
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## ECONOMICS REFERENCES COMMITTEE

**Reference: Liquidators and administrators**

TUESDAY, 13 APRIL 2010

SYDNEY

BY AUTHORITY OF THE SENATE

**INTERNET**

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

**http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
**http://parlinfo.aph.gov.au**

**SENATE ECONOMICS**

**REFERENCES COMMITTEE**

**Tuesday, 13 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 Bushby, Eggleston, Fierravanti-Wells, Hurley, Pratt and Williams

**Terms of reference for the inquiry:**

To inquire into and report on:

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

**WITNESSES**

**Committee met at 9.02 am**

**CHAIR (Senator Eggleston)**—I declare open this hearing of the Senate Economics References Committee inquiry into the role of liquidators and administrators. On 25 November 2009 the Senate referred the inquiry to the 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 the collapse of a business. To date the committee has received over 80 written submissions.

These proceedings today are public proceedings, although the committee may agree to a request to hear evidence in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, 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 committee. If a witness objects to answering a question the witness should state the ground on 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 also be made at any other time.

I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about how and when policies were adopted.

[9.04 am]

**MAGAREY, Mr Donald Rees, Chairman, Companies Auditors and Liquidators Disciplinary Board**

**CHAIR**—I welcome Mr Donald Magarey from the Companies Auditors and Liquidators Disciplinary Board. I now invite you to make an opening statement.

**Mr Magarey**—Thanks, Mr Chairman. We have not put in a submission to the inquiry, but I would like to make a couple of points by way of explanation of the background of the board, who we are and how we operate.

We are an independent, statutory body established under the ASIC Act with powers and functions given to the board under the Corporations Act. The membership comprises 14 members appointed by the minister, who are resident throughout Australia. Individual cases are dealt with by panels of members of the board—either a three-person panel or a five-person panel. Our purpose is basically the protection of the public interest in relation to the disciplinary function over auditors and liquidators. Our purpose is not a punitive purpose; we are not established for the purposes of enforcing statutory obligations or punishing practitioners. We have been the subject of a constitutional challenge two or three years ago which went to the High Court, which determined that the board was constitutionally valid and was not in breach of chapter 3 of the federal Constitution.

We operate with several statutory obligations, one of which is confidentiality; the second of which is expedition; the third of which is that we must give any respondent an opportunity to attend a hearing and present their case. Any evidence or submissions they want to make can be done at that hearing. Finally, the other important statutory obligation is our obligation to give respondents natural justice. We are not bound by the rules of evidence in our hearings, but we are bound to afford natural justice. We have no investigative powers ourselves. Cases are referred to us either by ASIC under the act or by APRA. In dealing with those cases and making our orders we are totally reliant on evidence presented to the board and on the expertise of members of the panel.

We issue practice manuals, which we review periodically—mostly each year—which set out details of the board's procedures relating to prehearing procedures and procedures at a hearing. Those manuals are on our website, together with copies of our annual reports. We are obliged under the act to report annually to the minister, and our report is tabled in both houses of parliament. I understand that members of the committee have been provided with copies of our most recent annual report up to 30 June 2009. Also on our website are copies of our recent decisions. The act was amended two or three years ago to give us discretion to publish details of our decisions and of our reasons. Prior to that, our only obligation, which we still have, was to publish a notice of a decision in the Commonwealth *Gazette*. We had no power to publish the reasons for our decisions, which we now do and which we publish on our website. The most recent ones are available there.

As far as parties who want to take the matter further after our decision, there is provision in the legislation for an application to be made by either party to the Administrative Appeals Tribunal for a review of our decision. That is not actually an appeal, but it is a review of our decision. It is really more of a merits review. It is a new and independent hearing by the AAT based on the evidence presented to the AAT, not based on the evidence that is presented to us. In fact, there is a recent decision which says that the AAT can take into account evidence which has emerged after the time at which our original decision was made. I think that emphasises the point that the AAT's decision is based on materials put to them and the submissions made to them. It is a review of our decision; it is not a review of the reasons for our decision. Our reasons may be different from theirs because the evidence may be different and the submissions may be different.

There is also provision under different legislation for matters to go to the Federal Court, either under the Administrative Decisions (Judicial Review) Act or under the Judiciary Act, but that is confined to questions of law. That is not strictly speaking an appeal either; it is a reference of a question of law as to whether there has been a mistake on a question of law, either in the AAT or in our board. We have had cases where parties have taken matters to the Federal Court on the basis that we have made an error of law.

Finally, I wanted to mention that we have an annual workshop. As I said earlier, our members are resident all around Australia and we do not see each other very often. They are all appointed on a part-time basis. Most of them are still busy practitioners themselves, accountants, lawyers, businesspeople. We do not see each other very often and we get together once a year for an annual workshop to discuss matters of procedure in the board and how we are operating. One of the important elements we have had in the last four or five years is a forum within our workshop where we invite representatives of our stakeholders to come and have open discussion, stakeholders including ASIC, APRA, the professional associations, the chartered institute, CPAs, national institute. We also invite representatives of Treasury Department, Financial Reporting Council. They are all happy to come and we have a discussion about general matters of interest to them which relate to the operations of the board. We are very keen to keep in touch with our stakeholders and their views about what we do and how we do it, whether we can improve and other matters of that nature. They also discuss matters between themselves which do not strictly speaking relate to the board, but it is a good opportunity at least once a year for everyone to get together who has an impact on the board's operations.

**CHAIR**—Thank you very much. For the purposes of the committee's background information, can you tell us how your process works. You are the auditors and liquidators disciplinary board, so someone makes a complaint about an auditor or a liquidator and you investigate that case and evaluate it and apply disciplinary process. Do you want to go through that in a little bit of detail for the benefit of committee members?

**Mr Magarey**—As I mentioned in my opening points, we have no investigative powers. Any matters that come to us, and we do get inquiries from time to time from members of the public saying they have a complaint about either the conduct of an auditor or the conduct of a liquidator, but we have no power to investigate complaints. We refer all of those complaints to ASIC. We have an arrangement with ASIC because this happens relatively frequently, that is, maybe half a dozen times a year. We have a designated person within ASIC to whom we refer these inquiries. So ASIC itself or APRA—it could be APRA—does all the investigation. It

investigates the complaint. We take no part in that whatsoever. If ASIC decides ultimately in its discretion to bring the case to the board, it has various options. It can go to court in some cases, it can enter into negotiations for enforceable undertakings on other occasions, and on other occasions it can bring the matter to the board. If it does then it prepares its application, sends it to the board and sends a copy to the respondent.

Immediately that happens we then have a current application which we then proceed to deal with. The first thing we do is notify the respondent that we have received the application and we establish a prehearing conference within a matter of the first month or so after we receive the application. That gives the respondent an opportunity to, firstly, read the application and read all the evidence that is attached to it and, secondly, to instruct a lawyer if they choose to do that and give a lawyer an opportunity to advise the respondent about what is involved in the proceedings.

We then have a prehearing conference, normally attended by the lawyers for the respondent and a legal representative from ASIC, at which we discuss a timetable for our prehearing procedures, which are really designed to narrow down and refine the issues that are going to be involved in a particular case. There are all sorts of facts involved that may be admitted, and we do not want to spend time, and we do not want parties to have to spend time, worrying about facts that are going to be admitted or issues that are going to be conceded. So the object of the prehearing procedure is to narrow down what is going to be involved in the hearing.

The respondent then puts on a response to all the contentions that are in the application together with evidence. The respondent can then decide whether they want to retain an expert to put on an expert report. We allow expert evidence either by ASIC or by the respondent—sometimes by both. Then witnesses have to be interviewed by both parties, ASIC and the respondent. They prepare statements and exchange the statements. Along the way we may hold more than one prehearing conference; we most often do. Disputes arise between the parties as to matters of a prehearing nature—whether issues are being properly dealt with, what issues are relevant and whether particular documents are relevant. They are all dealt with by the chairman, by me, in prehearing conferences, so that at the hearing we concentrate on matters that are really in dispute and that both parties are fully aware of what the other is going to be saying.

That process extends over some months. We aim to finish it in approximately six months. They then retain counsel, quite often Queen's Counsel, for the hearing. I then empanel members of our board to sit on a particular case. They are resident around Australia. Most of them are busy professional people. The hearing can take anything up to two or three weeks. Sometimes it takes only two or three days but it can take a couple of weeks. We have to line that up with adequate notice because Queen's Counsel, members of the panel and witnesses have to be available. Getting them all together is a bit of a juggle, so that takes some months. Then we have a hearing at which the evidence is presented and submissions are made. We then make our determination as to whether the case has been established and finally, once again on a few weeks notice, we hold a further hearing, which is a much shorter hearing—normally it finishes within a day—as to what order we should make. Having made our determination that the case has been established we then hold a further short hearing to receive submissions—and sometimes further evidence, as to character, for example—as to what order we should make: whether we should cancel the registration of the person as an auditor or liquidator, suspend, admonish, reprimand, require undertakings or further education—those sorts of things. That is the end of it. We aim to complete that entire process within a 12-month period.

**CHAIR**—Thank you, Mr Magarey. It seems to be a very long process. Do you have the resources and the manpower to cope with the workload or are there delays because of the length of the process and the pressure of work?

**Mr Magarey**—No. It is a long process but, as I emphasised before, we do have an obligation to afford natural justice and we are dealing with matters that can affect the person's professional career if they lose their registration. In the interests of natural justice we want to give them every opportunity, firstly, to know what it is exactly they are facing and, secondly, to have an adequate opportunity to present everything they want to present in defence. It might take us some time to consider all that. The writing is done in Sydney, but we circulate drafts among the members of the panel and eventually reach consensus.

We write very substantial documents. Natural justice requires us to give full reasons of the respondents as to why we are reaching our decision, which involves analysing the facts which we regard as relevant, dealing with all their submissions, dealing with all the witnesses. Some points of law sometimes arise and we have to deal with those. The longest ones are over 150 pages, so it takes a while to get through all that. In recognition of our obligation to provide natural justice to the respondents and to ASIC, it just takes time to do that, to get it all decided and get it all written in a way that all members of the panel are happy with.

**CHAIR**—One of the issues that has been raised in this inquiry is the idea of limited period registration with a period of re-registration and a requirement for ongoing professional education. Is that a concept you might find appealing and useful in terms of maintaining professional standards and perhaps weeding out people who were not maintaining their standards?

**Mr Magarey**—I would not want to comment on policy matters—

**CHAIR**—Just as a general concept. It happens in the medical profession and the legal profession.

**Mr Magarey**—I think the professional associations already have, as I understand it, some requirements for continuing professional education. There is also provision in the act at the moment, as I understand it, for auditors—I do not think this applies to liquidators—to have conditions attaching to their registration. So there is some scope for that, but whether there would be any benefit in a periodic review of registration, I could see in theory there could be some benefit in that. It would have to be a decision as to whether that would be a wise allocation of additional resources to achieve what the result would be.

**CHAIR**—Medical boards in the states not only register but also exercise disciplinary powers, and I suppose that is the model, and medical registration is periodic for a year at a time. Presumably were this to be done with liquidators you would be adequately resourced by the relevant authorities.

**Senator PRATT**—Would you be able to give us a short statement as to the purpose of the board? You have given a good outline of its processes but I think it would be helpful for our report to have a short statement about the objectives that you seek to meet.

**Mr Magarey**—Can I say firstly in relation to that that the decision of the full Federal Court on the constitutional challenge and of the High Court on the constitutional challenge, which went under the name of Gould versus Magarey and also under the name of Albarran versus the board, those two decisions do explain in some detail what those two courts see as the purpose of the board under our legislation. But I am quite happy to add my own thoughts on that.

**Senator PRATT**—That would be great.

**Mr Magarey**—That case would certainly be a matter of reference for the committee. It is clear on all the authorities and it is clear in our understanding that our board is established to protect the public interest by ensuring that the regulatory system for disciplining members of the auditing and liquidating professions who fail to perform their professional duty adequately are appropriately dealt with. Firstly, so that the particular person concerned is properly dealt with and deterred from engaging in further conduct of the same or similar nature. Secondly, so that the other members of the profession can see that that particular conduct has led to that particular result and it would be intended to assist in deterring them from engaging in the same or similar conduct. Thirdly, to reassure the public that the regulatory system is there and that it is working effectively; not only that it works effectively but that it is seen to be working effectively, so that the public can have confidence in the services provided by auditors and by liquidators, that they can rely on that, both of which services are of fundamental importance in the continuing consistent success of the financial system.

**Senator PRATT**—Thank you. How would you see the strengths and weaknesses of the current system—in terms of driving those accountabilities within the profession?

**Mr Magarey**—What we do is limited by the cases that get referred to us, and that has varied over the years. We have no power of investigation; we simply deal with matters that are referred to us. But we attempt, particularly now that we are publishing our decisions and our reasons, to put into those material which will be of assistance in achieving the public purposes which I have just been describing to you, by educating the profession and the public about the standards that should be observed and by providing that dual deterrent effect that I was talking about.

**Senator PRATT**—How well do you think each new case drive accountability and outcomes across the whole of the sector?

**Mr Magarey**—It is interesting you raise that, because one of the discussions we have at our annual workshop with our stakeholders is an effort to encourage the professional associations to give wider publicity to the content of our decisions with a view to informing their members more about the sort of thing we have been deciding and the sorts of reasons we have been giving. We are aware of the fact that professional associations do advise their members about decisions of the board to bring to their attention the rulings that we have made and the reasons we have given. We are certainly conscious of what you are raising: the need for wider dissemination of our decisions and our reasons. We issue a press release indicating that a decision has been made and the press release indicates that our decision is available on our website.

**Senator PRATT**—You did mention that it is something of a weakness that you can only tackle cases that are brought to you as opposed to, I suppose, a self-initiated case.

**Mr Magarey**—Yes.

**Senator PRATT**—Did you want to comment further on that? Is that a specific problem you think needs to be addressed or would there be other ways of looking at that? What are the real consequences of someone needing to bring a case before the board?

**Mr Magarey**—We do not regard it as part of the board's role to consider whether the existing system should be different. I do not think I want to make comment on policy questions.

**Senator PRATT**—No, that is fair enough.

**Mr Magarey**—I see in some of the submissions that have been put in and some of the evidence that you have already taken before the committee that there has been reference, for example, to the possibility of an ombudsman. There are a variety of ways of achieving the end which we are now seeking to achieve, but there will always be the dichotomy between the investigative function and what I might call the adjudicative function. Someone has to do the work to investigate the complaint and someone else has to do the work to decide on the complaint and make the orders. Whether you make those the same person or whether you keep them separate—and if you keep them separate, who they are; whether it is ASIC or an ombudsman or some other organisation and you keep the board as the adjudicator function—you are really trying to work out different ways to achieve exactly the same goal.

**Senator PRATT**—Yes.

**Mr Magarey**—But there are those two separate functions, investigation and adjudication, that are normally kept separate.

**Senator PRATT**—How well do you think that the board's current activities complement ASIC, as the two main bodies responsible in this area, as far as the depth and breadth of the kind of accountability mechanisms that drive good professional practice in the industry?

**Mr Magarey**—Because we are independent, we do not talk to ASIC and ASIC do not talk to us about what investigations they are doing or what complaints they have had. The first we know about it is when the case comes in our door. Before that we have no knowledge of how many complaints they are investigating, how far they are extending or who is involved. We keep it like that, because we need to retain our independence from ASIC, because ASIC is a party to all our proceedings and we do not want any respondent to have any grounds for thinking that we are associated in any way with ASIC or ASIC's activities. We keep them strictly at arm's length.

**Senator PRATT**—That is fair enough, but does that sufficiently enable the board to use its experience to influence decision making within ASIC or in broader circles about, for example, reforming the sector and other kinds of drivers? How do you pass on that information and those ideas based on the quite judicial role that you have? Clearly there are a lot of learnings from that that could influence other outcomes elsewhere.

**Mr Magarey**—We put all of that in our reasons and ASIC gets that. Of course ASIC has always had our reasons, being a party. Even before we were permitted to make them public ASIC always had our reasons, and we still put all that in our reasons.

**Senator PRATT**—How well do you think ASIC responds to picking up the issues raised in those reasons?

**Mr Magarey**—As I understand it, once again we do not discuss the detail with them but we are anxious to get feedback about what we are doing and whether we could be doing it better from them, as we are from all our stakeholders. We understand that ASIC responds favourably to what we set out and that they regard it as helpful and beneficial in their dealings with people whom they are investigating in the future to be able to say, 'This is what the board says. These are the reasons in these circumstances. If you're doing an investigation as a voluntary administrator this is what the board says you should be doing.' We understand ASIC finds that very helpful.

**Senator WILLIAMS**—Mr Magarey, was Stuart Ariff referred to you from ASIC or did he go directly to the court with ASIC?

**Mr Magarey**—He was not referred to us. Where there are questions of financial reimbursement, where ASIC wishes to obtain orders where money should be paid back, we do not have power to do that. So they do not come to us; they go to court. That was the case for Ariff.

**Senator WILLIAMS**—The serious problem I see in this industry is the time it takes, when you have a bad egg, to take them out of the industry. Mr D'Aloisio told us in the committee that it is very difficult to deregister a liquidator. Following on from Senator Eggleston, it is different in the medical profession and the legal profession, which Senator Fierravanti-Wells has been involved with in her life. Imagine that we had a licensing system that had to be renewed every couple of years. I will draw an analogy with that. If you drive down the road and you get caught for speeding more than 45 kilometres above the speed limit you lose your licence instantly. Mr Ariff was reported to ASIC in 2004. He was taken out of the industry around August 2009. In the meantime he went on practising and, in my opinion, rorting millions of dollars. The wheels of motion turn so slowly, even with you. On your evidence here today, it takes 12 months, basically, to enforce disciplinary action in your case, if you have to do that. How can we speed things up when someone is doing the wrong thing? How can they be stopped overnight?

