at that end of the spectrum and you get a group that cluster at the other end of the spectrum, about which we would say, 'I wouldn't go there unless I absolutely had to,' or, 'I wouldn't go there at all'—'I wouldn't work there, I wouldn't want to be associated with them and I wouldn't use their services.' We rely on the premise that people understand that, and people who are genuinely professional do understand that and behave accordingly. I see that across a number of different sectors, not just the accounting profession. My work is as a company director. We use services from various companies in a whole range of professions, and we reasonably quickly get to know who we trust and rely on because they charge us fairly, do quality work and so on, and who we do not trust. That is how we make our choices around who we use.

I think it is challenging in the insolvency area because it is one of those groups that is fairly small and closed, and you have a significant differential, in many cases, between those who are providing the services and those who are using those services. That is not true in all cases—there are some very sophisticated corporates that understand exactly what they are buying and who they are buying it from. But, as with any of these things, as you come down the line to the smaller, less well resourced and less commercially savvy—for want of a better term—groups, it is harder. We see that in our work through the auditing area as well. Large, well-resourced companies can afford audit services and know what they are buying. The very small companies, which are still required to have an audit conducted, are less well resourced to buy what they are required to have, and they are often less well resourced to understand who is available, what they are buying and the quality of what they are buying. We see that across a range of areas.

Very briefly, our submission was an attempt to demonstrate what we are doing in this area. We developed what is called APES 330, which is one of our standards. It was completed last year. It coincides, in effect—it is almost coincident—with the IPA's standard. We worked alongside them. It is just brief; we are not discursive, but it would essentially marry up almost entirely.

Mr Wijesinghe—Yes, the principles.

Ms Spargo—We did that for a reason. It is counterproductive, unless there are significant philosophical differences, to have two standards applying to the same group of people, essentially—there are variations. It just does not make sense. So we worked hard and spent a long time with the IPA to ensure that we came to a common ground on the standards. I think you have been provided with a copy of our standard APES 330. It is essentially about accountants, obviously practitioners in this case, acting in the public interest in how they behave around their independence, how they calculate their fees and how they charge. Also, a supplementary area that I think is quite important is how they behave when they act as expert witnesses.

If practitioners followed the standard that we have devised in a true sense of professionalism, the problems would disappear. The issue is that, in any of these areas, there will always be people who find ways to gouge—'gouge' is a horrible word, I suppose—to game, to deal

inappropriately with the rules. One of the things that could encourage our members is the promotion of the concept of professionalism and the conduct that comes from being a professional. On the other hand, of course, there are the penalties and the action ASIC can take where there has been poor behaviour. Of course, we encourage professional bodies, where it is appropriate, to be disciplined about taking action, but we can only try and do that through influence.

CHAIR—Thank you very much. The APES 330 standard is obviously very comprehensive, but it is voluntary, isn't it?

Ms Spargo—The sanction is removal of membership of the professional body and the possibility of a fine of up to $20,000.

CHAIR—They are fairly substantial penalties, but—

Mr Wijesinghe—It is compulsory if you have a public practice certificate issued by one of the professional bodies. The APES 300 series is applicable to members in public practice. So, if you are holding a practising certificate from the Institute of Chartered Accountants and doing insolvency work, you have to follow this.

CHAIR—One of the ideas that had been put to this committee so far in these two hearings is the idea of registration of insolvency practitioners with a regular re-registration period and perhaps the penalty of deregistration, which would mean inability to practise if there was malpractice. What are your views about that? That would apply to lawyers, doctors and so on. Why shouldn't it apply?

Ms Spargo—It is a significant sanction. It applies to company directors under the Corporations Law and I, quite frankly, cannot see any reason why that same sort of regime should not apply here. I understand that have been very few actions, and maybe that is quite right, but very few actions taken under the Corporations Law against insolvency practitioners. In some instances I think they may fall within the concept of an officer within the Corporations Law requirements. A company director that does not behave appropriately, and it is not criminal behaviour for a company director entirely, it can be simply failing to act in good faith, can be acted against. There are behaviours by insolvency practitioners in some cases that you could say, 'Well, failure to act in good faith,' and the penalties are there for that, including deregistration. The most significant penalty to, say, a company director is the removal of the capacity to practise. Equally here it is much more of a significant sanction that a direct fine.

Senator FIERRAVANTI-WELLS—It is all very well to have a framework but if you do not prosecute it seems to be less than ideal. You may not answer this question, but obviously in the work that you do you must have a handle on the insolvency profession and you must know the good and the not so good. In my dealings with them I have always had good dealings, but there have been people who have practised in this area who should have been thrown out a long time ago and it took years and years for any action to be taken against them, and God knows how many people they have sent to the wall and the sort of thing that happened in the interim before that action was taken. I guess that is really where we are coming from. From your perspective, what changes do you think should happen to preclude that in the future?

Ms Spargo—The issue you describe is the same for medical practitioners, it takes too long to remove their right to practise, and lawyers and so on. Instead it is a classic problem for professions, including the insolvency practitioners. ASIC has got the opportunity to act in certain circumstances. Does it act often enough? I do not have a view particularly on that, but the numbers are low. The professional bodies will act at times, but again the numbers are relatively low. It depends on an attitude, I think, of the extent to which the regulatory bodies, those that do have an opportunity and have the authority to actually remove somebody's right to practise, to actually get on and do it. Having worked on the prosecution side, I temper that by saying it is not always easy proving these things. It can be very challenging. So I have some sympathy with the regulatory bodies as well. We might all think the behaviour is there but proving it can be quite another challenge. You are quite right. If the sanctions are not there, people ignore—we rely on people complying with laws generally speaking out of their sense that it is the right thing to do. That is the group of people we do not ever really need to worry about. It is the group who know that the likelihood of a sanction is extremely low, where they are not the sort of people that will want to do the right thing, so to speak. You have got a problem with that group, unless action is taken.

Senator FIERRAVANTI-WELLS—If they know that the sanctions are there but for the regulator it is so low down the priority list that they are not going to bother take the action then that is different. Effectively it is turning a blind eye. I am not saying that is the case, but the reality is that, given the number of corporate failures, given the number of liquidators we have and given the size of the insolvency profession, the numbers are very low. There is a lot of anecdotal evidence there but the numbers do not seem to back up. In reality it is somebody has fallen down because of the corporate failures that are happening and they are not being prosecuted.

Ms Spargo—You will get nothing but support from me to say that regulators should be well resourced and that means in terms of funds and also the sorts of people that you need to be able to ensure work within regulators to be able to run these cases effectively. As I said, I have empathy with ASIC—look at their recent track record they are a bit nervous, I guess, about doing some of these things.

Senator FIERRAVANTI-WELLS—Their choice of prosecutions have left their legal funds somewhat depleted I think.

Ms Spargo—It is very personal to say this but it is a terrible thing to be in that situation for a regulator—

Senator FIERRAVANTI-WELLS—Particularly when you lose one after the other.

Ms Spargo—One after another, yes, it does not look good, but it is not an easy thing to do. I think having seen myself some instances where the regulator takes an action and it may not be ASIC but various regulators such as APRA might take action, for instance, and the parties on the other side of the line are the best, most expensive batch of lawyers they can find and it is a challenging situation. If you could do more to ensure that those entities were well resourced that would be good.

Senator FIERRAVANTI-WELLS—You have heard the evidence this morning. Do you have a view in relation to the potential of one insolvency body that looks after both corporate and personal?

Ms Spargo—It is not something I have a strong view on. We have not taken a view in that area.

Senator FIERRAVANTI-WELLS—Okay, thank you.

Senator WILLIAMS—Thank you for your attendance today. I want to refer to one of the earlier submissions as well. We are talking that the resourcing of ASIC. At the last Senate estimates I asked ASIC probably three or four times that evening: are you resourced well enough? The answer was, 'Yes, we are.' If we look back at one of the previous submissions today that submission says that the CALDB:

… can only determine cases brought before it by ASIC. We doubt that this is because there are hardly any cases of practitioner misconduct or default, and therefore it must be surmised that ASIC is not devoting sufficient time and resources to the monitoring and investigation of insolvency practitioners.

The point I make is this: ASIC has a huge job throughout Australia. They are the corporate watchdog of I do not know how many million companies et cetera. I take you back to Senator Fierravanti-Wells suggestion of should the IP institute be under one umbrella with an ombudsman there to take the load off ASIC. We are dealing with people who are creditors many of them in small businesses who have lost their money when they have given credit to a company that has fallen over and they are angry and annoyed. ASIC cannot take every phone call and every whinge going but at least if we had an ombudsman there under a separate industry body, that could handle this. Even satisfying people that they have been heard might be a good thing because I do not think that ASIC or any other body similar to ASIC is capable of dealing with this huge level of complaints from these people.

Ms Spargo—Personally I do not mind who does it. I have an interest in somebody doing it and in creating the most efficient systems you can. I tend to agree that ASIC should be reserved probably for the most serious of the failures. There is an ambit for ASIC. There is a lot of work that could be done at a different level. Ever since we have had courts and tribunals et cetera we have tried to work out where to most effectively send matters. Things come in and out of fashion and things change but time spent in trying to understand especially at that smaller end how to actually do that I think would be really useful. It is difficult in this area. I mentioned what we see in the audit area. For our standards an audit is an audit. So whether you be BHP or whether you be the very smallest of companies that is required to have an audit—a small listed start-up—an audit is an audit. The disparity, in a sense, if something goes wrong or there is a complaint or something that needs to be addressed, is enormous. One body that might deal with everybody from BHP right down to the very smallest—it is just very different work. I think there is a rationale for dividing it up.