**Mr Magarey**—Just harking back to a couple of my earlier comments about natural justice and the right to a hearing, I have always taken the view that in this area the existing system has been based on the proposition that, until people have an adequate hearing and an opportunity to present their case and they have natural justice and the rights to see the decision and all the reasons for the decision, taking away their registration would somehow be in breach of the golden rule of innocent until proven guilty. That is my own view; that is the way I have always looked at it. I have never seen that written down but that is the way I have always looked at it.

Governments can change that; I accept that. If governments change that and said to us to operate differently then we would. We are not aware of any suggestion that we should be doing what we do differently. We are an expert panel. My members are accountants, lawyers, businesspeople. They bring a special knowledge. They are appointed for that purpose under the act. They bring a special knowledge. If that were to change we would operate under the new legislation. I do not want to make any recommendation about a matter that is really a policy decision for the government.

**Senator WILLIAMS**—You can see where I am coming from. It was a problem with the time of delay. In reference to Mr Ariff, who is probably well known for all the wrong reasons, he went on to practise over time, let his PI insurance lapse, did the wrong thing obviously and has admitted to 83 counts of wrongdoing. The problem I have with it is the time delay, when you have a bad egg in the basket, how to remove that egg. That is why I flag the licensing issue in analogy to the drivers licence, where you can have your licence taken off you instantly, then you have the right to appeal that decision. This is a problem that I am trying to sort out in this industry, how ASIC can act quicker to take a bad egg out of the industry instantly. I see it as a serious problem.

**Mr Magarey**—We have no involvement in, let alone control over, what ASIC does. Sometimes it takes them time to prepare a case even when it does come to us. We endeavour to deal with it as promptly as possible when we can consistently with our obligations of natural justice. That might have taken quite a while to get to us, for a whole variety of reasons that we are not aware of. We do not inquire into those.

**Senator FIERRAVANTI-WELLS**—You are self-funded or funded by the government?

**Mr Magarey**—We are funded by the government through ASIC. We are a very small organisation in those terms, in fact in any terms. We do have our own budget allocation but it comes through ASIC. The details of that are set out in our annual report.

**Senator FIERRAVANTI-WELLS**—The reality is that your activities are very much contingent on what ASIC may or may not direct you to do.

**Mr Magarey**—Totally contingent.

**Senator FIERRAVANTI-WELLS**—In effect, constrained as you are by the parameters of your power, there is a further constraint that, even if you do take a matter to ASIC irrespective of whether that has come from a member of the profession or a member of the public or any other area, you are dependent on whether ASIC directs you to do something. So by the time you actually deal with the problem on the street not only has time passed but, as Senator Williams correctly points out, people are out there doing the wrong thing. So that some extent, and I do not mean this in a disparaging manner, aren't you really in effect toothless in some ways? You are not really able to tackle the problems and to get the bad apples off the street. I practised for years in this profession as well, so I saw my fair share of liquidators who should have been taken off the street before they were able to continue what they did and basically put a lot of people into misery. So that is my question to you and I do not mean that any disparaging way, but it is very clear that you really do not have a lot of power and what power you do have is very much constrained by what ASIC has resources to give you or resources it actually has to then translate that into a case that it refers to you. Is that it in a nutshell?

**Mr Magarey**—Very close to that, yes. I think the only qualification would be that where you said we have very limited powers, our powers are extensive in the sense that we can cancel a registration of a liquidator. That is an extensive and important power. But everything else you say about we are limited to cases that come to us, yes, and we are limited in that we take no part in the investigation, yes. We just deal with what comes to us.

**Senator FIERRAVANTI-WELLS**—I will use an analogy. You obviously have a system where it is analogous to a court proceeding, but you do not have the benefit of injunction powers or anything like that. If a member of the public came to you with what might well be an alarming circumstance, you would have absolutely no power other than to refer that to ASIC. Is that the situation?

**Mr Magarey**—Yes, that is the situation.

**Senator FIERRAVANTI-WELLS**—And without any parameters for you even to recommend some sort of intervention or at least some sort of potentially injunctive—if I can use that word in a loose sense rather than its legal sense—opportunity to go in and preclude further damaging action occurring.

**Mr Magarey**—Under the existing legislation, we have no such power.

**Senator FIERRAVANTI-WELLS**—Would it be of benefit to you if this committee gave some consideration to it? I am just putting that on the table as a potential course. Where do you see the deficiency in your powers to get rotten apples off the street? That is really what we are talking about. That is why we are here.

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

**Senator FIERRAVANTI-WELLS**—No, you cannot. But, of course, it is dependent on ASIC's resources and its willingness to take decisive action and embark you on an investigative course.

**Mr Magarey**—I will just say this: we are not dependent for our operations on ASIC's resources.

**Senator FIERRAVANTI-WELLS**—But didn't you say that you refer to ASIC or APRA, they do the investigation and, if ASIC decides to bring a matter to the board, it comes back to you?

**Mr Magarey**—I did say that. I am sorry. I was referring to financial resources. We are not dependent on ASIC for our financial resources.

**Senator FIERRAVANTI-WELLS**—No, but you are dependent on ASIC having the resources to do the investigation and then make the decision as to whether they refer a matter to you as the board to undertake the disciplinary proceedings.

**Mr Magarey**—It is. That is correct.

**Senator FIERRAVANTI-WELLS**—That is my point. So, in a given year, you might send off 20 briefs to ASIC where you think that there are matters that ought to be dealt with, but unless ASIC has the resources to investigate, turn those around and send them back to you and say, 'Yes, Mr Magarey, do prosecute this matter,' that is really where it ends, isn't it?

**Mr Magarey**—It is. I do not recall saying any figure like 20. I think I might have mentioned a couple a year.

**Senator FIERRAVANTI-WELLS**—No. I am just asking. Please do not take it literally.

**Mr Magarey**—I am sorry.

**Senator FIERRAVANTI-WELLS**—And please do not take it in any negative way—that I am being critical of your organisation. I am just trying to understand the parameters within which you operate. If you heard my question, I said 'if you were to undertake 20,' hypothetically'—underline 'hypothetically' so we are not misunderstood. Hypothetically, you might go off and refer 20 matters to ASIC in a given year, but unless they turn those around and give you the go-ahead to prosecute then those 20 matters may well just vanish into the ether.

**Mr Magarey**—Yes, I would agree with that.

**Senator FIERRAVANTI-WELLS**—Thank you.

**Senator HURLEY**—Senator Fierravanti-Wells's questions were premised, I think, on the assumption that ASIC was not doing its job properly.

**Senator FIERRAVANTI-WELLS**—No, they were not.

**Senator HURLEY**—They were.

**Senator FIERRAVANTI-WELLS**—I just said 'if ASIC has to have the resources to be able to do it'. That was the point.

**Senator HURLEY**—Obviously you cannot comment on whether ASIC has properly investigated complaints that are sent to it unless they come to you. But can you tell me if you have found, as you are making determinations, systemic problems with cases that ASIC has put to you?

**Mr Magarey**—I do not know about systemic problems. Certainly it is the case that ASIC are not always successful in all of the matters that they contend when they bring cases to us. They are mostly successful in the overall result, because they have conducted the investigation and only bring cases to us when they have a level of certainty about the result. But they are certainly not successful in relation to all of the matters that they contend in each case. I have certainly not ever thought that there has been evidence of any systemic problem within ASIC about the way in which they conduct their investigations. I have no knowledge that is the case.

**Senator HURLEY**—Thank you.

**Senator BUSHBY**—ASIC come to you and they say: 'Here's some information on what we perceive as a problem that we'd like you to look at. We've investigated it and here's our evidence.' You go to the person involved and you let them know that they are being investigated, as you mentioned you are required to. They may give you some evidence in response, but I would not have thought they would necessarily have the skills, the resources or even the opportunity to put together a case that can match the level of investigation that ASIC might have already undertaken. Do you think that the cases that are presented to you always fully illuminate the realities of the situation?

**Mr Magarey**—The cases that come to us are in two categories, the first of which we call conduct cases. They are the major cases where there is some allegation that the respondent has failed to perform duties adequately and properly in a professional sense. They are the main conduct cases. They are the ones that get publicity and they are the ones that have the most benefit for the deterrent and educative effects that I have been talking about. Secondly, we have cases which we call administrative cases, which are greater in number. They are for other matters, not conduct offences but failure to observe administrative requirements, the most common being failure by an auditor or liquidator to lodge an annual return. It used to be a triennial return but is now an annual return for both of them. If they fail to lodge that over a period of years then ASIC may bring them to us, and we then have power to deal with that. That is not a conduct matter but an administrative matter. It is a much simpler, much more straightforward matter.

**Senator BUSHBY**—And the facts are black and white, basically.

**Mr Magarey**—Yes. Most often the respondent will come with pretty straightforward facts—they have become bankrupt or ceased being a resident of Australia or some matter like that, where the facts really are much easier to ascertain. Quite commonly the respondent will come before the board without even a lawyer, just telling his or her own story, and we deal with it. They are not as well prepared, because they have not had the benefit of legal assistance. Mind you, they are perfectly capable of explaining their own cases, but they do not have the legal background. However, the conduct cases, what you might call the major cases, have a battery of lawyers—Queen's Counsel et cetera. I would not say that we have had a case where I have felt that the respondent has not been fully prepared for a hearing.

**Senator BUSHBY**—Do you have any statistics which show what proportion of the decisions which your board makes are then actually upheld at higher levels when they are taken elsewhere?

**Mr Magarey**—They are not all taken elsewhere.

**Senator BUSHBY**—But some of them would be. Of those decisions that are taken to the AAT or the courts, what proportion are actually upheld?

**Mr Magarey**—Firstly, I do not have the statistics available to me in terms of actual numbers. Secondly, a number of the cases that go from us to the AAT, and there are not a lot of them, ultimately do not finish up in a final decision in the AAT; they finish up in—

**Senator BUSHBY**—The courts.

**Mr Magarey**—No, they finish up in a deal between the respondent and ASIC. You see, when a case goes to the AAT, ASIC becomes a party to that and they argue the case. We are technically a party because we are the decision maker. But we put on a submitting appearance and take no part in the argument because we made the decision that we do not want to be involved in it—and there are judicial decisions about decision makers not being involved. So ASIC gets involved and ASIC and the respondent argue. In a lot of cases, particularly in the last few years, they have finished up in deals. So it has not got to a final decision.

**Senator BUSHBY**—That makes it harder for you to answer my question.

**Mr Magarey**—Exactly.

**Senator BUSHBY**—But of those that do actually go to a decision with the AAT or in a court, are you generally upheld?

**Mr Magarey**—Yes. I am just going from a general feeling here. We are probably upheld more; then again, we can sometimes be upheld but our decision may be varied slightly. For example, there was a case two or three years ago in which we ordered the suspension of a liquidator for a certain period—quite a short period. He took that to the AAT and the AAT decided to reduce that to an admonishment. The AAT upheld our decision but it slightly changed the order that we made. I do not know if that answers your question either, but that can happen. Sometimes we are totally upheld in both the decision and the order and sometimes our decisions are overruled. I emphasise this in relation to the AAT: as I said earlier, we are an expert tribunal and appointed such under the act, but the AAT, and courts generally, are not expert tribunals. I do not mean that they are not experts in law—because that is what they are—but they are not expert in the areas of auditing and liquidation, which we are, so they operate quite differently. As I said before, when the case goes to the AAT the AAT makes its decision as a substitution for our decision. It does not review our reasons; it makes its own decision based on the evidence that is presented to it.

**Senator BUSHBY**—A de novo review?

**Mr Magarey**—It is a de novo review. That is exactly what it is. So its evidence may be different from the evidence that we made our decision on. The submissions that are made may be different. So they are not strictly apples and apples in a technical sense.

**Senator BUSHBY**—That is, in one sense, why I asked my initial question about the evidence that might be presented to you and whether the respondents necessarily prepare for cases, which you indicated they do.

**Mr Magarey**—In my experience they do.

**Senator BUSHBY**—But that may evolve to some extent into the case they may present before the AAT.

**Mr Magarey**—In most cases it does. Mind you, we do not take part in the AAT. We do not go to the hearings unless there is some particular aspect that is unusual. For a normal AAT case, we put on a submitting appearance and take no further part.

**Senator BUSHBY**—I have one final question. You mentioned that one of your statutory obligations is expedition. How does that play out in terms of timeliness and how you actually approach things?

**Mr Magarey**—I mostly refer to the statutory obligation in relation to expedition in the pre-hearing period, when we are leading up to the hearing, from the time the application comes in our door until the hearing, when we are going through the exchange of issues and witness statements and the further and better particulars and complaints about whether documents are relevant or not. We hold pre-hearing conferences. There is a provision in the act for the chairman to hold pre-hearing conferences to make sure things keep moving. I always say to the parties that I have this statutory obligation. They say it will take me a month, but I say it will take two weeks.

**Senator BUSHBY**—Does the statutory obligation give you time lines?

**Mr Magarey**—No.

**Senator BUSHBY**—So is it just a general requirement to be expeditious in your approach?

**Mr Magarey**—Exactly. The act says that the chairman can hold pre-hearing conferences for the purpose of setting timetables and dealing with other matters to get the case, in effect, ready for the hearing. I take that as a wide discretion just to move everything along. That is where I rely on it, mostly. After the hearing, when we are writing up our decisions, we are conscious of that. The workload just goes up. We generate that as soon as we possibly can.

**Senator BUSHBY**—Are you adequately resourced to deal with your workload?

**Mr Magarey**—For the current workload, certainly. There have been occasions in the past few years, when we have had a higher workload, when we have really felt the pinch, but we have always got through it.

**Senator BUSHBY**—When that happens, do you go to ASIC to ask for more resources? Is that how it works?

**Mr Magarey**—No. We just increase our work rate. We have never got to the stage where we have not been able to handle it.

**Senator BUSHBY**—But if you did, if you got to that point where you felt that you needed additional resources, would you be going to see Tony D'Aloisio?

**Mr Magarey**—No.

**Senator BUSHBY**—Would you go to see the minister?

**Mr Magarey**—My first port of call would be the Treasury, yes. We are in touch with Treasury about what we are doing, how we are doing it and the sorts of issues you were asking about, such as resources. We are in touch with them regularly about all sorts of matters.

**Senator WILLIAMS**—Mr Magarey, our next witness is a bloke by the name of Mr Gould. Have you read his submission?

**Mr Magarey**—I have, yes.

**Senator WILLIAMS**—In his submission he says:

The CALDB see their role as little more than an enforcement arm of ASIC. I can say this with confidence as the 18 charges upheld by the CALDB against me were ultimately overturned.

Would you like to add anything to that?

**Mr Magarey**—I have read that.

**Senator WILLIAMS**—Reading Mr Gould's submission, 46 out of 48 counts of wrongdoing, if I can call it that, were put aside. The last one was over a case of $120 with ASIC and that was settled. It seems to me an expensive exercise to achieve nothing.

**Mr Magarey**—Can I say, firstly, that I certainly do not agree with Mr Gould's submission that suggests that the CALDB are predisposed to the ASIC perspective. I disagree with that. Under the statute we are completely independent and in practice we are completely independent.

**Senator WILLIAMS**—The court obviously disagreed with you on that case, though.

**Mr Magarey**—The court?

**Senator WILLIAMS**—I assume he is talking about the court. He says:

… the 18 charges are upheld by the CALDB against me were ultimately overturned.

I do not know whether they were overturned by the court or the AAT or whoever.

**Mr Magarey**—Can I deal with that in a moment. I was, firstly, dealing with paragraph 4 of Mr Gould's submission, which is what you referred to.

**Senator WILLIAMS**—At the bottom of that, yes.

**Mr Magarey**—He says:

The CALDB see their role as little more than an enforcement arm of ASIC.

I completely disagree with that. That is not a correct statement of how we see our role. I have explained this morning how we see our role. I do not question Mr Gould's right to have his own opinion, but that is not how we see our role. We do not believe that that is what the statute says our role is. As far as the overturning is concerned, I will go back to what I said earlier on. Maybe the committee should read all those Gould decisions in the AAT and in the Federal Court. There were two decisions last year which dealt with those matters. They were referred to the Federal

Court from the AAT, not from us, on questions of law. They were not appeals against the decision in the AAT; they were referred on questions of law. There is no appeal on the decisions. There is no appeal from us on the decisions except a merits review. I do not want to explain Justice Lindgren's decision in the Federal Court to you. But, for example, there were a number of matters which the Federal Court decided that the AAT were not capable of dealing with as a matter of law without an expert opinion, whereas we are. We are an expert tribunal. We were perfectly capable of dealing with some of the decisions in Mr Gould's case. It is a little invidious discussing an individual case, but there are a number of reasons set out in the Federal Court where they deal with each point as a matter of law. I would recommend that the committee investigate that.

**Senator WILLIAMS**—That is fine.

**CHAIR**—Mr Magarey, one last point: it seems to me that the regulation and the disciplinary functions in relation to this professional practice are very disparate—there are little bits here and there. I think there is a professional body which registers individuals and proposes some kind of ongoing education requirements. Yet, when you look at other professions, it is much more centralised. We have talked about suspension of practitioners. The medical boards, coming back to that model, have the power to suspend a practitioner who is reported to be behaving or practicing in an unsatisfactory way. This inquiry is being held because there are complaints about practitioners in this field who are practicing in an unacceptable way. Do you feel that there might be some public benefit in this committee recommending that the whole regime under which registration, discipline and continuing education is required be looked at, with a view to setting up a different kind of system that is more akin to a medical board, for example? In that example the body could register, suspend and discipline. Admittedly, the colleges in medicine carry on the continuing medical education requirement, but nevertheless it would seem desirable to include something like that in the registration requirements for this profession. What would your comment be if we suggested some sort of different structure for the supervision of this profession on a national basis?