Senator HURLEY—We had some discussion about professional fees earlier. Your standards talk about fees in 8.2 and say that the professional work must be directly connected with the administration and performed in accordance with the duties of the appointment. I think there was

some suggestion earlier that there might be a bit of cross-subsidisation occasionally. In view of this standard, would you agree that that might occur?

Ms Spargo—I heard that comment and it is a really interesting one. It is a worry that firms that do pro bono in any sort of area are making it up somewhere else. You are always frightened that it is being made up at your expense. The comment I would make about it would be to say that there are jobs in this area and other areas for accountants that are fully paid and well paid. The clients expect to pay well for the service they are getting. Those jobs are very profitable for the firms. If there is a good sense of professionalism and a good sense of trust—I am on the paying end of many of those and you sort of cringe, but it is the going rate. If it is work that is well done by people you trust and it has been done properly then that is fine. If there is a lot of that work available to a good firm then they have a greater capacity to also take some other work that may not be at that sort of rate. Some firms will not do that. Some firms will entirely look for the stuff at the other end that I mentioned and will not do any. A lot of good firms who want a good corporate reputation might temper what they do a bit in terms of who the client is and so on. As soon as I say that it sounds wrong, but there are ways to do it that are not wrong.

Senator HURLEY—I suppose the suggestion is—perhaps I am misquoting Senator Fierravanti-Wells—that someone else might do the low-end work, such as a government or other agency, in order to free up the other work.

Senator FIERRAVANTI-WELLS—It is a model.

Senator HURLEY—Would you see any value in that?

Ms Spargo—I understand, and it sounds attractive. I think the dilemma is that the smaller entity—this is a generalisation—is often less well resourced, has less sophisticated advisers et cetera and has a board that is less sophisticated et cetera, although it may well be gone by then. So it is often the entity that really needs the help the most. It often needs it at quite a sophisticated level. If you go up to the other end of the spectrum with big entities, often they are extremely well resourced, they have plenty of advisers and they have plenty of people hanging off them. They often need the resource less. It is quite an inverse issue. We worry a lot in terms of the audit area where we have standards as well. With a small audit firm that does just the very low-end audits and does them at a very low-cost rate—a bit like the low-doc loan concept—it is a worry. The standards required, the thought and professionalism required, is no different really. The work might be simpler, it might be a bit easier and you might be able to churn it out, but I hesitate to advocate a great division of that strongly. I do not know whether Channa has a different view.

Mr Wijesinghe—I think one of the things that it has is the regular review of all practitioners, which is another good mechanism. If you look at the profession, registered ones have to go to a regular review by ASIC, while the liquidator one seems to be driven by complaints.

Senator HURLEY—I think that is a very good point. If they are driven by complaints, that is something that we need to look at very closely, because that might account for the small number of complaints. When I asked about this previously, I think Dr Brand talked about profiling that the Law Council does. Do you have any views on that? As an industry body, profiles could be kept of those kinds of practitioners who might be most at risk, given there is industry

understanding, and that might be a way to investigate or to keep an eye on people to make sure that there is not anything happening, to nip problems in the bud.

Ms Spargo—I do not have a problem with it in principle. I know that the professional bodies are quite constructive in their approach, trying to help people not to get into trouble. There is a lot of remedial and preventative work done. I know ASIC does the same and APRA does the same as well. ASIC does not immediately come down on you the minute you look as though you might have done something; it tries to work in an encouraging way to help people so that you do not get people getting into more and more trouble.

Generally speaking, we do not do any profiling ourselves but we know that through the professional bodies it is relatively easy to see where the high-risk areas are. The smaller practitioners—and I mean this is in a general sense, not just the insolvency practitioners—who do not have the resource to have a unit set aside for dealing with standards and are working in a small practice where they are doing a lot of the work themselves, they just cannot resource it up, we know they are probably the highest risk area.

Senator HURLEY—I got a bit diverted from the fees question there. Clearly there has to be some pressure to keep fees at a reduced level. On the other hand, we did have some discussion at an earlier hearing about practitioners who may not be familiar with the area of the insolvency they are investigating and the example was given of a cattle breeding property where the cattle were sold for a value that was much lower than you would expect. In terms of fees I was thinking we may be a bit cautious because if there is a push to drive down fees then you might not employ the correct valuers or you might not employ the right consultants to inform your work. Do you have any comment on that?

Ms Spargo—It is the perennial challenge in any of these areas of work and I go back to my comment about ASIC. Some companies can afford all the best resources and if you cannot afford those you are going to be at a disadvantage. It is the perennial problem of the huge differential in positions some times between the party likely to be affected and the people who are providing services. The smaller they are the less likely they are to have the resources they need to buy in the services they need to protect them. It is very hard to do much about that unless you get people who are very good at what they do, doing it at a rate that is able to be met by a smaller entity.

Senator HURLEY—I suppose that reinforces the idea that although there may be a place for smaller companies doing smaller work, there is some advantage in the industry as a whole having a large number of companies who do a range of work and so have the expertise.