**Mr Magarey**—I am not sufficiently familiar with the detail of the medical disciplinary procedures—

**CHAIR**—But you are familiar with the legal boards, I presume.

**Mr Magarey**—Luckily not personally!

**CHAIR**—Let me say: I am not implying anything in that sense! But I gather you are a lawyer.

**Mr Magarey**—Yes. I am required to be, under the act.

**CHAIR**—So you are familiar with the processes for registration and discipline under the legal practitioners and barristers boards?

**Mr Magarey**—Perhaps it is a reflection on me but I am not really familiar in detail with the disciplinary proceedings in the legal profession either.

**CHAIR**—Again, I am sure you are not personally—

**Mr Magarey**—No, but I meant I am not familiar in general.

**CHAIR**—But do you see a public need in terms of public policy to improve the administration or the regulation of this profession?

**Mr Magarey**—I suppose there is always scope for improvement.

**CHAIR**—That is a very soft answer.

**Mr Magarey**—It is a very big question.

**CHAIR**—In the Gould case in the submission, this individual lost millions of dollars and went through a great deal of trauma for what appears to perhaps not have been a very good reason in the first place. I am not saying this is a reflection on your board, but should there be a better system—and we have mentioned Mr Ariff, whose activities have been a large driver of this inquiry—for picking up these sorts of people and suspending them from continuing to practise instead of, in his case, being able to continue to practise for some five or six years, wreaking havoc on the way? We are asking you this because you are the chairman of this board.

**Mr Magarey**—I understand that. Firstly, I did not really want to engage in debate about Mr Gould's submission in relation to our decision—

**CHAIR**—I do understand that, and I have sought the advice of the secretariat.

**Mr Magarey**—I do not want to appear to be defending our decision, which was five or more years ago anyway. Our decision—not the ultimate proceedings—was a long time ago.

**CHAIR**—We can talk about a hypothetical case in which something may have happened.

**Mr Magarey**—All right.

**CHAIR**—Do you see these things as problems that should be addressed?

**Mr Magarey**—I think there are one or two cases that highlight the problem. I am not sure that all cases suffer from the same problems. We have seen a number of cases over the years which come to us within much shorter time frames after the conduct complained of; some of them take longer. We do not inquire into the reasons why that is. We do not see that it is our role or that it assists us in our decision making as to the reasons why it takes a while to come to us. I must say, Chair, though, in answer to your question—and I feel as if I should try and make a constructive answer—that we see disadvantages in cases coming to us which relate to events some years ago, partly because documents may have gone out of existence for one reason or another; and, secondly, because witnesses recollections are not as good. If they are thinking about matters of five or six or seven years ago, their evidence, by definition, cannot be quite as reliable. Sometimes their recollection might change. Sometimes witnesses may have moved on and may not even be contactable some years later. Those sorts of reasons mean that the evidence that comes to us when we are finally making our decision is not perhaps of the same standard as it would be if the matter were only a couple of years ago. They are practical comments about how we deal with the decisions that come to us. We have found, sometimes, that the lapse of time

since the events have occurred—without commenting on why there has been lapse of time or whether it is appropriate or not appropriate—results in the evidence not being as good as it would have been.

**CHAIR**—Thank you. You do not see your board as having any obligation to oversee and maintain professional standards within this particular profession?

**Mr Magarey**—Within the legislation that is established we see that part of our role is to encourage the observance of professional standards and to encourage public confidence that professional standards are being observed. We see that as part of our overall public interest role, yes. We do not see that as being a proactive role, but in the sense of incorporating that into our decisions and explaining our reasons, we see that as part of our public interest role—an educative role of the profession and of the public. We do.

**CHAIR**—Thank you, Mr Magarey, for appearing this morning.

**Mr Magarey**—Thank you.

[10.08 am]

**GOULD, Mr Vanda Russell, Private capacity**

**CHAIR**—We welcome you to this inquiry, Mr Gould. Would you like to make an opening statement?

**Mr Gould**—I would. Thank you, Chair. Thank you, senators, for the opportunity of appearing before this important inquiry. I have been a chartered accountant since 1973; a registered trustee in bankruptcy since 1982; a registered liquidator since 1983; and the founding chairman of CVC, which I founded in 1984. I hope that my extensive experience in these fields, and in particular dealing with ASIC and the CALDB, will be of assistance to senators in the development of the committee's recommendations. As I stated in my written submission, I believe there are principles that arise from my experience with ASIC and the CALDB that justifies substantial changes to the Corporations Law covering liquidators and auditors. My submission clearly sets out the unfairness and the unbalanced nature of the legislation by reference to my own experience.

My major argument is that an insolvency practitioner or an accountant should always have the option of appealing directly to the Federal Court, as is the case for the taxpayer who has a dispute with the Commissioner of Taxation. In truth, CALDB is an enforcement arm of ASIC, and it is important to understand that ASIC is highly selective as to who it prosecutes. Some practitioners have a relationship with ASIC which in practical terms precludes prosecution. The truth is that any practitioner in a fishing expedition, like I experienced, would arguably have blemishes of the type found in the 46 charges, technical to the point of triviality, laid against me by ASIC. Whilst I successfully defeated the 46 charges, it took more than eight years until I was wholly exonerated, subject to making a small qualification, at the end of 2009.

I recognise that most practitioners would not have the resources to defend themselves against unreasonable and unwarranted charges over such a long period. I incurred costs of more than $1.2 million to clear my name. In the eight years between the charges being laid and withdrawn, my professional reputation suffered significant damage. I might add that ASIC itself incurred substantial costs, including costs of Queen's Counsel. Probably their own costs may come towards $1 million.

Owing to the pro-ASIC nature of the legislation, I was unable to receive any compensation, except for some costs incurred in a Federal Court. My chief concern is that practitioners are forced in virtually every situation to appeal from the CALDB to the Administrative Appeals Tribunal and from there to the Federal Court. This is an unnecessary, cumbersome and costly process, and is a major regulatory hurdle that smaller practitioners are simply not able to jump.

I am not alone in suspecting that ASIC's policy intent is to drive smaller practitioners out of the insolvency industry. I am also not aware of any prosecution before CALDB for overcharging or failure to achieve a reasonable outcome. The most egregious offences actually occur when banks appoint receivers and managers to distressed companies. The costs of these situations are staggering. ASIC and the CALDB seem to have no interest in these issues. This is because

insolvency firms are seen to be wholly compliant with the form of the legislation and usually have working relationships with ASIC.

The effect of the present ASIC policy has been to drive smaller practitioners out of the industry. Let me illustrate. If you try to put in place a deed of company arrangement with a small business, let's say in a situation where there was only one creditor, the cheapest quote you would get in this town of Sydney would be in excess of $30,000. In fact, it should be possible for the work to be done at a cost of between $3,000 and $5,000. In my opinion we need to encourage more chartered accountants to do insolvency work. Further, there should be introduced into the Corporations Act a provision that presently exists in the United Kingdom whereby receiverships have been abolished. Further, I believe that all creditors—that is, secured creditors, preferential creditors such as employees, and ordinary trade creditors—should have an equal vote in the election of a qualified insolvency practitioner. There should be the capacity in large insolvencies for perhaps five per cent of the total creditors to call a meeting whereby alternative insolvency practitioners are nominated, whose election would be determined by majority vote. Whilst the bank would still have its preferential rights over unsecured creditors in terms of distributions, it would no longer be as easy to charge excessive fees. In a situation where the bank represent only a small proportion of the total debt, it would be harder for the rights of unsecured creditors to be totally ignored and for the bank to adopt the position that it did not care, provided it got its money back, and had no interest in the charges of the insolvency practitioner.

In summary, the insolvency industry, particularly the regulatory process affecting practitioners, needs fundamental reform. The legislation governing the operation of CALDB needs to be fundamentally changed. Personally I think CALDB should be abolished and its responsibilities absorbed into the Administrative Appeals Tribunal. The discipline of insolvency practitioners should be overseen by the Federal Court or state supreme courts, which hear company matters involving insolvency every day of the week. Above all, a practitioner should have a right at all times to appeal directly to the Federal Court, just as a taxpayer can today. The broad policy objective should be to facilitate the resuscitation of companies where possible. A system which encourages an insolvency practitioner to abide in the form of the legislation and yet at the same time maximise his fees through the insolvency continuing is not in the public interest, because the unpalatable truth is that viable businesses are often sacrificed to achieve fee outcomes.

With the committee's permission, I would like to table my correspondence with the chairman of ASIC. In many ways it bears out the points I have made in my submission to the inquiry, and I note that the points Mr Magarey made also bear out what I have said—which, as you will see if you read the letters, is contrary to what the chairman of ASIC says the system actually is. Thank you for listening to me. I would be pleased to respond to senators' questions.

**CHAIR**—Thank you. You may table that document. The committee accepts it.

**Senator WILLIAMS**—From reading your submission, Mr Gould, you have had a horrid experience and a very expensive one at that. I want to take you to a couple of points you made in your opening address. You said, and I did not quite catch it, that some practitioners have a relationship with ASIC that precludes them from any action or something. What do you mean by that?

**Mr Gould**—What I mean is that there are some firms in the insolvency industry that work very closely with ASIC in other ways, and the net result is that they are never criticised or examined. It is one of those trade pieces of knowledge that exists.

**Senator WILLIAMS**—So are you implying that these people become friends with some representatives of ASIC and hence they do not get investigated or they are treated as mates or something?

**Mr Gould**—Correct.

**Senator WILLIAMS**—That is a very serious allegation.

**Mr Gould**—Well, it is absolutely true.

**Senator WILLIAMS**—It is also a very interesting allegation. In your submission you refer to a CALDB case on overcharging. Do you believe overcharging is rife in the insolvency practice, by liquidators, administrators et cetera?

**Mr Gould**—I think it is a very big problem.

**Senator WILLIAMS**—I ask the question because to me the attitude of many of the general public is, 'Liquidators charge $550 or $650 an hour and, when there is a company with a lot of assets, the liquidation seems to go on month after month.' I think Ansett is still going.

**Mr Gould**—Correct, and as there are some—

**Senator WILLIAMS**—If there was not any money there they would not still be going, though, would they?

**Mr Gould**—True, and there are certainly some receiverships that have gone on for over 40 years. I think some of those old insolvencies, those Custom Credit and Esanda type cases, are still going and have been since the sixties—or they may have just recently been terminated. They are perhaps the most egregious examples of this problem.

**Senator WILLIAMS**—We heard evidence in Adelaide last Friday from some solicitors appearing as witnesses who said that, in their opinion, if someone is appointed administrator and therefore sees the assets and wealth of the business, that person should not be allowed to then be appointed the liquidator. What they were saying is that some administrators might say: 'This company's got a lot of money; there are a lot of assets here to cash up. I think I'll stay here and do the liquidation. I can get a fair bit of that money.' Do you think that exists in the industry?

**Mr Gould**—Human nature being what it is, that probably is true. But I think, provided the creditors are happy with that, that should be permissible. That is why I suggest all creditors should have an equal vote in terms of the appointment of an insolvency practitioner, so this issue of charging is squarely on the table.

**Senator WILLIAMS**—While we are on that issue, you said that, with a majority vote, a committee of creditors should have the right to sack a liquidator.

**Mr Gould**—Yes.

**Senator WILLIAMS**—That is a very interesting point, because a company by the name of Carlovers Carwash spent $1.8 million in legal fees to get Mr Ariff—who is no stranger to this inquiry, as far as his name goes, anyway—kicked out as liquidator. Obviously, that backs up your argument that if a majority of creditors say, 'Look, you are not doing your job properly, you're not communicating with us, you're not giving us evidence, you're charging too much,' then—

**Mr Gould**—Yes, they can get rid of him.

**Senator WILLIAMS**—they can get rid of him.

**Mr Gould**—And I would have thought that, if ASIC had done their job, they could have immediately got an injunction against him. The real issue is: why didn't they move when obviously there was a lot of disquiet about Mr Ariff?

**Senator WILLIAMS**—That would also bring the industry to account, because, if the liquidator did the wrong thing by the creditors, they could put him out of that position.

**Mr Gould**—Correct, with the public odium which flows from that.

**Senator WILLIAMS**—There is no doubt that the industry is such that when you are the liquidator, either voluntary or appointed by the court, you have control of all the assets. You have control of the money and you have control over where it is going; you might charge an hourly fee; you might charge exorbitant disbursements for photocopying and hiring a room—and that is totally out of the creditors' control.

**Mr Gould**—That can happen. That is why you need to have the creditors with some capacity. They are the best people to say they are happy with the situation or they are not. In a large insolvency, perhaps five per cent of the creditors would be able to call a vote and see what happens. If the majority of creditors want the situation to continue, fair enough.

**Senator WILLIAMS**—I want to take you to one more point. You mentioned receiverships in the UK. We heard evidence in Adelaide from professors who have been involved and studied these sorts of things at university and they say that receivership is still in existence in the UK but it has changed a lot. Correct me if I am wrong, but the way I see receivership is where a bank has a mortgage on, say, a building—the example I give is a corner store—a lady runs the corner store, the building might be worth $400,000, she owes the bank $200,000, she is going backwards, and they can just order in the receivers, the receivers can close the doors the next day, they can proceed to sell the assets and the bank gets its money, but all the little creditors in that little corner store who give her milk, bread, lollies and everything else she sells have, in many cases, no hope of getting any money. Would that be correct?

**Mr Gould**—Correct. That is a very sad outcome. What happens is that there is also a relationship between banks and the receivers. It is like a club. In essence they end up gouging the public. The way around this is by basically abolishing receiverships and just having an administrator in every situation. Essentially that is how I understand the UK law to work. That

would be a very big step forward here in Australia. Receiverships, by and large, are not in the public interest.

**Senator WILLIAMS**—Do you know of other countries that have receiverships or is it just something that flowed from the UK into Australia from our early settlement days? Does the United States, Canada or other countries have receiverships—do you know?

**Mr Gould**—There are very limited specialised receiverships in America, but normally it is under chapter 11. Again, it is very similar to what I am saying—where all creditors are dealt with by the court appointed person who manages the totality of the pool of creditors and is responsible for the different priorities between them. In fact, you can knock them together in an appropriate situation, which is a very good power to have. Perhaps going to a chapter 11 is one step too far for us. I would say that, in the Australian context, the big step forward would be to get rid of receivers and managers.

**Senator WILLIAMS**—In your submission you make the point that, when you took on ASIC, you were not granted any costs, but the boot is on the other foot in relation to ASIC. Is that correct?

**Mr Gould**—Correct. The legislation is drafted so that the practitioner cannot get costs, which is just remarkable. Whoever drafted the legislation drafted it in a very unfair way. At the very least, the legislation should be changed so that, as acknowledged by ASIC in the correspondence I have tabled, that is the legislative situation. How can that be fair?

**Senator WILLIAMS**—If I was here representing ASIC, wouldn't they be faced with a situation—being a devil's advocate—where, if they pursued people and ASIC lost, it would be very expensive for ASIC, or the taxpayers, to pay the costs? You do not see that as being a problem, where ASIC would be reluctant to pursue people if there were any doubt in their evidence on whom they were pursuing?

**Mr Gould**—The Commissioner of Taxation, equally, if he loses a case in the Federal Court, has to pay a person's costs. What is the difference?

**Senator WILLIAMS**—Fair enough.

**CHAIR**—Senator, I agree with you that it is outrageous that you cannot recover costs from ASIC. I think that is very one-sided, very unfair and totally unacceptable. It will certainly be one of our recommendations, I would think, that that provision be changed. I have been interested in the whole overriding issue of registration and disciplinary procedures as they relate to insolvency practitioners. Do you have any thoughts about that? At the present time, as we heard from the last witness, it is very broken up and disparate. Would it be better if there were some sort of new body set up to manage the registration and disciplinary actions against insolvency practitioners and bring it all together under one heading? They would only be registered for a limited period, they would have to apply for re-registration or the registration would lapse, they could be suspended and unable to practise if there were malpractice allegations against them, and there should be a requirement for ongoing education in the field for registration. Would you like to comment on that kind of proposal?

**Mr Gould**—Yes. Personally, I do not think there is a need for a new body. I think the real issue is ASIC doing its job properly, because ASIC should be able to, in an appropriate situation, get an injunctive relief. When wrongdoing is detected they should be able to move quickly. The law presently exists for them to do it; they just do not do it. As to the big complaint which I raised in my letter: a thousand shareholders were writing to ASIC complaining about this guy who stole the $30 million, and ASIC were doing nothing about it. What I cannot understand is why those situations happen. There are lots of situations which I have reported to ASIC and which they have done nothing about. They are extremely selective in terms of the cases that they run and the actions that they take. And then you ask, 'Why would ASIC worry about my type of situation, where you are dealing with whether a bank charge has been allocated correctly between a six-month period—$20—and yet not worry about somebody who steals $30 million from an Australian public company. What is going on here?' I think they are the big questions.

Also, I think the courts themselves are used to dealing with liquidators and administrators because every day there is litigation before them concerning the conduct of liquidators and administrators. So I think one of the problems is that you need people to be judging liquidators who are actually dealing with them day by day. I think that is a better solution. On your analogy with the medical world: medical people, also, are in the business of being in the medical world. They are judging people in a peer type of way. They have an understanding of what is going on in the marketplace. I think that the Federal Court or the state supreme courts are the appropriate places for the disciplining of liquidators, but we need to see ASIC being a lot more proactive in terms of what they actually do.

**CHAIR**—What do you think the problem with ASIC is? Is it a culture of not moving quickly, or is it just that they are overloaded and do not have the resources?

**Mr Gould**—It is impossible to say. There is certainly a cultural problem. There is also an ignorance problem. If you look at the letters which I have tabled from the commissioner, he clearly does not understand the law. What can you do?

**CHAIR**—What would you do? What would you suggest?

**Mr Gould**—I think it obviously needs some new people appointed to ASIC to ginger it up, because I think that the laws probably do exist—they just need to be made to work by having a more aggressive regulator.

**CHAIR**—We have heard, from other inquiries that we have done, that ASIC has a resource problem and also, to some degree, a money problem in terms of funding litigation. Given that background—which does not necessarily relate to this inquiry but is information which this committee has heard on other occasions—should there be some sort of other body looking after these things, taking it out of ASIC with its culture, and a new start made?

**Mr Gould**—It is hard to see why the new body would not degenerate into being another ASIC. Look at my case, where they have spent, say, $1 million on the trivial issues they have raised against me. Who made that decision? Why was that decision made? Come on—they have had more than ample funding to do that.

**CHAIR**—All right. Thank you.

**Senator FIERRAVANTI-WELLS**—One of the issues that has been raised in this inquiry is the prospect of one registration body rather than the situation at the moment where if you are a trustee in bankruptcy you take one route and if you are a liquidator you take another. What is your view in relation to that?

**Mr Gould**—I think it is appropriate to have two bodies because they very rarely cross over. What happens in bankruptcy is very different—you are dealing with individuals—from what happens with companies, which obviously come under the Companies Auditors and Liquidators Disciplinary Board.

**Senator FIERRAVANTI-WELLS**—But you are still registered—you could be both.

**Mr Gould**—But you can't, because actually you have to be registered in both places, and not everyone is both. I think in New South Wales there are only 33 registered people who are registered trustees. There are very few registered trustees.

**Senator FIERRAVANTI-WELLS**—But you can be both.

**Mr Gould**—Of course. I am both.

**Senator FIERRAVANTI-WELLS**—I know, but it has been put to us that there may be some merit in having one insolvency registration body. You don't see the merit of that?

**Mr Gould**—I do not think it is a big issue. It would not worry me if there was. I do not have a strong view. However, I would say that in dealing with the Official Receiver, which we do in bankruptcy, that organisation has always struck me as a very efficient and well-run operation. They deal with issues by actually coming and talking to you and saying, 'Listen, have you thought about this or thought about that? Why did you do that?' You have a discussion and you might explain your situation. In my case that did not happen with ASIC. There is never an opportunity to say, 'This why I have done this,' or have any interaction. I think that is a very big weakness in the ASIC approach, which is essentially to say, 'You are a small practitioner and we are going to smash you by litigation power.'

**Senator FIERRAVANTI-WELLS**—One of the things that you alluded to in your opening comments is the distinction of official liquidators. I think you said in your comments that you think everybody should be doing liquidations and that the load should be spread. Do you want to amplify that?

**Mr Gould**—Official liquidators are the people who take appointments under the Corporations Law. Then you have ordinary registered liquidators who basically do not take jobs through the courts directly. They are appointed by the creditors, a bank or whatever as the case may be. So there is a difference. I do not think it is important one way or the other. Some people basically want to have a practice that is very much geared to doing the court work, and that is fine. Other people want to be much more selective in work they take on in insolvency, and I think that is equally appropriate. I do not think they should necessarily be merged.

My big point is that I do not think we should have receivers and managers. I think that should be abolished. I think in every insolvency there should be one person appointed as an

administrator. The basic idea should be that the administrator gets in with an obligation to resuscitate the company if at all possible. That presently exists in the legislation now but for some reason it does not happen. It is certainly a better outcome than having the receiver-manager route. I believe a report has been put out by the Inspector General in the UK which makes the point that, since they got rid of receivers and managers, it has reduced the cost to the public and there have been far better outcomes generally from insolvency from that type of regime. So my big point is that there should just be an administrator/liquidator type legislative framework and that is it. There should not be this other option of receivers and managers.

**Senator FIERRAVANTI-WELLS**—If we are going to put greater focus on the use of voluntary administration parameters, one of the concerns I have with these provisions is that the intention is the resuscitation of the company, but regrettably it has been used as a debt management tool for some of the reasons that you mentioned. That has been the negative usage of those provisions. If you did go down that route, surely the next step must be to also tighten up those voluntary administration provisions so that they cannot be used simply as debt management. Putting the company into voluntary administration is a way of avoiding your creditors. Then you move on, are put into liquidation and that is the end of it. Let's start with the next company. Do you see what I am getting at?

**Mr Gould**—That is a whole different area though. You are always going to get that. Everything in this life is not perfect and you are always going to get people who will use insolvency as a way of escaping their moral obligations to third parties. As a society, since we got rid of the 'clink', we basically have moved in the direction of saying that people do deserve a second chance. But, as with anything, you are always going to get people who abuse the system.

**Senator FIERRAVANTI-WELLS**—On the issue of litigation, it really comes down to the question of ASIC's litigation priorities. Some of their decisions recently have not proved to be very profitable. So it really does become a question of where they put their litigation priorities. Do I read into your comments that people like you—and I do not mean this is any disrespectful way—are not the highest priority? Their litigation priorities do not seem to be very profitable, if I could put it that way.

**Mr Gould**—Clearly, if it is true that ASIC spent around $20 million on the OneTel case then it does beggar disbelief when there would be a lot easier cases to run than that. I would have thought you were absolutely right: the selection of their targets is poor.

**Senator FIERRAVANTI-WELLS**—Thank you.

**CHAIR**—I do not think senators have any further questions. Would you like to make any closing remarks? We are very interested in your story.

**Mr Gould**—Thank you for the opportunity of speaking to you. I look forward to hearing the conclusion.

**CHAIR**—Thank you, Mr Gould.

**Proceedings suspended from 10.36 am to 11.01 am**

**EPSTEIN, Mr Stephen, Private capacity**

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

**Mr Epstein**—Yes. Thank you for asking me to come here today. I have practised since the 1970s as, first of all, a solicitor and then as a barrister, and a principal part of my practice has been insolvency law. In that connection I have had considerable experience with complaints about the workings of the insolvency accounting profession in that legal disputes arising from such complaints, whether they are justified or unjustified—and both have happened many times—are relatively common. I had a particular interest in the subject matter of this inquiry through that general professional connection.

I also had a specific interest in the matter in that this particular inquiry appears to have been, in large part, provoked by the conduct of a Mr Ariff. Mr Ariff came under complaint by a number of people, as you know, but in particular he became the subject of a complaint by what is known as the Berjaya Group, which is a Malaysian investment group which operated a car wash business in Australia known as Carlovers. You have received a submission from Carlovers and they have put their point of view forward. I should repeat that the views I have expressed in my written submission and will express today are purely personal views and do not necessarily reflect those of my former clients—the Berjaya Group. I should say that their views about the matter are worthy of respect. In my dealings with them I regarded them as quite reliable informants about their unfortunate experiences with the insolvency industry profession in Australia. But I do not personally fully agree with their perspective on the matter, although I must acknowledge their familiarity with the detail of their dealings with Mr Ariff is much more extensive than my own.

In my connection with Mr Ariff I appeared before the corporations judge of the Supreme Court of New South Wales, Justice Reg Barrett. The controversy before His Honour largely revolved around the respective truthfulness of Mr Ariff on the one hand and the Berjaya executives on the other. That controversy was resolved, fortunately for me and my clients, in their favour. They were successful in that litigation. While that litigation was afoot, as you may know, ASIC was itself bringing proceedings in the Supreme Court against Mr Ariff in which Mr Ariff ultimately conceded a considerable amount of wrongdoing on his behalf and was the subject of the sanctions which the court was asked to impose by ASIC. I had only a limited insight into ASIC's pursuit of Mr Ariff in that connection, but my view, for what it is worth—and this is rather contrary to Berjaya Carlovers' view of the matter—is that ASIC's pursuit of Mr Ariff was undertaken with reasonable diligence and with competence.

I heard some of Mr Gould's evidence and I read his submission. He has his complaints about ASIC's pursuit of him in the Cresvale matter—and I am not familiar with that dispute and I do not purport to comment on it. Over the years, I have acted for and against ASIC and its statutory predecessors on a number of occasions and I can only say that Mr Gould's account of his experience does have a certain credible resonance, if I may put it that way. As he puts the matter, he was rather like a character in a Kafka novel—not knowing why he was being pursued with the vigour he was and the matter not really making much sense to him. In one's experience in the

legal profession acting for and against instrumentalities like ASIC, the tax office or the trade practices commission or its current equivalent, this is a relatively frequent perception, at least.

I think Mr Gould makes a valid point in his written submission about the Companies Auditors and Liquidators Disciplinary Board as concerns the appellate route from the tribunal being not an appropriate one in that there is a degree of unnecessary repetition in that appeals from the board go to the AAT, to a single judge of the court, I think, and then to the full Federal Court. This is, in my view, far too cumbersome a process. I do not know whether Mr Magarey may have cast some light on that in his evidence this morning. Mr Magarey and his colleagues on that board are a group of very eminent and competent people, and I believe that appeals from their decisions should go at least to the single judge level of the court and, perhaps preferably, to the full Federal Court.

It does occur to me that really the credibility and independence of that body could desirably perhaps be enhanced were its hearings to be presided over by a judge of the court. I do not disparage Mr Magarey in that sense—and he himself, I think, would be generally regarded as quite acceptable for judicial appointment—but I believe there is some problem with possible perceptions about the board in that ASIC is in effect its only client, in effect, and its proceedings are conducted confidentially or secretly. The practitioners who appear before it are, I think, entitled to have legitimate misgivings about the lack of separation between the board and ASIC. ASIC has a great deal of inside knowledge about the workings of the board and its procedures, and professional men—auditors or liquidators who are called before it—are disadvantaged by the lack of familiarity and the lack of public exposure of the workings of the board. For that reason it does occur to me that a more public process and the process which had the credibility of a member of the judiciary presiding over it would be probably preferable in the public interest.

In a way this inquiry involves a consideration of the question as to whether Mr Ariff's conduct was simply that of a rotten apple and an unusual occurrence in the profession. The evidence before the inquiry rather suggests that to have been the case, but that does not deny the desirability for an improvement in the procedures by which insolvency administrators are regulated. I have in my written submission put a couple of modest proposals forward but I feel that the legislation is, as I say, always something of a work in progress. Various law reform bodies and legislators such as yourselves will no doubt keep its operation under consideration and make improvements to the text of the Corporations Law as circumstances emerge to make that desirable. Thank you.

**CHAIR**—Thank you very much, Mr Epstein.

**Senator FIERRAVANTI-WELLS**—I want to take you through some of the points in your submission. You make a point about insolvency practitioners being uniquely placed. Is that part of the reason that you perhaps put them in the last comment that you made about a public process of judicial overview. Is that one of the reasons that you think that should be the case because they are in a unique position; therefore, given the nature of their obligations, a much more stringent and perhaps judicial oversight may be warranted?

**Mr Epstein**—That connection is probably reasonable. My point about their unique position is that in the typical insolvency scenario the constituency, as it were, of the insolvency practitioner

is very widely dispersed and quite often rather uninterested in that their investment as creditors in the affairs of the insolvent company has been lost. They vote in favour of a deed of company arrangement, typically, which promises them some small outcome from the wreckage. The file, as it were, is then normally closed, one would imagine, in the creditor's office and no active surveillance of the insolvency administrator's conduct, his or her administration, is really undertaken by anyone in particular in a majority of cases.

**Senator FIERRAVANTI-WELLS**—You may have been present earlier when I made my comments in relation to the framework of the voluntary administration provisions. I have two points. One is: what is your view in relation to the receivership point and is it time for us to do something about receiver managers and those provisions? If we do, does that ultimately then require some strengthening or alterations to the voluntary administration provisions as they currently exist?

**Mr Epstein**—I do not think I can present any very well-considered or informed response beyond saying that the abolition of receiverships, which I heard Mr Gould speak about, would be a very far-reaching change to the legal structure and operation of companies in this country and would have obvious serious impacts on how companies raise finance from banks in particular and other financial institutions. One would need to pay very close attention to what views were expressed by financial institutions of that nature if they were to lose the ability to control, through appointing their own man or woman as receiver, the affairs of the company which they have provided with secured finance. The very essence of secured finance in a sense is the ability to control the affairs of the debtor company after it has failed to honour its obligations under the mortgage debenture or registered company charge. It is certainly not something one would rush into recommending, but it may be worthy of consideration.

**Senator FIERRAVANTI-WELLS**—I asked that question in the context of your noting in your submission some areas for improvement in the current law. You talked about the provisions of section 445CA. You said the balance has swung very much in the opposite direction so that the administrator of the deed can become indefinitely entrenched in office. Isn't that the analogy with receiverships—and that is one of the things that we can see? Indeed, this issue has been canvassed by this committee with various witnesses about the use of receiverships and perhaps a need to regulate the whole concept a bit more. I made my comments in that context, because surely some receivers can well and truly entrench themselves into a company for a long, long time. So there is an analogy there.

**Mr Epstein**—The receiver will almost always regard his client as the bank appointor, and it is that institution which has the substantial interest in invigilating the conduct of its appointee. Certainly, conflicts can and do arise between the bank and the receiver. Where the bank is unhappy with the performance of its appointee, and unsecured creditors and the proprietors of the company in receivership have their own conflicting economic interest in the matter, the interrelationship between all those groups is often the subject of controversy. But, beyond some far-reaching reform in the way securities over a company's assets are given and enforced, it is difficult to see how any particular improvement in that potentiality for conflict can be introduced.

**Senator FIERRAVANTI-WELLS**—With voluntary administrations there is, of course, a pecking order in terms of secured debtors and unsecured debtors. But I take your point: if we are

going to go down the route of the receiver, we are going to have to carefully consider the framework that would ultimately exist—and I will not pursue that any further as far as you are concerned. You made a point about further amendments to 445CA—in other words, putting an artificial sunset on an administrator's time. Do you see some sort of reporting to creditors, some sort of option of five to 10 per cent of creditors being able to remove—in other words, putting a bigger framework or some other framework in place to afford creditors a greater opportunity to review? Is that what you mean?

**Mr Epstein**—Yes. My observation there reflected the Ariff-Carlovers experience. That was a deed of company arrangement where, if memory serves me correctly, Mr Ariff and his legal advisers were effectively the authors, and the owners of the company, the Berjaya Group, abandoned their claims as creditors, so they had no voting power under the deed. But the remaining creditors such as the Australian Taxation Office, which is typically amongst the unsecured creditors, after a period of time went by, had little or no interest in the administration once it emerged that Mr Ariff's fees had eaten up all the potential for any dividend they had. That left a situation where no-one who could vote had any interest in bringing Mr Ariff's administration to an end, and he was therefore able to continue in office as administrator of this group over the opposition of its owner. I think it is not desirable that that position be allowed other than in circumstances where there is active support from creditors in favour of an administrator continuing in office for a period of length in excess of 12 months.

**Senator FIERRAVANTI-WELLS**—Where the tax office is involved it is at least a much more active liquidation, if I can put it that way. If you have a major creditor like the tax office, whilst their interest in the case is retained there is much more opportunity for scrutiny; but, once they realise, the thing just seems to fall off. I think that is a very valid observation.

**Mr Epstein**—That is exactly what happened. The tax office was a representative on the committee of inspection. One of their officers was a committee member. When it became apparent to the tax office that they were not going to see any money, that gentleman resigned, and obviously the tax office had no further interest in Mr Ariff's behaviour or misbehaviour.

**Senator FIERRAVANTI-WELLS**—I want to take you to the point you made about the disclosure of related party transactions. Can you elaborate a little bit on that?

**Mr Epstein**—Again, the Ariff case threw up this problem. Mr Ariff's accounting practice employed or engaged other accountants. The allegation was made—and I think the evidence supported it—that, rather than draw down 'remuneration' under that terminology, Mr Ariff, whether or not it was lawful, was able to deploy assets in favour of corporations which were controlled by his employees or quasi-employees. His obligation to provide statutory reports to ASIC did not disclose transactions of that nature, nor did the prescribed form require him to disclose that large amounts of, in effect, creditors' funds were being deployed in favour of his associates. That, I think, is a deficiency in the regulation and the form insofar as the reporting requirements go.

**Senator FIERRAVANTI-WELLS**—That leads on to the next point. You are basically saying that we really should, in regulation I take it, include a definition of remuneration and expand upon what remuneration is—A, B, C, D, E, F or G. Is that what you envisage?

**Mr Epstein**—Yes, it is a similar point. The distinction between remuneration, as they call it, court, and disbursement, which is the other type of charge that people sometimes impose, is not a clear cut one. There is an opportunity to pay oneself by means of disbursements when really one should be regulated in terms of the remuneration processes which the legislation prescribes.

**Senator FIERRAVANTI-WELLS**—In previous evidence the idea of a 'taxing master' was floated—where you cost your bill, if I can put it that way. If required, that could happen. Would that help in these circumstances? If you ultimately knew there was going to be some court scrutiny, or some other scrutiny, of your remuneration could some of these issues be avoided?

**Mr Epstein**—The regulation of remuneration has been a vexed question in insolvencies generally—in personal bankruptcies as well as corporate insolvency. Similarly, in the legal profession there is a problem of people charging by the hour and the ability of the person who is paying that money to appraise the value of the 24 hours that the practitioner has put down in his time diary for that a particular week and whether value for money has been received. Whether it be the legal profession or the accounting profession, these problems of charging appropriately are very difficult, and I would not pretend to be able to offer a solution to them.

**Senator PRATT**—Senator Fierravanti-Wells has covered most of my questions but I want to pick up on the concept of remuneration as you have put it in your submission. Based on the discussion you have just outlined, such a definition could create a concept of remuneration that would rule out corrupt acts and make it very explicit that they could not be part of that. What would a definition look like and would we be able to capture value for money in such a definition?