Ms Spargo—Yes. I think one of the more worrying areas is the smaller practitioner who does just a very little bit of a particular specialty area because they are at a serious disadvantage in relation to those specialists who do any sort of work in a more concentrated way. With these areas of work insolvency and other sorts of areas of work, those who do them regularly get very used to what comes out. They know what to expect. They know the right people to use when they need services. If you are not working in the area regularly is very hard and of course by the time you have learnt it may well be that you have disadvantage the party you are there to help.

Senator HURLEY—This is why I am a little bit concerned about the discussion about an ombudsman going out and observing particular creditors meetings and so on. It is a strange area of work in a lot of ways, so an ombudsman would presumably be familiar with it, but it might be a little difficult to make a judgment from just one meeting as to whether creditors were getting value for what should be done. Do you have any views on how an ombudsman might work?

Ms Spargo—It depends on the expertise of that person. This is totally off the top of my head, but if you say to an experienced insolvency practitioner, 'Go and have a look at meeting A, B and C and see whether it is fine, a bit dicey or somewhere in the middle,' they would be able to tell you very quickly. They would say, 'I think this all looks fine,' or they would say, 'We've got a problem with these practitioners,' because they are overdoing the work or overdoing the fees or whatever. So an experienced person who knows what they are looking for, and who remains current, would be of enormous idea—but not someone who does not have that ongoing working knowledge and perception and currency. It is about currency, too, because things change over time. You might be a professional in an area but, five years later, your currency is just not there. No matter how good you were at the time you did it, going into that sort of role you might not pick up what is current practice.

Senator HURLEY—So, for example, a retired person looking at fees or practice might not necessarily be the best person?

Ms Spargo—Again, I think there is a real issue around currency and acuity and a real sense of not being passive. I see it in other sectors. You can put a very current person on a board but, if they stay too long as a non-executive director and are no longer working in their area, their currency inevitably diminishes over a couple of years. So you to have to have people who are very close to current practice.

Senator FIERRAVANTI-WELLS—I read your submission in relation to dropping the title of 'official liquidator' and making sure all liquidators get their share of jobs, particularly the court appointed ones. Do you have a view in relation to that?

Ms Spargo—I have not formed a strong view on that.

CHAIR—Thank you very much for appearing today. It has been very useful to hear from you. We will look through your submission with great interest.

Ms Spargo—Thank you very much.

[11.18 am]

McNAMARA, Mr Stephen Patrick, Director, Commercial and General Law

VISCARIELLO, Mr John, Private capacity

CHAIR—Welcome. Would you like to make an opening statement?

Mr McNamara—We have put in two submissions. I will make an opening statement and go through what I want to put to you. Mr Viscariello will then make a statement on the matters he specifically wants to refer to. I am not sure whether you have had the opportunity to read the submission that I put in. Generally, we submit that there should be an ombudsman to be able to look at and liaise with debtors and creditors in relation to insolvency work.

I will just give you a little bit of background. I am from a small law firm. We generally act for directors and guarantors in companies that have gone into liquidation. Generally an underlying feature of this is that people are stressed. They are financially stressed and socially stressed because their companies are in trouble. And they are usually under severe financial stress, which means they generally cannot get the resources to be able to put their point across, to fight liquidators or to take action if they need to. The company's assets are a sort of a honey pot. That honey pot includes company assets and, sometimes, directors' assets, guarantors' assets and preferential creditors' assets. That honey pot is not big enough to go around, which is why the company is in trouble. So it goes from the control of the directors to the control of the liquidator. The liquidator generally looks to see how big the honey pot is and what they can take from it. That is the point at which the directors and guarantors have a complaint. The problem is that the liquidators have now got control of any assets that the directors or guarantors generally had, and that is the only way of funding any issue they have with liquidators or receivers and managers.

My point is that something needs to be done put for these people to be able to put their complaint if they have one. The only avenue they have at the moment is through ASIC—and I will run through a case study that I think is very instructive. No-one looks to see whether the action of the liquidator is going to assist the creditors. Most creditors in this situation have lost their money and, certainly in small liquidations, given up on what is going on; they have written their money off. So it is up to any directors or guarantors to try and do something. As I said, they generally do not have the financial resources to do it, so they need somewhere to go to lay a complaint or at least have someone oversee what is going on. My submission again is that that cannot be something that requires the directors or guarantors to put their hand in their pocket, because they just do not have the money to do it. There are two things that need to be looked at: what the liquidators are doing—any court actions they are taking et cetera for the benefit of creditors—and whether the steps they are taking are just and equitable. As I said, the only avenue that seems to be available to directors and guarantors et cetera at the moment is to go to ASIC. But ASIC is generally too slow and does not get on top of the problem quickly enough. As I said, these people have usually been seriously affected, their lives are under serious stress and they need something to happen quickly—and that just does not occur.