**Mr Epstein**—I would not like to offer a solution to the problem on the run, but I do note that it is the subject of some judicial exposition—that is, in decided case law one finds discussion and decision where there has been legal controversy about whether a particular payment was remuneration or was not remuneration. Judges, in various contexts, have expressed views on whether something was remuneration or was not remuneration. If one were to adopt my suggestion, I think the starting point in defining remuneration would be to have regard to the decided case law on the meaning of that phrase and perhaps codify the judicial definition or understanding of remuneration in some more complete fashion than simply using the word without any explanation to it.

**Senator PRATT**—That makes sense. I am not familiar with the case law in that area. Does the case law look at value for money questions adequately?

**Mr Epstein**—From what I recall, the controversies and the cases are often directed to this disbursement/remuneration dichotomy I have spoken of where payments to outsiders are made by, let us say, liquidators for the performance of functions which are the liquidator's responsibility. The liquidator will employ a third party to, say, send out notices to creditors. The provision of that service, the posting out of circulars to creditors, can have within it a profit element for whoever gets paid for it. So if the liquidator does it himself, his profit in undertaking the task of posting the circulars is part of his remuneration. If he engages an outside party to post out the circulars to creditors and pays that outside party and treats it as a disbursement then that charge is not the subject of regulation in the same way that remuneration is. Where it is part of the insolvency administrator's function, it ought to be remuneration and not disbursements.

**Senator PRATT**—In that sense it is a question of value for money in both remuneration and disbursements. Clearly, if you contract out a particular activity, you want to know that you are getting value for money because it is not your money that you are spending. But surely there should not be an issue of corruption unless there is some kind of kickback from the person you have disbursed those funds to for a particular service.

**Mr Epstein**—That is right as a general matter, but what my observation here is directed to is that remuneration, in section 449E, is the subject of particular regulation and attention in the act, as it ought to be, but disbursements are not dealt with in the legislation in the same way. What I am saying is that what is in truth remuneration and not disbursements should be the subject of the regime which section 449E prescribes.

**Senator PRATT**—In that they are all activities necessary for the functioning of the liquidation or insolvency.

**Mr Epstein**—So the insolvency administrator ought not to be allowed to outflank the regime for remuneration, which section 449E prescribes, by characterising payments which in substance are remuneration as activities which are merely disbursements.

**Senator PRATT**—But what is the incentive to do that inappropriately if they are simply disbursements? Are we assuming that we are watching for some kind of corrupt act where that money is being recycled back to the liquidator?

**Mr Epstein**—Not necessarily corrupt, but more favourable to the financial interests of the insolvency administrator than for his constituency, the creditors. If insolvency administrators are able to deploy creditor funds extravagantly or wastefully when that deployment of their funds ought to be the object of creditor approval et cetera through section 449E then that ought to be addressed either in the definition of 'remuneration' or otherwise.

**Senator PRATT**—I can certainly see the nature of the problem, but it does indicate that the question of value for money is one not only for the liquidators' fees and charges but for those other disbursements. It need not necessarily be a question of corruption but rather a question of whether there is value for money in remuneration and disbursements.

**Mr Epstein**—Quite so. It is one's experience that the critics of the insolvency administrator may not be complaining just about how much the liquidator has charged. Often the liquidators' solicitors have put in a hefty bill as well.

**Senator PRATT**—What is the motivation to not disburse money efficiently? I would have thought that that was a fairly core duty when you are undertaking those tasks on behalf of a business.

**Mr Epstein**—No doubt it is a duty, but if it is not one's own money then one is not quite as rigorous in ensuring, as you say, value for money.

**Senator PRATT**—So it is just laziness.

**Mr Epstein**—I do not think a simple word can really capture it.

**Senator PRATT**—Fair enough.

**Mr Epstein**—I do not know that there is a simple solution for it, but this would be a typical problem that one observes: creditors or proprietors of companies are dissatisfied with, in the example I give, liquidators' remuneration being too high. At least section 449E regulates that, but it is not only that: the liquidator has spent money on solicitors who have charged a huge amount of money, in the creditors' or proprietors' view. It means that, for regulating solicitors' charges and so on—

**Senator PRATT**—We did have an example of how this was a problem: the more solicitors' fees come onto your books, the more you are also able to charge a fee for managing the solicitor, and this is how some of that growth also happens. So you might be disbursing funds in a way that is a bit over the top, because you can claim your own management fee on top of the service that you have disbursed for, I suppose. So the more you disburse the more you can, perhaps, charge to manage those disbursements. Is that part of the dynamic?

**Mr Epstein**—To some degree, in my observation, that can and does happen.

**Senator PRATT**—So that would be part of the motivation to not disburse efficiently in that sense, perhaps.

**Mr Epstein**—There is that economic incentive there. I do not know if there is an easy way to eradicate it, but one ought to recognise it.

**Senator PRATT**—Thank you for exploring that with me.

**Senator WILLIAMS**—I will be very brief. Mr Epstein, did you represent Carlovers when they took the court action to remove Stuart Ariff as their liquidator?

**Mr Epstein**—For some of it, in the later parts of that dispute, although it was a lengthy dispute. Towards the end of it, I appeared on their behalf.

**Senator WILLIAMS**—In the Carlovers submission it says it cost them $1.8 million to have Mr Ariff removed as liquidator. Surely it is a problem in the industry itself, when you have a bad egg carrying out a liquidation, simply to remove the liquidator at a cost of $1.8 million. That is a huge cost to a company that is already battling and hence the administrator is there. Do you see a better solution for when a liquidator should be removed from their position? One idea we had this morning is that a majority vote of the creditors would have the power to remove a liquidator from their position. How do you feel about that?

**Mr Epstein**—As I explained in my earlier evidence, that was the subject of some real complexity in the Carlovers situation because, the way the deed of company arrangement was set up, Carlovers lacked any voting power. Their entitlement to legal redress was quite difficult and the litigation, long before my involvement, became very extensive—and no doubt expensive—with the consequence, I might say, that only a very small proportion of the figure you spoke of came into my pocket. Be that as it may, no doubt Carlovers' experience was a very unsatisfactory experience. It does appear to be unusual and it was certainly a very difficult and thus expensive task that they were faced with in demonstrating Mr Ariff's wrongdoing towards

them through court process and through activating ASIC action against Mr Ariff. The amount of legal work which had to be undertaken on their behalf, apart from my own very small contribution in that endeavour, meant a very large amount of legal energy which had to be directed to demonstrating Mr Ariff's misconduct. In a sense fortuitously for Carlovers, notwithstanding the overall disappointing element of the matter, ASIC did take the action which was appropriate for them to take and did achieve the outcome which certainly seemed to have been the appropriate outcome.

**Senator WILLIAMS**—Eventually.

**Mr Epstein**—That is so, Senator, yes.

**CHAIR**—As there are no further questions, we thank you very much, Mr Epstein, for appearing. That was very useful evidence.

**Mr Epstein**—Thank you for asking me.

[11.38 am]

**McDONALD, Mr Geoffrey David, Private capacity**

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

**Mr McDonald**—Yes, Mr Chairman. Thank you for the invitation to address this committee. I have a desire to make a contribution to benefit the insolvency profession. I contributed a lengthy submission, which I assume the members are familiar with.

**CHAIR**—Yes, we have it here.

**Mr McDonald**—The full contents did not appear on the internet, so I trust that the annexures found their way to you. The driving force behind my lengthy submission and the time I put into it was to contribute to the benefit of that profession, and I wish to continue to do that by identifying what I see as problems. If I am able to identify some problems I think that will assist this committee.

Before doing that I think it is appropriate to set a context. The insolvency profession is one of the most difficult professions to work in. I do not know that you deal with these sorts of problems on a daily basis, but in dealing with financial problems you are always dealing with issues such as divorce, suicide, fraud, deception, violence, general heartache and depression. And this is common; this is just normal; this is what you have to deal with on a day-by-day basis. Then you might not get paid for doing it.

So, having dealt with all of those problems, you may or may not recover your fees. For a number of years the fact that fees have not been recovered on insolvency appointment has been the justification for having a relatively high base rate of fees. I do not see that as necessarily the problem that needs to be addressed.

Even if you do get paid, there is a great likelihood that once a month you will be sued. I do not know how many times you have been served with lawsuits at home. It is not that you have done anything wrong; it is just standard practice that an insolvency practitioner will be joined as a party for technical reasons. That is just what you have to deal with when someone gives you a summons. You have to explain to your friends and family that it is just a normal part of business. My brother-in-law, David Lawler, said: 'Geoffrey has to swim with the sharks. Sometimes he gets bitten by them and sometimes he gets mistaken for being one.' I think that is a very apt description of what you have to do as an insolvency practitioner. I am not a conservative person, so I am at a particular end of the scale and I accept that. But that is the nature of insolvency that we have to consider when trying to identify whether the system is working.

I am going to focus on liquidators for a moment. The registration process and qualifications are relatively tough. I think the system is working in setting the bar relatively high in determining who can and cannot be a liquidator. So getting in is pretty hard, but what happens once you are in is not working—the monitoring of liquidators, the improvement of standards and dealing with any failings is broken.

In personal insolvency the system works well. We have the Bankruptcy Regulation Unit. The people there are good people. They are people you can talk to and they are people you respect. You can actually call them and talk to them as a trustee in bankruptcy if there is a technicality that is concerning you. You can ring people like Mark Findlay, who is a good man, and he will give you an honest and intelligent answer. You may not always agree, but it will be a good answer. Then you have a degree of protection. The regulator has given you some guidance. If you have faithfully followed that guidance, you should have no concerns.

The position with ASIC is totally different. There is a complete failing in the relationship between ASIC and insolvency practitioners. Insolvency practitioners could not with any comfort ring ASIC and say: 'I've got a bit of a problem here. What should I do?' Your fear would be that they would write that down and use that against you. There is not the same relationship. There has not been. I think that stems from the regulatory obligations of ASIC, but I see that as a failing and a problem. It would be great to have regular meetings with ASIC on an open basis about some of the difficulties that liquidators face day to day.

I also see that the rules in dealing with conflicts are incorrect. I have made this point in my submission. I feel that liquidators should not be entitled to give advice to a company and then become the liquidators of that company. I think the decision of Justice Branson, respectfully, is incorrect.

The process of dealing with failings before CALDB is broken; it is wrong. CALDB does not give you what I would consider a fair trial. As a barrister and a litigant I have appeared before many tribunals, courts and other bodies. CALDB is the most foreign body I have ever had to deal with. The members take an inquisitorial role. You give your evidence and are then cross-examined by ASIC and then are cross-examined by the people who are going to decide your future. That is wrong. I am talking about hours of cross-examination by people who seemed in the cases I experienced to have some predetermination of the outcome.

I might sound quite strong in my view here, but I am in the fairly rare situation of having experienced it firsthand. The criticism of CALDB is not towards any of the individuals. Mr Magarey, for example, I found to be a very intelligent and fair man. He earned my respect from the way he conducted himself. This is about the process and the system. Getting in as a liquidator is hard but, once you are in, there is no proper monitoring, there is no proper guidance and the system in dealing with any failings, in my respectful opinion, does not work.

**CHAIR**—Thank you, Mr McDonald. That was very interesting and power evidence.

**Senator FIERRAVANTI-WELLS**—For the record, can I disclose that during the time that I was at the Australian Government Solicitors Office acting as a lawyer, I had at various times dealings with Hall Chadwick and with Mr McDonald in a professional capacity. I would like to state that for the record. Mr McDonald, you said in your submission:

I have had many ups and downs in my career...

Perhaps you would like to share some of those with us, in particular the various disciplinary proceedings and various actions that have been taken against you or claimed against you as part of your work as a liquidator.

**Mr McDonald**—Would you like me to share the ups and the downs, or more towards that downs? I do not mind.

**Senator FIERRAVANTI-WELLS**—We are talking about dealings with liquidators, and in my personal dealings and certainly when I was at the AGS, I became aware of certain matters and I would like you to share some of those with the committee.

**Mr McDonald**—I am not sure what matters you are talking about but, clearly, I have been the subject of disciplinary proceedings that have found their way before the board known as CALDB, or the Companies Auditors and Liquidators Disciplinary Board. The first occasion was back in the nineties following a review of the law on voluntary administrations in 1995, I think it was. I think it was in 1996 that ASIC produced the report. ASIC formed the opinion that some of the styles or methodology of insolvency practitioners was not the way that they thought should be done, and they took disciplinary action. That was the way ASIC decided to deal with practice standards. There were not any practice standards. The IPAA had not issued any practice standards. ASIC had not issued practice standards. The way ASIC dealt with conduct that ASIC did not think was correct was to take disciplinary proceedings. Of the files throughout the whole of Australia that were reviewed, two people represented 51 per cent. That is a horribly biased statistic. They were myself and John Star, both of whom were subject to disciplinary proceedings and both of whom were suspended.

I recall running a case called McDonald versus ASIC to try to clear up some of the misconceptions that ASIC had regarding the way in which administrations ought to have been conducted in the early nineties. I won that case, but I had to run the case against ASIC to prove that ASIC was not necessarily right. The matter was taken by ASIC to the disciplinary board, and for very personal reasons I settled. I have made known the personal reasons. My son was unwell and needed medical attention. I went to practise as a barrister—an alternative then available to me—so I settled. It was as simple as that—no admission and settled. My partner at the time, Peter Rodgers, ran his case and won.

So I do not really have horribly guilty feelings at all about that episode. However, once that has happened, you are branded. I accepted that I had to live with that. That was part of the weighing up of family, work, lifestyle and one's reputation. I had to weigh all that up and I still settled with ASIC. But you are branded. So next time anyone has any dispute with you in an insolvency appointment, they quickly say that they are going to dob you into ASIC and ASIC quickly says, 'I'd love to hear'—and, before you know it, you are on the train. That is what you are stuck with.

On the second occasion it was very much like that. I had a relatively minor role in an insolvency appointment and the accusation was that I had breached the spirit of the ethics of the Institute of Chartered Accountants. At the time, every member of the big four accountancy firms was doing exactly the same. Let me make that point really clear: at the time the big four accountancy firms had an insolvency division. I think you will find in this week's *Business Review Weekly* they mention that insolvency partners broke away from Ernst and Young to become KordaMentha 'because of the conflict of interest'. So what we have is the big four accountancy firms merrily proceeding in conflict of interest and in breach of the Institute of Chartered Accountants ethics rules. That is what I had to deal with. Again, I settled the matter, because I was leaving the profession. Why I left the profession is probably more to the point.

Why was I going to leave the insolvency profession after 25 years? I had had enough, and those are some of the things that I think my submission really goes to.

**Senator FIERRAVANTI-WELLS**—I am surprised you lasted that long, Mr McDonald, I have to say.

**Mr McDonald**—For what reason?

**Senator FIERRAVANTI-WELLS**—Well, Mr McDonald, I think you know that. I am just surprised that you lasted that long. You left in mid-2008. I understand that, at the time, these suspension proceedings were pending. Can you explain why they were kept confidential and only disclosed by ASIC in December 2009?

**Mr McDonald**—I think that is standard practice. I do not know what you are talking about; it is always kept confidential. Certainly anything before the—

**Senator FIERRAVANTI-WELLS**—I had a look at ASIC's website in relation to your suspension and the proceedings that led to your suspension, and there was some sort of confidentiality attached to them in September 2008. That is what the press release seemed to say. I am asking you why there was some degree of confidentiality attached to it and why it was only made public in December 2009.

**Mr McDonald**—Again, I think it is standard practice. Proceedings were before the AAT and it is standard practice for the AAT to keep the identity of the participants in those proceedings confidential, so I think the case was known as ABCD v CALDB in the appeal proceedings before the AAT. Throughout that period, until there is a determination one way or the other, the names in the proceedings and all that has carried on beforehand are kept confidential. That is standard practice. When the matter was resolved in—I do not recall what time you said then–2009, all the details became public.

**Senator FIERRAVANTI-WELLS**—We will ask ASIC in relation to that, Mr McDonald. You say in your submission that you have certainly 'tested the boundaries on occasion and that that can be read in the positive and it can be read in the negative'. I would be interested to know where, in particular, in relation to the provisions, you think—in terms of liquidators you have obviously had your fair share of litigation, probably more so than other liquidators I would have to say, or at least you are one of the liquidators that has engaged in considerably more litigation than other liquidators.

**Mr McDonald**—I do not think you are right.

**Senator FIERRAVANTI-WELLS**—Well, suffice to say that you have had your fair share of experience in this area. Where do you see the changes that we should be making?

**Mr McDonald**—In the area of litigation?

**Senator FIERRAVANTI-WELLS**—In the area of liquidators. I read your submission, which was interesting reading, but what practical changes do you think we should be making?

**Mr McDonald**—Regardless of the involvement in litigation, I think liquidators should not be entitled to give advice to the company to which they are appointed. The starting point should be that they are not entitled to come along and say to people, you should do this or you should do that or you are insolvent or you are not insolvent, and then become the judge of the director's conduct. There is this massive conflict where a client will come and see a liquidator, a chartered accountant, and ask them what they should do. They sit there in front of you and say, 'What can you do to help me—I have got problems; I feel suicidal and my wife is leaving me.' This is a heavy stuff—it is very personal. You sit there and the person says, 'What can you do for me, what should I do, give me some advice.' Whatever the advice you give that results in your being the liquidator, you are then the person that has the prime responsibility to look at suing that director. You have not only the prime responsibility, as liquidator, to investigate but also the right to sue the director. So you just turned 100 per cent.

The creditors also expect you to represent them. I found out the hard way that that is just wrong. If you are sitting there thinking that the creditors, the people who are owed the money, should be represented by the liquidator, that is wrong. I thought that was the case. The Queen's Counsel representing me said there nothing wrong with working closely with the creditors—but, no, you need to be impartial from everyone. Biposo was the case, in the 1980s. You need to be independent from everyone. It is a difficult balancing job. The starting point is to keep away from providing advice to the people who ultimately appoint you as liquidator. I am not suggesting a pure rotation basis, or picking the name out of a hat. I am not suggesting that. That is a bit difficult. For example, when I got appointed to Traveland I had to run 500 stores the next day. It is a bit hard to just wake up and you are running 500 stores around Australia. You need some preparation time. The person giving the advice should not be the person taking on the role as liquidator. That is one point.

**Senator FIERRAVANTI-WELLS**—But that would of course necessitate the complete revamping of the whole issue. I do not know whether you have had a look at some of the evidence here about voluntary administration and the use of voluntary administration as a debt management tool. It is a tool—it is legal, it is available, and voluntary administration rules can be used not only to help a company stay alive but also to help a company die fairly quickly. In your scenario that would necessitate the whole revision of the rules relating not only to liquidation but also to voluntary administration –

**Mr McDonald**—I do not think it involves much of a change at all.

**Senator FIERRAVANTI-WELLS**—If somebody comes along—I am sure you have had this experience—and says they have a problem with their company, you might say one way to get out of it is to appoint a voluntary administrator, and then you go into a deed and then it is clear that the deed is not going to work and the next thing you know you have become the liquidator of that company.

**Mr McDonald**—I have seen those circumstances but that is not what I am talking about. I am saying that the person comes into you and asks what they should do. The person who gives the advice on what should be done should not be the person to then execute that plan.

**Senator FIERRAVANTI-WELLS**—I appreciate what you are saying in relation to the liquidator, but how do you deal with that in other insolvency circumstances?

**Mr McDonald**—It should apply all the way through—administrations, liquidations.

**Senator FIERRAVANTI-WELLS**—So, in other words, in circumstances where somebody comes to you and says they have a problem and you say to them these are your options and one of your options is to put the company into voluntary administration, what you are saying is that you should not then be the administrator of that company.

**Mr McDonald**—Yes, and that then means the advice you are giving is free from conflict. I have seen people give advice that says that the person should go into administration, and I know the reason they are recommending that is that they will get the most fees from the choice. I think that is wrong.

**Senator FIERRAVANTI-WELLS**—I have seen it too—many times.

**Mr McDonald**—And I do not like it; I do not agree with it. It was one of the influencing factors that made me want to change profession.

**Senator FIERRAVANTI-WELLS**—This option was available to many and I am sure that you yourself over many years involvement probably did it as well –

**Mr McDonald**—No, I did not.

**Senator FIERRAVANTI-WELLS**—Really, Mr McDonald?

**Mr McDonald**—Yes, really.

**Senator FIERRAVANTI-WELLS**—That is interesting. One of the questions that was asked earlier was in relation to receivers—I do not know whether you followed the evidence before in relation to the question of receivers and the regulation of receivers and those sorts of things. What is your view in relation to that?

**Mr McDonald**—The insolvency profession is—whether people acknowledge it or not—split down the middle. Some people straddle it a bit, but it is split down the middle. There are the organisations that predominantly act for the banks as receivers and there are the organisations that act for the debtors—the directors that cannot afford to pay.

The big firms in particular act for the banks; they see the banks as their clients and they act as receivers, effectively as the representatives of their clients to get their clients' money back. I do not see anything wrong with that. In some ways it is a truer representation of the circumstances: the creditor wants their money back and they have appointed the hired gun to go get it—the banks do not want to do the dirty work and sack people, so they employ the liquidator or the receivers to do it. The receivers go out there and do it, sell it up and give the bank the money—that is the system. If the system were not like that I do not think that the banks would be lending the money. I do not see the receivership side of things as broken because of the conflict issue. There is no conflict there: they are acting for the bank.

**Senator BUSHBY**—I just have some questions about ASIC's approach to disciplinary issues. You have highlighted what you consider to be a less than satisfactory approach to how they deal

with these things. One of the previous witnesses also did that. We also have a lot of evidence about ASIC's approaches to disciplinary actions. I think Senator Williams mentioned Mr Ariff in an earlier question, and how it took many years to deal with what actually turned out to be proven a quite serious case of inappropriate activity, shall we say.

We have got two extremes in one case that we are looking at here: one where ASIC is chasing people, which from your perspective is not right, and it causes severe financial costs and reputation costs to people like you; and at the other end of the scale you have got people who are proven to be doing things that are not right, and yet it takes a long time to actually deal with that. How do we resolve this? What is ASIC doing wrong? How do we actually move forward to ensure that we can appropriately enforce and take disciplinary action against those who need to have action taken against them without catching people who probably should not?

**Mr McDonald**—That is a good question. If you become familiar with the system which is used in personal insolvency I think you will find that could readily be a good answer. It exists, and many insolvency practitioners are used to dealing with the regulator in the personal insolvency sector. To adopt a similar regime for the corporate insolvency sector would not be a significant change.

The system is that your files are audited on a random basis once a year by an independent section of the Insolvency Trustee Service Australia. Last week I had my files audited—I still have a few follow-on files as a trustee in bankruptcy. I got the phone call on Monday and they said, 'We're going to be around, are you available next week?' I said, 'Yes', and they said, 'Well, lock the days in and we'll tell you two days before which files we're going to review'. So you have got enough time to find them and to get them in order, but not to fix them. It is just the way it is, and you accept that—this is the way it is going to be. You make sure your files are up to date and you make sure they are up to date all the time because you are expecting this. When the people do arrive they are pleasant, they are good to deal with and they will give you an interim report. They will make mistakes, but it will not be an adversarial situation; they will say, 'Oh, we did not see that report—it must have been misfiled'. Or, 'We missed it in the file'. Fine—no-one gets upset by that.

They classify the errors, A to C—A is serious—and you learn from it. If next year you keep on making the same mistakes it means there is a system problem and they would deal with it. I am aware that a number of registered trustees have, following these types of annual review, volunteered to hand in their licenses. That sounds like a reasonable system. It involves some resources and it involves an attitude as well. I commend that system, and I think it could easily be replicated for corporate insolvency.

**Senator BUSHBY**—I appreciate that. We have got ITSA appearing before us this afternoon, so we could follow that up with them. You are also a barrister—

**Mr McDonald**—Yes.

**Senator BUSHBY**—Do you think that there are any lessons for insolvency and administration practitioners in the approach to registration of legal practitioners?

**Mr McDonald**—That is a good question. I had not considered that. The disciplines that you need for insolvency are very widespread. In many respects, the accounting discipline is probably one of the least disciplines you need. The ability to understand tax law is not necessary. These companies do not pay tax; they do not make profits. Regarding the ability to deal with consolidated accounts and the like, I just do not see that the accounting skills are really the trick; it is commercial skills and probably the law. Defining the skills and qualifications that are needed for a liquidator to become registered is a challenge in its own right. The legal profession, obviously, is very disciplined and has its statutory backing. You cannot act as a legal practitioner without being qualified. That is a breach of the legislation. You can be an insolvency practitioner—not to take on the appointments, but be an insolvency practitioner without necessarily having these qualifications. It is a difficult question. I do not think I can give you the perfect answer.

**Senator BUSHBY**—One of the things you mentioned in your opening statement is that there are various hurdles to overcome to become an insolvency practitioner but, once you are there, there is not a lot of follow-up—

**Mr McDonald**—That is right.

**Senator BUSHBY**—whereas, in the legal profession registration, there is a lot of follow-up.

**Mr McDonald**—Is there really? You have to do your continuing education, which applies to liquidators.

**Senator BUSHBY**—There are well-defined ways of dealing with allegations of professional misconduct.

**Mr McDonald**—Again, that is reactive rather than proactive. I am looking for that wonderful proactive involvement of monitoring people's behaviour and monitoring people's conduct—educating them and working with them so that all human frailties are dealt with. The Law Society will do a trust account audit, but I just do not see an annual review scenario that would be very helpful.

**Senator FIERRAVANTI-WELLS**—There is much more competition in the legal profession. The problem with the liquidating and insolvency area is that it is such a closed shop and there is such a limited number of people involved. I am sure that, as you have been at the bar since August 2008, or whenever, there is much more competition in terms of what you were doing as a liquidator. That is one of the problems. I do not want to harp on it, but it is very—

**Mr McDonald**—Your point is valid in that it is a small profession. I think it will always be small, simply because of the size of the turnover and how much is paid to insolvency practitioners in fees per year. That is a question. From that you can work out how many mouths will be fed. If the profession is only going to be a certain size, it will only ever grow to that size, and therefore you are very right in that the small size of it will retain these problems. The IPAA has always had that problem. It has not been able to afford to have its own disciplinary process simply because the number of members do not create enough membership fees to pay for a full-time disciplinary body. They have had to tag onto the Institute of Chartered Accountants. So your point is very valid.

**CHAIR**—You also have the Company Auditors and Liquidators Disciplinary Board, if we are thinking broadly about a different system of registration, administration, discipline and so on. We could broaden existing institutions, or boards, I suppose. That seems to be a deficiency that is coming up as this inquiry progresses. There is not sufficient oversight. There needs to be some sort of process of re-registration and there needs to be the ability to suspend, short of the disciplinary proceedings. Would you agree with that?

**Mr McDonald**—I certainly agree that the system is not perfect; in fact, it is a long way short. Whether CALDB would be the right body to have a greater role is something I have not considered.

**CHAIR**—It does not have to be that board.

**Mr McDonald**—I do not think CALDB would be the right body. The way I see it in very bold terms is that, when ASIC picks you as the one that they want to target and can find one of the things that go wrong and you are not one of the chosen ones, they will put you up to CALDB and they will rubberstamp it. It would be interesting to see how many cases before CALDB have been lost. I understand it is 100 per cent in favour of ASIC. I do not know of any tribunal that goes 100 per cent to nil over years. So I would be very interested in seeing that statistic. It was told to me by the people at CALDB. After two years of that particular person being there, they knew of statistics where ASIC had a 100 per cent success rate over two years. That might have changed in the last year or so, but I still think that is an astonishing, unrealistic percentage.

**Senator WILLIAMS**—Mr McDonald, thank you for your presence. We have got ITSA looking after personal insolvencies. We have got ASIC looking after the corporate side of things. How would you feel if I were to suggest to you that perhaps the IP industry should be brought under one umbrella? Perhaps the 30 or 40 people who work with ASIC and concentrate on the IP industry and ITSA could be brought under the one umbrella, the one watchdog—a flying squad to come in and review your books afterwards.

**Mr McDonald**—That is a great idea.

**Senator WILLIAMS**—Do you think the industry in Australia would be in a better position if that were the case?

**Mr McDonald**—Yes, I do. I think that is a very good comment. Without reservation, I think that is a great idea.

**Senator WILLIAMS**—If you look through the submissions, there are a lot of submissions that are very, very critical of ASIC. They say they contacted ASIC and there was little or no response or ASIC did not act. A lot of the submissions are damning of ASIC.

The **Mr McDonald**—Which makes you wonder, when they did act, how you were the lucky one to be chosen. But I will not delve into that.

**Senator WILLIAMS**—That might be your good luck!

**Senator FIERRAVANTI-WELLS**—Perhaps they had a particular liking for you, Mr McDonald, that went over many, many years!

**Mr McDonald**—Thank you, Senator. I remember the times when we met before too!

**Senator FIERRAVANTI-WELLS**—Absolutely, Mr McDonald. How could I forget them?

**Senator WILLIAMS**—The point I am making is: if I had a magic wand, I would love to clean up the wrongdoings in the industry from the past. But I do not. But what we can do is look at what is wrong, what is broken, and hopefully fix it through legislation and make it better for the future. I see ASIC as taking on the big issues, but in smaller complaints too many times I say to people: 'Did you contact ASIC,' and they say, 'Yes, but there was no response,' or there was a generic email reply.

I want to run another idea past you: an ombudsman. For example, if I am a creditor to a company that has become insolvent and they owe me $1,000 and I get done over by the liquidator and I think I have been wrongfully done by, I could go to an ombudsman and say, 'This is the situation. Will you address it?' I am not going to go to the court. Perhaps ASIC is simply too busy with bigger fish to fry than a $1,000 issue. How do you feel about an ombudsman being set up in the IP industry to at least address complaints by the general public, so that at least they know they are being heard?

**Mr McDonald**—There is some merit to that. I think you would just consider how you react to the use of any ombudsman—the taxation ombudsman, the banking ombudsman—and what you feel yourself you would get out of that in considering that particular answer. However, I think a role for the Insolvency Practitioners Association to play could be along the lines of what you have just suggested there, where there is a body that deals with its members, for example, which is what ombudsmen deal with—they deal with people over whom they have some control—and the IPA, if it were resourced, could deal with these complaints and these concerns. It would have the industry knowledge. You use the terminology there that the person felt they were hard done by if the liquidator lost their thousand dollars. The fact is that the directors have probably knocked off their thousand dollars and left a big mess for the liquidator to clean up. How the liquidator cleans it up is an issue that we are talking about, but the directors are generally the people that cause the problem in the first place, and that is where many liquidators have great frustrations, because they report those directors to ASIC—

**Senator WILLIAMS**—And the result is?

**Mr McDonald**—And the result is nothing. I think the statistic I was told is that less than one per cent get investigated. These are circumstances where, as a liquidator, you say: 'I have seen these people steal this money. They have gone on a self-help exercise. They have hopelessly lost other people's money.' And what happens? Nothing. Then when you become the target of ASIC, in circumstances where you have breached the spirit of the ethics of an organisation, you think: 'No creditor has complained. No-one has lost any money. There is some imbalance here.' However, your thoughts are again a good suggestion, of having a person who can deal with—I do not mean to be disrespectful—the minor complaints.

**Senator WILLIAMS**—Exactly.

**Mr McDonald**—I do not mean to be disrespectful with that.

**Senator WILLIAMS**—Whether minor or major, surely every Australian has the right to be heard over an issue.

**Mr McDonald**—Yes, indeed. So that is a good idea.

**CHAIR**—With that we conclude this part of the hearing. Thank you very much for appearing, Mr McDonald.

**Mr McDonald**—Thank you.

**Proceedings suspended from 12.15 pm to 1.14 pm**

**SLATER, Mr Geoff, Private capacity**

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

**Mr Slater**—I was going to make a statement this morning almost from a script, but I am going to deviate and turn things around a little bit to add to some of the things that I have heard this morning. You have had some very good submissions, I might add. Perhaps as a short disclosure, I have acted for Mr McDonald and I have also acted for Mr Albarran in the past, some years ago, but I have also acted for a large number of liquidators and firms over the years. It is of no particular importance but I am just mentioning that. This morning we heard that Mr Vanda Gould talking about the abolition of receivers and managers.

**CHAIR**—Before we go on, Mr Slater, your submission was confidential, I gather.

**Mr Slater**—I did not know that, chair.

**CHAIR**—If you did not know it then it is not confidential. It is on yellow paper, though, which means confidential. I was going to ask you whether you want to proceed on that basis or should we ask people to leave the room. But you are quite happy to go ahead.

**Mr Slater**—I am very happy to go ahead. The talk about abolishing receivers and managers I think is probably quite a good idea. You have heard that that is the case in the United Kingdom. Another suggestion was that that was perhaps too radical a step and it would upset banks and the way they finance things. I do not think that is necessarily the case. For example, recently the High Court in a case called Sons of Gwalia—

**CHAIR**—Yes, we know them well. A West Australian mine.

**Mr Slater**—I believe there is legislation on the fora for it. That is considered a very radical decision of the High Court, and that was a unique situation where shareholders were actively misled. But it did not stop parliament from turning around fairly smartly, or at least the Attorney-General announcing that they wanted to abrogate the decision of the High Court. If they can do that, which is a fairly radical step for shareholders, then I do not see why receivers and managers cannot be abolished and just replaced with a more public process. The banks can still appoint somebody; it is just that it is a more public process that they have to go through in enforcing their security. I think that is a good idea.

Perhaps a more controversial part of what I would like to say about this morning is that Mr Magarey and CALDB. Some of the notes I have taken about that show that they were totally reliant on ASIC. He pointed out that it took them 12 months in many cases to investigate cases, which is an unconscionable amount of time. The fact is that if, for example, I am a fisherman and I run a commercial fishing boat and I have got a few hundred thousand dollars worth of fish in my hold that are frozen and the electricity is about to be cut off or something like that, 12 months just is not good enough. There needs to be a system in place operationally in the course of insolvency where people can get immediate relief before the farm is sold or whatever is about to happen. I think that is something that shows that CALDB is a complete policy failure.

It also occurred to me in listening to what Mr Magarey said about having the accountants workshop with stakeholders that the only problem with that is, let us think about it, what do they really mean by stakeholders? They are all the same people who have been in this little club for a very long time and have always done it the same old way. They are all accountants and they have all benefited from collecting fees in a certain way and they have paid off their mortgages probably a long time ago from it. Fundamentally and psychically they are opposed to change. Because of this professional association and this concept that that professional association is the right way of doing things, it creates a cultural set of baggage where nothing ever gets really changed for the better. That is why I think at the crux of it CALDB is not working well. There are 200-page decisions and the like. I do not think even the High Court has ever published a decision that long. It is ridiculous. Nobody is going to read it and I cannot possibly understand how a decision could be that long when the issues, I am sure, could be summarised rather than setting everything out verbatim.

It was also pointed out this morning that their funding comes through ASIC. What we did not hear, though, is exactly how much money they get per year, how many cases they do and how much that costs taxpayers per case that they hear. When we start looking at how much value for money, or bang for buck, that there is with CALDB, we wonder if it could it be done more efficiently. For example, I understand that the way that the ACCC uses junior barristers on direct briefings to look at discrete cases has produced very good value for money.