Without giving any names, the first case study involves a company that went into liquidation in 1996. An order was made by a judge in the Supreme Court of South Australia appointing two liquidators to investigate an allegation by one of the directors against a bank. Nothing happened with respect to that, so one of the creditors, off their own bat—it was a small creditor and it was instigated by a director—took out an action to replace those liquidators with another liquidator. That appointment was made in 2000. After the appointment, nothing ever happened in respect of the creditor. The creditor was not informed about what was going on, even though the creditor had spent its own money getting the liquidator appointed. There did not appear to be any report from the liquidator about the general affairs of the company that was in liquidation and it appears that nothing occurred with respect to the investigation into that particular bank. The creditor then heard, fortuitously, that the liquidator had taken out an action to remove themselves as liquidator and have the liquidation finalised in 2008 and they used a different action number in the Supreme Court so that the previous history did not come before the judge.

The creditor took out an application to block that so as to make sure that the liquidation was not finalised, and also took out an application to replace the liquidator who was asking to be released with another liquidator so that the thing that had been asked to be done in 2000 could be looked at. It was during the course of the application that the bank actually supported the liquidator in finalising the liquidation, and it was found out by affidavits put before the court that the liquidator who was asking to be released (1) had entered into a settlement arrangement with the bank and (2) had received fees in respect of that settlement arrangement that it had entered into. None of this had been reported to the court and none of it had been reported in the ASIC accounts, as a result of which we made a complaint to ASIC with respect to what had occurred. Nothing happened. ASIC did nothing. They became aware of the issues and said that there was nothing to investigate.

The matter continued on and a judgment was handed down in the Supreme Court of South Australia on 28 May 2009, during the course of which the judge made these comments:

A complaint was made that the arrangements entered into by the liquidator with a creditor were not disclosed in his original supporting affidavit, nor was the receipt of any moneys which were payable or had been paid pursuant to that agreement. Therefore, there were very serious questions in relation to the conduct of the formal liquidator and still more serious questions in relation to a potential cause of action against the creditor, being the bank.

The judge went on and found that a new liquidator should be appointed and that the liquidation was not complete. On receiving that judgment, the client instructed us to again approach ASIC and make a complaint, which we did. You will note that the judgment was handed down on 28 May 2009. The judgment was referred to ASIC soon after it was handed down, and at the time of me putting my submission in, which I think was on 2 February this year, we had not had a response from ASIC.

Subsequent to my putting the submission in, I received a response from ASIC dated 10 February 2010, some seven months later. The response from ASIC is instructive by itself. I can table a copy of the letter if that would be of assistance.

CHAIR—Yes, if you would like to do that.

Mr McNamara—I will also run through it. It is very worthwhile reading because it says that they confirm that ASIC's decision is not to take further action in the matter. That is in paragraph two. They then go through and highlight what they say the complaint is. If you have a look at the second to last paragraph, it says:

I understand that you adduce the judgment as evidence that—

the liquidator—

has not conducted sufficient investigation during his appointment as liquidator of the company.

The reason I say that is instructive is that that is not the complaint at all. The complaint was set out, and even if I had incorrectly written to ASIC about what the complaint was, the complaint stands in the judgment that His Honour handed down on 28 May 2009—that arrangements had been entered into that were not disclosed to the court and that the accounts that had been placed before ASIC and before the court did not disclose the amounts of money that the liquidator had received. So on 10 February we had ASIC dismissing the complaint—and they had not got the complaint correct at all. One would have thought that even, as I said, if I was an absolute dolt and had written in about the wrong complaint that they would have picked it up out of the judgment. They are just not doing their job. Apart from being very slow—as I said, it took seven months to get a letter back—whoever they have in there looking at it are just not picking up what is going on. That is why we say that we need someone else doing the job. These are only small matters, but someone else needs to be looking at what is going on because it does not appear that the people in ASIC understand what the problems are.

The second case study that I put in which, again, I think is instructive shows just how the honey pot disappears when insolvency practitioners, be they liquidators or acting for liquidators, go about their business. What I say by way of introduction is that this area is the only one in which professionals work where they write their own meal ticket. They decide how much work needs to be done, they decide who is going to do it and they decide when they take the money. There is no-one stopping them; there is no-one else overseeing what goes on—other than maybe a committee of inspection, which is made up of creditors who generally do not understand what is happening. The insolvency practitioners have the right to sit there and think: 'What are we going to do next and when are we going to draw the money down?'

That is highlighted by the second case study that I have set out for you. Again, without going into names, a company that went into liquidation was turning over approximately $25 million a year. We acted for one of the guarantors in relation to it. Again, the bank was suing the guarantor. The point about that was that, because the bank was suing the guarantor, the guarantors had no right at law to get an accounting to them of any sale by the receivers and managers in relation to the assets of the company because they were one step removed from it. The receivers and managers, as far as we know, have never accounted to anybody in relation to this particular liquidation. We do know from the court proceedings that the bank, which was a secured creditor, did not ever get paid anything.

The company went into liquidation. There were a number of different attempts, one of them being an administration—and I will come to the conflict between administrations and liquidations in a moment—

Senator XENOPHON—Mr McNamara, you said you did not want to go into names. What you say here is privileged. Why don't you want to mention the name of the company?

Mr McNamara—I could, but I am not sure that it actually—

Senator XENOPHON—No, but it is a well-known South Australian company.

Mr McNamara—It is Golden Chef.

Senator PRATT—We received it before.

Senator WILLIAMS—Yes, we have it all here.

Mr McNamara—It was Golden Chef that went into liquidation. We know that assets were sold up by auction in both Adelaide and Melbourne. On estimation, the assets recovered were in the vicinity of $3 to $3½ million. Not one creditor got paid in this liquidation.

Senator WILLIAMS—What about the bank?

Mr McNamara—According to the court action, the bank did not receive anything because they were suing for 100 per cent of the amount under the guarantee.

Senator WILLIAMS—So you are saying that in this example that you are putting to the committee some $3 million was collected by a liquidator through the auction of a vehicle which was an asset of the company, and the bank, which obviously the company owed money to, did not get anything and the creditors did not get anything. Is that what you are saying?

Mr McNamara—That is what I am saying. And I am saying that the whole of it was used up in legal fees, collection fees and liquidators' fees.

CHAIR—But you are also saying that ASIC was deficient in failing to understand what the issues that you complained about were.

Mr McNamara—I did not make a complaint to ASIC with respect to this matter. It was about the previous matter.

CHAIR—You did on the previous one.

Mr McNamara—Yes.

Senator HURLEY—Was any complaint made to anyone about this matter?

Mr McNamara—Not about this particular matter. The guarantors ended up going into bankruptcy and—

Senator HURLEY—So why is this a deficiency of the regulation?

Mr McNamara—I am not saying this was a deficiency of the regulation. What I am saying is that there is no-one overseeing this type of thing to see what is being done by the liquidators and insolvency practitioners generally—and that includes the solicitors who are acting for them. As I said, what they did and what this shows is that there is a pool of money and these people decide how much work they are going to do, what they are going to do and how they pay themselves. It is the only profession that has the opportunity to do that. No-one else does.

CHAIR—How would you see it reformed? That is what we are interested in. We accept the evidence that you are giving as being an example of an undesirable practice and undesirable management, but what would you like to see established?

Mr McNamara—In my submission I talk about having some sort of ombudsman officer to whom a guarantor who, in this case, had gone bankrupt could go and say, ' We think that there is a problem here. We are unable to get documents through the courts. We believe that the insolvency practitioners'—and I would say that is both the liquidators and the solicitors involved—'have made a meal of this particular liquidation, and it needs to be looked at.'

Senator HURLEY—Why would an ombudsman be any better than ASIC? If no-one complained to ASIC why would anyone complain to an ombudsman?

Mr McNamara—It needs to be done quickly; it needs to be done at the time. ASIC do not seem to move quickly enough in these instances, as in the example I have given.

Senator HURLEY—Is that why there was no complaint made—because of the expectation?

Mr McNamara—Yes, it was because of the expectation.

Senator HURLEY—Do you think an ombudsman would necessarily move quickly?

Mr McNamara—I would think an ombudsman would be able to move more quickly. These are not huge liquidations. ASIC is taken up with the OneTels of the world and what have you. These are only small matters but there are lots of them.

CHAIR—There has been some evidence given that ASIC really should be preserved for the more complex cases and that there should be a different system for the smaller cases. Your thrust seems to be supporting that.

Mr McNamara—I do not believe that this is complex. It would be a very easy thing for someone to step in and work out.

CHAIR—But you would need a better system to ensure—

Mr McNamara—A faster system.

CHAIR—that the smaller cases are dealt with effectively and that if there is a deficiency or a complaint there is some sort of system under which there can be a quick resolution to the problem.

Mr McNamara—Yes.

CHAIR—Do you have any idea to put to the committee about what sort of structure should do that and who should be responsible?

Mr McNamara—My submission was that there should be an ombudsman.

CHAIR—Apart from an ombudsman?

Mr McNamara—I do not really think there is another structure that would be able to do it effectively.

Senator WILLIAMS—Could I just suggest something? We have ITSA overseeing the private bankruptcies. We have ASIC on the corporate side of things. What if we had one umbrella to handle insolvency issues instead of having some under ITSA and some under ASIC? Of course ASIC happens to be responsible for every other company in Australia as well. What is your reaction if I suggest to you we have the industry under one umbrella with its ombudsman and its corporate laws et cetera?

Mr McNamara—That would need to include governing of insolvency practitioners, including the legal practitioners. At the moment it does not. It focuses on the accounting profession in that area.

Senator WILLIAMS—And not on the legal profession?

Mr McNamara—It does not focus on the legal profession. The legal profession are involved in it as much as the accounting profession. They generate the court actions, run them and generate fees out of the same pool of assets.