The other thing about CALDB is that the stakeholders in it are all appointed by the minister. Who advises the minister? No doubt it is the other stakeholders, which again just re-emphasises and reinforces that we have got the same tired old club of people doing the same old things as they always have. It creates an oligarchy, and this is something that really needs to change. If we stand up and think about this really carefully, what is CALDB really? It is actually an overlay; it runs parallel to the court system. It is not a chapter III court under the Constitution; it is this body, if you like, that has these secret hearings. They are not open. The evidence is not open. It is not easy for the public to look at the evidence that was put before the court. For example, currently I have a matter before the High Court on this very issue of open courts. It is a very big issue about secret decisions, secret affidavits and secret directions hearings and the like, and I say that that is wrong. I think the public should be able to go in there and see CALDB in action. They are some of the comments that I really wanted to make.

In respect of the professional standards that we are talking about—and we have heard a lot about them this morning—has it actually occurred to anybody that maybe the professional standards are what the problem is? The professional standards—like the legal profession itself, which is not perfect but it is changing—encourage overbilling, inefficiency and the use of interposing solicitors, in many cases where solicitors are not even needed. We heard this morning about confidence in professional standards. Maybe the problem is that the public does not actually have confidence in the professional standards and it is the professional standards that are wrong.

This brings me to the whole process that Geoff McDonald was talking about this morning of how you get in as a liquidator. Let's go to that. Section 1282 of the Corporations Act sets out all the qualifications that people must have. I will paraphrase it. It says that you have to be an accountant and ASIC decides whether that qualification is adequate or not according to their opinion. On what basis do they decide that? If you turn to regulation 9.2.02, it sets out a series of

universities and so on. What it essentially does, however, is create a monopoly for accountants. Australia is the only country that does this. In the United Kingdom anybody can sit an exam, including solicitors, and become a liquidator. The same thing applies in the United States. In Europe, you must be a solicitor before you can act as a liquidator. Why is this so? The answer is because, as you have heard from Mr McDonald, what liquidators are really doing is not accounting and not looking at ledger. Their real skills are commercial.

What he means by commercial skills, though, is combining the economic skills as well as the legal consequences. In effect, liquidators are quasi-judicial officers. They are making quasi-judicial decisions all the time. That requires a set of ethical training and legal skills. I will put squarely to this committee that most barristers do not have those sorts of skills. Accountants absolutely do not have those sorts of skills. I do not even want to think about how many creditors meetings I have sat in where I have heard liquidators refer to section this or section that of the Corporations Act. None of them have talked about equitable remedies that are available. I do not think they are particularly well qualified to be given this role. The first recommendation I would make to this committee is that the door should be thrown open, to open the field to anybody who wants to sit the exam. This should be removed from ASIC and Australia should be brought into harmony with the United States and England so that anybody who is qualified or who has a law degree or an accounting degree with sufficient law should be able to sit the exam.

This morning, one of the witnesses drew my attention to the fact that it turns out that the Institute of Chartered Accountants in Australia—and I will have to check this; I cannot vouch that this is 100 per cent correct, but from memory it is correct—will let solicitors come in and join the ICAA. Because the ICAA was listed in the Corporations Regulations as being one of the qualifications for becoming a liquidator, the ICAA doing that effectively opened the door for competition to come into it. How did ASIC react to that? By removing the part of the subsection that allowed membership of that professional association to become a liquidator, thus perpetuating ASIC's monopoly power over who they regulate.

They are the main things that I wanted to point out. I think the monopoly is a really big issue. I will put some numbers on this for everybody. As of late March this year, there were 663 liquidators in Australia, both official and normal liquidators. Getting that information out of ASIC was very difficult. The appointments for 2009 were 14,580. I will do the maths for you. That is 22 jobs per liquidator. New South Wales had the biggest share, 41 per cent. How much money do these people make out of doing these liquidations? What is their incentive for keeping the current system going? Remember, I said there were 663. I will quote from a case. The citation is Hellier Capital Pty Ltd v Richard Albarran (2009) NSWSC 403. It says:

Over the last three and a half years, his monthly earnings from the partnership business have averaged $77,000 …

That is per month. According to the public examination of liquidator Mr Stuart Ariff, his income for the years 2006, 2007 and 2008 was, respectively, $3.09 million, $2.3 million and $2.223 million. I will not go into his activities. Suffice to say, though, that he was fined $20,000 on 12 February 2008 by the Institute of Chartered Accountants as a result of the decision in Wando Coal Pty Ltd v Stuart Karim Ariff & 1Or. That is cited at (2007) NSWSC 589.

So we have an industry of 663 people where people are making millions of dollars a year. I have acted for Richard Albarran. I make no comment about his affairs or his firm's affairs. I am

only citing from publicly available cases. I can say, though, from my experience that that is at the low end of the range. For some of the larger firms in Australia we are talking well over $4 million, or $5 million or $6 billion per year for the partners of the insolvency. That is more than any of the partners make at the big firms such as Allens Arthur Robinson or Clayton Utz or anywhere like that. I think even the Prime Minister only earns about $300,00 or $400,000 a year. So the lowest paid liquidator earns three times more than the Prime Minister—something that the committee might want to consider.

That is some of the basic ground that should put a framework on this. My own opinion is that this reeks of a monopoly rent that is being charged by a select group of people who have a statutory monopoly. The easiest way to reform everything that we have talked about this morning is by removing the monopoly and increasing the number of people who are eligible to do this. This is the most important part. At the moment, if I want to get rid of a liquidator—and we heard this morning about a group that had to spend, I think, $1.6 million or $1.8 million to remove Mr Ariff—there has to be cause shown. Where does that phrase come from? The cause shown formula has been around for about a century. It started as section 102 in the Companies Act 1899 in New South Wales, which actually said 'on due cause shown'. It survived from that into section 228 of the Companies Act 1936 in New South Wales and has continued to legislation today. So the key problem we have is a century-old legislative relic that does not explicitly relate liquidator fees with value or what is best for creditors, let alone any self-determination of creditors. A shareholder of a company can vote directors out; they do so frequently. Creditors cannot do the same. Even if they want to get rid of a liquidator, they have to go to court and show due cause.

Another point about that is that 'for cause shown' came about at the turn of the century. At the turn of the century it was common for liquidators to get paid a percentage fee rather than an hourly fee. This makes a very big difference because a century ago their interests were reliant; their interests now are opposed. The tyranny of the billable hour and the way modern firms run on the clock and the resulting economic conflict for the liquidator and the creditors between billable hours and efficiency is a really big problem. I have been involved in so many cases where this has been so, but, rather than giving you my views, I will directly quote from a number of judges in some selected decisions. I will start with a Sydney insolvency firm, O'Brien Palmer, in a newsletter dated August 2008. They said in one of their brochures to their clients:

In our experience, incumbent liquidators are loath to resign and such requests are likely to fall on deaf ears, especially if reasonable fee opportunities remain in the administration.

The next thing we come to his Justice Palmer in Hall and Poolman. He said in his judgment:

When I asked him—

the liquidator—

whether he had done an exercise to work out what benefit to creditors of the companies the proceedings could have had and whether the proceedings were worthwhile, Mr Hall gave a lengthy, non-responsive answer.

His Honour Justice Palmer said later in the judgment:

A liquidator is appointed to salvage as much as possible for the benefit of creditors. If a proposed course of action—whether it be a legal proceeding or a commercial transaction—is not likely to produce a worthwhile benefit for creditors, the liquidator should not undertake it simply because it will generate enough to pay the liquidator's fees in undertaking that very transaction or litigation—a practice which is familiarly known in the market place as 'churning and burning'.

Justice Lightman, of the UK High Court of Justice, Chancery Division, spoke of:

… the perceived lack of professional concern and lack of control over fees and costs in corporate insolvencies … There is perceived to be a particular mindframe towards costs referable to the open unguarded pocket from which the costs are paid and the absence of effective monitoring—a mindframe careless of the consequences for unsecured creditors and others.

**CHAIR**—Mr Slater, we are against the clock a little bit and we are eating up quite a lot of the time that has been allocated to you. As some of these comments are included in your submission, would you like to come to a conclusion and the senators can question you? What you are saying is very useful and very interesting, but we have an unexpectedly tight time frame this afternoon.

**Senator PRATT**—They are very good quotes, and we have noted them.

**Mr Slater**—If I could encapsulate everything we have heard this morning, it comes down to a fundamental thing: the way our liquidators get in. Let us take another example, with Mr Ariff. There is a section that says that they have to have insurance. But guess what the problem is: nobody actually checks to see whether they have insurance. And if they do not have insurance, guess what—the section does not lay down a penalty. If I dive a car, and I do not have a green slip, I get fined and I get into big trouble—but, more to the point, under the RTA in New South Wales my registration and my insurance march in lock step. We have a situation with ASIC where there is this enormous risk transfer. They can take on big cases with no insurance and nobody is looking at it. If I wanted to say to a liquidator, 'Have you got current insurance? Provide proof to me', and they are an official liquidator appointed by the court, they do not have to do that. There is no official public register to make sure they are currently registered, in the same way that I can check whether a car is currently registered. Why is that the case? It is the case because ASIC does not actually interview any of these people when they get in; it is a registration process—they stamp bits of paper.

Let us take another example. Every time a liquidator does a job they have to put in a detailed report as to how much money they make from the job and so on. Does anybody actually collect all of this data and put it into a central database? No. Should they? Yes. What would it tell us? It would tell us how much they are charging. More to the point, it would operate as what we call a mineshaft canary with respect to whether the fees are getting too big or there are too many complaints. You could simply look at a histogram of complaints per practitioner, in the same way that Medicare looks at doctor fraud—they say, 'You've got a few too many pathology reports here' or 'Look at this guy: there is this huge spike.' That is how they home in on people and use their resources more efficiently. These are the basic sorts of things that should be done at ASIC, which are not done. Why they are not done, I have no idea. I do not know how much money ASIC goes through every year, but it is a lot of money—and, to my mind, just keeping some basic statistics should be at the forefront of any effective form of monitoring and regulation.

How did we get here? Legislation fundamentally changed in 1958. Before then Australia essentially adopted the English legislation. In 1958 we did this huge U-turn, where we gave accounts a monopoly. Things went wrong from that point on. In the late 1970s the UK appointed the Cork committee, as it was called, to look into the whole business of liquidators. In 1982 Sir Kenneth Cork handed down a report of the Committee of Insolvency Law and Practice. It is something this committee might want to have a good look at. What is perhaps less well known is that, after handing down the report, Sir Kenneth said that the general opinion of insolvency receivers is that they are an unnecessary evil put in for the sole purpose of earning a decent living for themselves.

I realise that some of what I am saying is slightly repetitious. It is slightly repetitious because the same old problems keep presenting themselves for the same old reasons that the same old people get appointed and they have the same professional associations with the same old standards that keep perpetuating the current problems. The only way we are going to solve this is to change the professional standards and, more importantly, change the mix of people who come into this and in particular the 663 people in Australia who currently enjoy a monopoly.

**CHAIR**—Thank you. Your submission is very comprehensive, I must say. We will try and get a copy of the Cork report for the committee's use. I notice that in paragraph 81 you say you are probably in a position to have retired judges or Queen's Counsel offer evidence to the committee, and the secretary may well contact you about that.

**Mr Slater**—That is quite the case. I should add that I spoke to former Justice Rogers yesterday, who wanted me to pass on the message that he thought the process of having public examinations and then having to do the same examinations all over again in a court hearing—that level of duplication and waste—had, in the expression I think he used, nothing on *Bleak House*.

**Senator FIERRAVANTI-WELLS**—Thank you for that. Whilst it took a bit of time, I think you have touched very much on some practical solutions. Can I just ask about the 663. What is the number we are potentially talking about? How many people, if we did open it up, could become liquidators? Have you thought about that figure?

**Mr Slater**—I do not think there should be a limit on it, in the same way that solicitors do not have any particular limit on them, because otherwise we are really talking about economic trade protection, and that is not good enough. Neither the bar associations nor the various solicitor associations put any such upper limit or quota on things. I think it is very true that a lot of the work of what a liquidator does is not so much accounting. A lot of it is psychology. It is dealing with people's problems. It is getting them to accept the fact that they are going to lose a lot of money and take a haircut. But that is not a skill of an accountant. It is a skill of anybody who is good at dealing with people and dealing with conflict—something that, for example, barristers are very good at doing. The sorts of qualifications, in answer to your question, to open this up to would be to, say, I would suggest, people who have actually been in court and done at least five, 10 or 20 cases involving liquidations. If you have not been in court and actually faced down a judge and done one of these, you should not be acting as liquidator.

There should be a closed-book exam as distinct to an open-book exam, so that people can prove that they have a fundamental grasp of equitable principles and company law—not just

parroting neat little answers that they have cribbed from one of those nutshell books but actually demonstrating to an examiner that they truly understand the underlying concepts.

**Senator FIERRAVANTI-WELLS**—So potentially 663 could become any number. At the moment we have this difference between official liquidators and other liquidators—court appointed and all that sort of thing. In your scenario you really see that opening up, and of course you also see the court-appointed liquidator lists becoming a lot broader than they are.

**Mr Slater**—Yes. There is another tension here that nobody has really articulated. A lot of the jobs that official liquidators take on they lose money on. If we are really being honest about this, what we have is a system whereby we let people make up for the loss jobs by absolutely ripping off people on the good, fat and juicy jobs. So it is a cross-subsidy, and that is a nasty little fact that nobody really wants to talk about because to really solve that we have to talk about government funding of loss jobs. The government probably just does not want to fund that. That is how we would solve the problem.

**Senator FIERRAVANTI-WELLS**—We have canvassed this in previous evidence, but it might be worthwhile. Mr Slater, I do not know if you have gone back and had a look at that evidence, but you might want to go back and look at some of the previous evidence, where we have discussed the possibility of some sort of tiered structure where we look at a modified version of liquidation where you can immediately see whether a company has no assets there and we really should not go through the whole rigmarole of it. Potentially that could be done within that. So, if you have a look at that evidence and have any further comments in relation to that, that might be very useful for the committee. I will just ask this: if we are dealing with insolvency practitioners, should we have one body dealing with the insurance, registration and all those issues pertaining to insolvency practitioners?

**Mr Slater**—I think that is right, but the point that was made this morning is that I am very wary of tribunals, secret hearings, secret ASIC reports and the like. I think that if there is going to be a disciplinary action or an operational issue then it should be heard in open court before a judge. The advantage of having judges as opposed to these tribunals—and I am talking about Justice White or Justice Barrett in New South Wales or Justice Robson in Melbourne, for example; they are just three people I have picked at random—is that they will put their finger right on the point almost immediately and they will see right through all of the issues, camouflage, subterfuge and obfuscation. That is the beauty of judges: they have been around for too long, they have heard it all, they have seen it all every which way and they have a way of getting right to the point.

**Senator FIERRAVANTI-WELLS**—I have one last question. In paragraph 17 you make the point that the monopoly was not always the case, and you then go on to removing the monopoly and the 'for cause shown'. Am I to infer that potentially we should be looking at percentage of assets recovered and that type of scenario? Is that the sort of thing that you are potentially suggesting?

**Mr Slater**—That is a very difficult issue. I think the answer to that is yes. There is one thing that was said that is worth a quick quote. I do not think I included in my original submission. It is by Chief Justice Spigelman of the New South Wales Supreme Court. This applies strongly to both solicitors and liquidators. He said:

The comparatively recent emergence of the tyranny of billable hours and the ubiquity of time-based charging—a system which rewards the least efficient—has created real difficulties for the maintenance of an ethic of service.

I think that statement by His Honour is absolutely spot on. It applies very strongly to insolvency practitioners, who differ from legal practitioners in a very fundamental way. If I sign somebody up as a client, I have to do a costs disclosure and a fee agreement. There are many, many ways it can be reviewed, chopped up, sliced, diced, second-guessed—

**Senator FIERRAVANTI-WELLS**—And enforced.

**Mr Slater**—and enforced. The legal system is very accomplished. It has a very greased-system way of doing this. If you appear before a judge, he may ask you directly, out of the blue, how much this is costing, and you have to be prepared to answer. In my submission, I point this out. There was a case on this just last year: people went in and had a deed of company arrangement. They said, 'How much will this cost us, Mr Scheme Administrator?' and he said, 'It'll cost you X.' They said, 'Okay, that's good; we'll vote for that.' So they signed up for X. He then turned around and said, 'I'm not happy with X; I want more money,' and went back to court and got it increased. Tell me what will happen if I do that as a panelbeater—say, 'I'm going to fix your car for X dollars,' and then turn around and go to the court and say, 'No, I want more money because I underbid on the job.' I do not know of any other profession where you could do that. Certainly in the legal profession you could not do that if you give a fixed fee agreement. It is yet another anomaly that there is a distinct lack of regulation for billable hours with insolvency practitioners.

Another thing that I want to point out I will attribute to a QC that I work with, Mr Miller, QC. He ran the Spedley royal commission in the early 1990s and is a former Commonwealth prosecutor. He described the liquidation process as coming in and appointing a shark—and not only appointing a shark but also a whole lot of feeding fish behind him. The way this comes about is as follows. You hear the headline figure the administrator, the liquidator or the insolvency practitioner—or whatever description you want to give them—is going to charge you $400, $600 or whatever per hour. What they do not mention is that there are clerical staff at $300 an hour, the girl who serves up the tea and coffee at the creditors' meeting is being billed out at $300 an hour and the photocopies are being charged out at $2 page and so are the emails. Very quickly you get a cascade effect where you are not supporting the liquidator; you are supporting an entire colony of people who are sucking off the corpse of these companies. Suddenly, then comes a creditors' meeting and they go to approve the remuneration—which is another problem. They say my remuneration is X but, 'We forgot to mention all these disbursements.' So people then go and approve their remuneration only to discover that the actual bill that is really going to cost the creditors is considerably more than what they thought they were signing up for. That is another issue.