Senator WILLIAMS—It was suggested earlier on that the corporate watchdog have a flying squad that can come in. You gave the example of the $3 million, or whatever has been received from the sale of the assets, where nothing is paid to the bank, the main financier, and nothing is paid to the creditors. Surely we need some sort of watchdog to ask: 'Where has the money gone?'

Mr McNamara—That is right. There certainly needs to be someone looking at it to see where it has gone. These are just two examples. The examples go on and on where creditors receive nothing because the honey pot is sucked up by the insolvency professionals.

Senator WILLIAMS—When you are talking about the legal side of the work, the liquidators or the voluntary administrators do you often see the situation where one company may be appointed liquidator or get the job as the voluntary administrator and they use another company, which might be a law firm, and then another company, which might be a valuation company? Do they work closely together? Do they seem to be working with each other?

Mr McNamara—They work closely together. But, as was said, it is a small profession, in any event, so you would expect that. But they do; they obviously work closely together. Certainly where guarantees are involved you will get law firms which act for receivers, managers and

liquidators getting together in relation to how they attack a guarantor who may not be a director of the company. You certainly get passing of information between those groups. That is not necessarily wrong; I am just saying that it certainly occurs. They certainly do work together.

ACTING CHAIR (Senator Hurley)—Is that all, Senator Williams?

Senator WILLIAMS—Are you talking about winding up now?

ACTING CHAIR—No, I am asking whether you have another question.

Senator WILLIAMS—Thank you, Deputy Chair.

Mr McNamara—I have another point to make. I am not sure how it fits in with what the committee does. Quite often you will see directors whose company may be under stress go and see an insolvency practitioner to look at putting the company into voluntary administration. The administrator has a huge conflict because in an administration generally they will earn between $5,000, at the low end, up to maybe $30,000 or $40,000, but if they sit there, look at the company and see what sort of asset backing it has there is the utmost incentive for them to put that company into liquidation because they know they are going to make a lot more out of the liquidation than they will out of any voluntary administration. You see that sort of thing going on quite regularly. Directors will say, 'We took in the company to put it into voluntary administration and it has gone into liquidation.' Certainly creditors have to vote to put the company into liquidation, but generally they do that on the recommendation of the person running the meeting, who would be the administrator. The administrator generally goes from administrator to liquidator, so they pick up the work.

Senator XENOPHON—Can I ask a follow-on question to that, Deputy Chair?

ACTING CHAIR—Yes, just quickly.

Senator XENOPHON—Just following on from that, you are basically saying there is an inherent conflict of interest. In a legislative sense how do you provide safeguards against that?

Mr McNamara—It may be that the administrator is not allowed to be the liquidator. If they are approached to be the administrator of a particular company then they should be barred from being the liquidator of that company.

Senator FIERRAVANTI-WELLS—There will not be if there is a court appointed liquidator, because in a court appointed situation if it was proposing to be and then ultimately there are problems—

ACTING CHAIR—Sorry, Senator Fierravanti-Wells, could you speak up a bit?

Senator FIERRAVANTI-WELLS—Sorry. Do not worry about it. I will make the point afterwards.

Mr McNamara—Generally an administrator should be precluded from being the liquidator of the company. That would be one way of addressing it. Again, it is the issue of what they make

out of it, and administrators are never going to make as much money out of administration generally as they are going to make out of liquidation, so they do not have any incentive to keep the company going.

ACTING CHAIR—We do not have a lot of time left. A confidential submission was put in about a court case. Because it was confidential I will not talk about the people involved, but has that case been resolved?

Mr McNamara—That is Mr Viscariello's area. He can speak on that.

Mr Viscariello—No, it is still on.

ACTING CHAIR—Was that case between you and a liquidator?

Mr Viscariello—Correct.

ACTING CHAIR—So you are suing a liquidator in the Supreme Court about an issue?

Mr Viscariello—Yes, I am.

ACTING CHAIR—It seems to me from your evidence that in fact there are particular instances that you are unhappy with and that you are unhappy with ASIC's response, so you are looking to set up another body rather than reform the way ASIC does it. Can you explain why?

Mr McNamara—It is probably because ASIC has lots of other objectives, issues and things that it has to deal with. It seems to me that this area is so busy that it really needs one body, as Senator Williams has said. Whether that is an ombudsman or a separate body that is set up that looks at both bankruptcies and liquidations, if that is—

ACTING CHAIR—You see ASIC as too busy, but there is a separate section within ASIC which has a dedicated team of some 30 full-time equivalents in insolvency practitioners and liquidators.

Mr McNamara—All I can do is say to you that from my experience, and I have just given you one example, it took seven months to get a letter back.

Senator HURLEY—To set up an ombudsman it would presumably have to have more than 30 full-time equivalents to deal with the issues more quickly.

Mr McNamara—I would have thought so. If you have a look at the number of liquidations, administrations and insolvencies generally in Australia, there are a huge number of them. If someone is going to investigate the complaints or the problems that arise with them, I would have thought it is going to take more than 30 people to do it.

CHAIR—Mr Viscariello, do you wish to make any comment?

Mr Viscariello—I do. I would firstly like to say that whilst these proceedings are on foot the further supplementary submissions that I wish to make this morning are on matters which are in

the public domain—they are on public documents and are the subject of judgements. So my references to people and firms and so forth are matters which are in the public domain. To that extent, I am able to make certain points in these submissions.

I am most grateful to the honourable members of the Senate inquiry for the opportunity to make submissions in relation to the inquiry into the conduct of liquidators in this country. By way of background, I have the following qualifications: Bachelor of Applied Science in Building Technology, Master of Applied Science in Project Management, Master of Business Administration, Bachelor of Laws, Graduate Diploma in Legal Practice and I am a member of the Australian Institute of Company Directors. I have had extensive experience in senior management roles in the building and property development industries as well as experience in running medium sized retail businesses. I am currently a co-director with Stephen McNamara in a small law firm. Our primary area of practice is commercial litigation for small to medium sized business. We generally do defendant work.

As a consequence of my professional career in these various industries, my experience as a legal practitioner acting for businesses that have gone into liquidation, anecdotal evidence from clients and other practitioners both in South Australia and in other states of Australia about their own experience and that of their clients with liquidators, and my own experience as director of two companies that were placed into liquidation in 2001, I have accumulated a body of knowledge and experience which has been the basis of forming a firm and very disturbing view about the profession of administrators, liquidators and receivers and managers. In my opinion, liquidators—if I can use that term to cover administrators, liquidators, receivers and mangers as a whole—can be characterised as a profession dominated by white-collar criminals motivated by a deep seated culture of greed and self-interest.

Liquidators strip and sell assets of companies that are asset-rich but cash-poor in order to simply pay their own professional fees. The amount of the liquidators professional fees is usually equal to the amount of cash realised from the sale of assets and/or amounts recovered by liquidators in various recovery actions, leaving creditors with nothing. Under the Corporations Act, liquidators' fees rank ahead of all creditors, even secured creditors. Liquidators purport to undertake all manner of work in relation to the liquidation of companies unchecked with the guarantee that their fees will be paid ahead of others. The recent case of Stuart Ariff, which achieved some notoriety, is in my opinion illustrative of the corrupt profession that the system allows to continue virtually unchecked. Victims of the conduct of liquidators—that is, directors or creditors of companies—generally do not have the resources to take on liquidators and even if they do they find liquidators not only using moneys obtained from the sale of company assets to pay the legal fees to defend those actions but also paying themselves their own professional fees in relation to managing those actions.

This is a privilege enjoyed by no other plaintiff or defendant to any litigation. If you are a plaintiff or defendant in the action, you do not get to recover the time, costs and expenses of going to see a lawyer and so forth, but liquidators do, so they have every incentive to spend more and more time managing their litigation. In my opinion, liquidators traffic freely in litigation to recover moneys from third parties for the sole purpose of paying their own professional fees and disbursements. This practice has been referred to in some courts as the practice of churn and burn.

In my opinion, ASIC is indifferent to complaints made to it about the conduct of liquidators and will only in the most extreme cases take seriously any complaints made to it about liquidators. ASIC's summary dismissal of complaints is well known amongst the profession and encourages liquidators to take their chances in not ever being brought to account for their conduct. This indifference by ASIC, along with a lack of any independent auditing process over company liquidators, allows liquidators to basically charge whatever fees, costs and disbursements they want, unchecked and unfettered. The limited disclosure that liquidators are obliged to make to ASIC through lodging a form 524 with ASIC provides little assistance to anyone trying to obtain information about a liquidation.

In my personal experience with a liquidator, Mr Macks of the firm PPB—

Senator HURLEY—Chair, the witness is now talking about individual parties without those parties being able to respond. In some respects this is an abuse of privilege.

Mr Viscariello—I am happy not to refer to the parties.

Senator HURLEY—You already have.

Mr Viscariello—Sorry.

Senator HURLEY—As you just said, this is a court case that is ongoing.

CHAIR—If it is sub judice we should not refer to it, and I think we should not refer to it at all again. If you want to give general examples and general principles, that is fine.

Mr Viscariello—What I can say is that these allegations were brought to the attention of ASIC. They were summarily dismissed and nothing was done. Later these matters were brought to the attention of Senator Williams, who then instigated some sort of inquiry by ASIC, and I understand that inquiry is ongoing. The point is that not all individuals are able to access ASIC and get a senator involved in a complaint. It should not come to that. What I also want to touch on are the two cases that Mr McNamara referred to.

CHAIR—We will just pause for a minute, because we might have a solution to this issue. There is a suggestion being made that the committee should go in camera, which is a confidential session. On the motion of Senator Fierravanti-Wells, the committee will now go in camera.

Evidence was then taken in camera—

Committee adjourned at 12.14 pm