The open-ended hourly billings that liquidators do are, in my view, completely unreasonable. I have some sympathy for professional people who bill by the hour. I am in that position myself. But I still have constraints. It is not carte blanche for me to charge my secretary out at $600 an hour. It is not $600 for liquidators, but I certainly know of cases. I know of one case of a major top 5 firm who served coffee to all the creditors, and I remember calculating how much the charge-out rate was for the girl who brought the coffee in and I think I worked it out at about $80 a cup.

**CHAIR**—I hope it was very nice coffee!

**Mr Slater**—Unfortunately, it was not.

**Senator PRATT**—I have two questions, if you could answer them briefly. At the beginning of your remarks—I think in response to this morning's evidence where we discussing CALDB—you basically implied that the decisions are fairly impenetrable. Do you have a view about whether those kinds of decisions are driving any kind of outcomes across the sector to influence practise?

**Mr Slater**—I am sorry but I did not quite understand your question.

**Senator PRATT**—You talked about the decisions of CALDB, the Companies Auditors and Liquidators Disciplinary Board, and you made some references to 200-page decisions.

**Mr Slater**—Yes.

**Senator PRATT**—And you were critical of that. In your view, do those decisions—other than taking action in those individual cases—play any role in influencing standards across the sector?

**Mr Slater**—I do not think so. What I do think is that cases such as the one I cited before with Richard Albarran being successfully sued for a couple of million dollars really do have a very, very direct effect, where the hip pocket hurts. When you are making $2 million a year, with fines of $20,000 and reports by CALDB and suspensions for six months and so on, you might be out of the count for six months every now and then but you will make it up in the next five years. So I do not think play much of a deterrence role, despite what they might say. They are also very expensive to run. That is another thing that was not spoken about by Mr Magarey this morning. How many cases do they do? How much does it cost taxpayers to fund CALDB for a year? Divide one into the other and ask yourself whether that could be more effectively done in open court and whether it could be done more quickly. Instead of taking 12 months, a judge could probably turn that around in a matter of days.

**Senator PRATT**—Lastly, should this committee have a list of issues that come out of this inquiry that it believes needs to be addressed, hypothetically, who is best to drive a reform process?

**Mr Slater**—I could suggest to this committee any number of judges or senior QCs who are extremely experienced in this field who could almost certainly follow the path of the UK in 1982 with the Cork report.

**Senator PRATT**—Thank you.

**Senator WILLIAMS**—Mr Slater, thank you for your appearance. I could listen to you all day. I think you have a lot of knowledge on the issue. In summary, you are saying: the liquidator has too much power when appointed. They can overrule creditors' fees and agreed charges. You believe that there should be more competition brought into the industry. You believe that perhaps creditors are not getting a fair return from assets being sold up when they should be. Would you agree with my summary?

**Mr Slater**—Yes, I would.

**Senator WILLIAMS**—And you believe that there should be some radical changes in the industry, as far as legislation goes, do you?

**Mr Slater**—I do. I think the biggest change would be the ability to remove them without having to go to court, just through an ordinary vote at a creditors' meeting, if they are not performing. I think also that they should be bound by some kind of better fee disclosure and agreement, including not just themselves but all of their followers. So, for example, if I am a liquidator and I say, 'I'm going to quote you $500 an hour,' then I should have to tell you exactly how much my staff are going to cost and how many there are going to be, how many timekeepers there will be and, most importantly, how much time they will spend. It does not matter what label you put on it, whether it is 'liquidator', their staff or whatever, creditors are looking at a package: 'How much will it cost us to have these people, as a group, do our work which they enjoy a monopoly on?' That is the question; that is the issue that needs to be fixed. I do a fee disclosure and cost agreement under the Legal Profession Act; I have to give a quote: 'It is going to range around this amount.' Or, if I cannot give a quote, I have to say why and I have to list the factors. I cannot just say, 'It's going to be as long as a piece of string that I choose.'

**Senator HURLEY**—No doubt you are making some very good points. I am concerned that you are exaggerating the case in a number of aspects. I mean, you are taking some of the most egregious examples of practices all through and using those as the norm. For example, you said that CALDB takes 12 months to do a case when, in fact, Mr Magarey said that some of them only take days.

**Senator FIERRAVANTI-WELLS**—He said six months.

**Senator HURLEY**—But he did say some cases only take days.

**Senator FIERRAVANTI-WELLS**—No, he said 'the final hearing'—that, once they have gone through the procedure, the actual order, or whatever it is that they are going to enforce on the person, only takes a day. That is as I heard his evidence this morning.

**Senator HURLEY**—He was saying that there are different kinds of cases: some take days; some take months. It depends on whether it is a procedural issue or whether it is a longer issue. And I do not think that anyone could argue that there are not some court cases that take years and that there are not allegations that some barristers drag out cases and charge large fees that end up costing the litigants huge amounts of money.

**Mr Slater**—I totally agree.

**Senator HURLEY**—And I do not think anyone could argue that there are not bad practices amongst lawyers. I know a number of lawyers and accountants, and I know that, if I were having my company run for me in administration, I would rather have an accountant to do it than a lawyer—which is not to say that there might not be a case for lawyers to be involved in some aspects. But I do think that you are kind of overexaggerating your case. And to talk about quoting fixed costs for any kind of receiver or administrator—I mean, you might give an indication, but I think any receiver would argue that there are companies where you could get in

and find out that there was a huge mess, one much larger than it looked at first blush when you were talking to the people initially. So I think that, yes, there is a need for change, but to say that all lawyers are good and all accountants are bad and that appointing accountants is the start of everything going wrong is a bit of an exaggeration.

**Mr Slater**—No, what I was really getting at was this. You are absolutely right as to barristers and particularly solicitors, and another statistic that the committee might find interesting is that, for a typical firm, out of a legal budget of $100, less than $5 is spent on barristers; the other $95 goes to the solicitor's firm. That is something else that the committee might want to keep in mind. There is overcharging in the legal profession; it is rampant—I agree with all of that. However, notwithstanding that, there are still better controls in it that there are with liquidators—and I say that from a lot of experience. Neither system is perfect.

**Senator HURLEY**—No.

**Mr Slater**—And I completely agree with you about who should be watching the fox and the chickens, as it were. I am not saying that everything went wrong in 1958 and all accountants are bad and all lawyers are good. That is definitely not what I am saying. What I am saying is that the hourly billable charge that came into vogue in the 1970s and 1980s is really the core issue. There has been a fundamental change in the service ethic, which Justice Spigelman has pointed out. That is common to all service industries that charge by time.

**CHAIR**—We will have to leave it there because we are 20 minutes over time.

**Mr Slater**—Chair, I ask to tender a modified submission and an annexe to that, please.

**CHAIR**—I am quite happy for you to do that, Mr Slater. Thank you very much for your evidence; it has been very good and very useful.

**Mr Slater**—Thank you.

**Proceedings suspended from 2.01 pm to 2.07 pm**

**INGRAM, Ms Veronique, Chief Executive and Inspector-General in Bankruptcy, Insolvency and Trustee Service Australia**

**OSBORNE, Mr Matthew, Principal Legal Officer, Corporate Strategy and Support, Insolvency and Trustee Service Australia**

**HANLEY, Mr Jeff, Acting National Manager, Regulation and Enforcement, Insolvency and Trustee Service Australia**

**CHAIR**—Welcome. Thank you for filling in. We invite you to make an opening statement.

**Ms Ingram**—Thank you. We do not have an opening statement, but I would like to note that, as you would know, ITSA is the regulator of the personal insolvency system and, as such, it does not advise the government in relation to policy issues surrounding the legislation underpinning the system itself. In February last year, the responsibility for advising the government in that respect was passed to the Attorney-General's Department. I would also like to draw your attention to a study by the International Association of Insolvency Regulators which you may not be aware of. Last month they issued a study on the development of the insolvency profession and assessment of its performance in several countries, mostly OECD. It looks at the licensing registration regimes in other countries, which I think would be of interest to the committee.

**CHAIR**—Would you like to tell us exactly what ITSA does do? That would be useful for the committee.

**Ms Ingram**—To put it very simply, we run the bankruptcy system. Historically, it is quite complex in the sense that we have what we call the Official Receiver, the Official Trustee and the Inspector-General in Bankruptcy and they all have quite distinct functions. I think it was 10 years ago that the government decided to establish ITSA as an executive agency. ITSA itself is almost like a secretariat to those functions, but basically we register bankruptcy petitions. We administer them, we regulate the registration of practitioners and we enforce the law in relation to, say, debtors who have breached the law. That is a very basic description.

**CHAIR**—Thank you very much. Among other things, we are interested in the registration of practitioners. Would you like to tell us what you do in that respect? It has become one of the big issues for this inquiry because it seems there are certain deficiencies in that system.

**Ms Ingram**—First, I should say that we only register trustees in bankruptcy and debt agreement administrators. We do not register liquidators et cetera under the Corporations Act, as you know. So I would say it is a different system but very similar. In respect of the detail, I will pass you on to my colleague Mr Jeff Hanley, who heads up our regulation and enforcement area.

**Mr Hanley**—Senator, are you asking how we go about registering trustees?

**CHAIR**—Who do you register—

**Senator FIERRAVANTI-WELLS**—What is the process?

**CHAIR**—What is the process? What are the standards? Is the registration permanent or is it for a limited period? Do you require evidence of continuing education? What if there is malpractice—do you have the right to suspend?

**Mr Hanley**—The submission included a reference to *Inspector general practice statement 13*. I draw your attention to that statement. It should have been attached to the cover letter from the inspector-general.

**CHAIR**—I cannot actually see it.

**Mr Hanley**—I will run through it with you step by step, if you wish.

**CHAIR**—That is what we would like you to do.

**Mr Hanley**—Certainly. To become a registered trustee a person lodges an application to become registered with the inspector-general. The application must be accompanied by a prescribed application fee and certain documentation, which is listed in the regulations. Once an application is received, with the application fee, the inspector-general convenes a committee to determine the application. The committee, as per our requirements, comprises: the inspector-general or their delegate, which would be a member of my senior staff in the regulatory area; a separate member of the Australian Public Service; and another person who is a member of the Insolvency Practitioners Association of Australia. They are the peak industry body as far as registered trustees are concerned.

The requirements are as follows. I will give them to you in order. The application must be on the approved form. The applicant must provide proof of the qualifications that we require, along with two referee reports attesting to the applicant's current knowledge and experience. The applications are available on our website, so they are very easily obtained by people who wish to become registered. Once the completed application is received, the committee is convened and the applicant is interviewed. The interview comprises 20 questions, which are asked of all the applicants. We have those available; however, if you wish to see them, Senators, I ask that they be kept in confidence, for obvious reasons—clearly we do not want those out in the public domain because that would give away the exact types of things we are looking at.

**CHAIR**—What sort of qualifications do you have to have?

**Mr Hanley**—The applicant must have an accounting degree and show that they have had relevant employment on a full-time basis for a period of not less than two years in the preceding five years. They have to demonstrate to the committee that they have the ability to perform satisfactorily the duties of a trustee immediately upon registration. So we require an accounting qualification to become a registered trustee. A lesser qualification is needed to become a debt agreement administrator.

**CHAIR**—Thank you.

**Senator FIERRAVANTI-WELLS**—There has been a lot of talk about and attempts at comparison with what ITSA do and perhaps comparing it with some of the deficiencies that may or may not be perceived in relation to corporate insolvency. I think it would be useful if you

could perhaps go back over the evidence before this committee and just as a general question see if you do have some additional comments that you may wish to put in writing to us. One of the issues that I would really like to invite you to comment on is that there has been talk about one body for insolvency practitioners. So perhaps in a blunt way, taking the ITSA model because it seems to have been, in the various comments that we have heard, working well and there are some very positive things about it and translating that across the insolvency practice. What are your views in relation to that?

**Ms Ingram**—I think I would go back to my opening comment which is that we are the regulator of the personal insolvency system. I think it is a policy question as to what the best regime would be. I would point out some issues that you would want to consider. I have to say that ITSA has the advantage of a single focus but bankruptcy of individuals is quite a different matter from insolvency of corporations. It is less complex mostly. The personal insolvency statistics show that most bankruptcies are actually personal bankruptcies. They do not relate to business. I think the numbers are running at, say, 15 per cent that relate to business in the sense that someone might have given a guarantee who is operating a company and has become bankrupt. You are looking at what I would call more or less plain vanilla type insolvencies although some of them are very complex. It is a different kettle of fish.

In my previous background in Treasury I was responsible for the policy advice in relation to the Corporations Act and I understand the requirements and the regime. I have to say that, and this is a view from my personal perspective, one of the issues that you would need to consider if you were looking at a single regulator of both of the systems is the fact that—and that is one of the issues that I think the committee is exercised about—it is very difficult to divorce insolvent trading from the regular operation of the company in the sense that, if you had a separate regulator, you would have to work very closely with ASIC. Also with the fact that you are looking at antecedent transactions you have all these issues where breaches of directors duties are all core Corporations Act obligations on those involved in companies, so you are taking it out of that regime and putting it in another. I think that raises real complexity issues. You would have to build in a lot of bells and whistles to make it work. It is not a simple cut and paste onto a single regulator that is doing what we do—

**Senator FIERRAVANTI-WELLS**—To combine the regulatory functions of ITSA and the regulatory functions of ASIC and put them under one umbrella is not as simple as that and that is really what you are saying.

**Ms Ingram**—Sure, there are many issues involved. Insolvency, and I do not claim to be an expert in the corporate area, is inextricably linked up with directors, directors duties, creditors—

**Senator FIERRAVANTI-WELLS**—They all have responsibilities.

**Ms Ingram**—Yes. You just cannot divorce those provisions from the day-to-day running of the company because insolvency is an act that happens in a particular time and you have everything that happened before that which is regulated by ASIC up to that point and then you have a different regulator—so what does that mean?

**Senator FIERRAVANTI-WELLS**—Having said that, there would be aspects of what it does well now, and has been lauded for doing well, that could be transferred over to a beefed-up

regulation system in corporate insolvency, such as the interviewing process. How could you see that being transferred across?

**Ms Ingram**—I cannot really comment on the way ASIC exercises its powers in relation to the registration process; I can really only comment on what we do. I do not see any reason why you could not translate some of the practices that we have and the provisions in the act across to the Corporations Act regulation, but I am not speaking from an in-depth knowledge of how ASIC administers the regulations.

**Senator FIERRAVANTI-WELLS**—Obviously, while costs do feature, the costs regimes and how they are dealt with in the personal bankruptcy area are very different. Would you like to give us a bit of a thumbnail sketch in relation to how it is done there?

**Ms Ingram**—Do you mean the fees and remuneration?

**Senator FIERRAVANTI-WELLS**—The fees and those sorts of things.

**Ms Ingram**—Again, I do not want to comment on the fees and remuneration structure in relation to liquidators under the Corporations Act—

**Senator FIERRAVANTI-WELLS**—No, I am asking you in terms of—

**Ms Ingram**—In our area?

**Senator FIERRAVANTI-WELLS**—Yes.

**Ms Ingram**—I will pass you to Matthew Osborne, head of our legal area, because there are amendments afoot, as you probably know, in the Bankruptcy Legislation Amendment Bill, which if they go through will have an impact to some extent on the way that remuneration is supervised, if I can put it that way. But Matthew can take you through what powers we have in respect of remuneration and how the remuneration of trustees is set under the act.

**Senator FIERRAVANTI-WELLS**—Thank you.

**Mr Osborne**—Senator, the current scheme is premised on the bedrock principle of the remuneration being set, essentially, by creditors. Where that agreement is not reached with creditors, we currently operate under a scheme where a default exists that takes the trustee to a remuneration schedule fixed by the Insolvency Practitioners Association which is a scale of charges under regulations. One of the difficulties leading to the review of the current remuneration scheme is that that scale of charges has not been updated for some time. I think it is currently standing at 85 per cent of that scale. The current scheme also relates to a minimum charge that a trustee can take from an estate, and if that is not available from the estate they can pursue the bankrupt personally. Again, that is an issue that is taken up in the review, which has led to both an increase in the minimum rate and a change from being able to pursue the bankrupt personally to only being able to take money from the estate where it exists.

The current system also relates to disputes about the rate of remuneration, the trustee claims, and currently we have a taxation process, as in someone will be appointed a delegate of the

inspector-general to examine particular charges. Again, that is going to be changed, if the bill before parliament is passed, to a system of review whereby a no-fee process will apply and the costs presented by the trustee will be considered according to whether it is necessary work and it is properly performed based on a number of criteria to be set out in regulations. That is the current scheme that we operate in terms of remuneration.

**Senator FIERRAVANTI-WELLS**—A standard bankruptcy has certain steps, so does that fixed scale take into account those various steps and that is what can be charged?

**Mr Osborne**—As I understand it, that is correct. It is broken up into a number of steps.

**Senator FIERRAVANTI-WELLS**—So, as opposed to now listing those fees as per the fixed scale, you are now going to move to a system where it is going to be a global figure; is that what is going to happen?

**Mr Osborne**—It will be examined by a delegate of the inspector-general against a number of criteria set out in the regulations.

**Senator FIERRAVANTI-WELLS**—Why are you changing it?

**Mr Osborne**—As I mentioned, there was a concern that the scale had not been changed for a considerable time and that it did not provide the flexibility considered necessary to examine a bill of costs from a trustee, to use your term, globally. The proposal seeks to address those deficiencies.

**Senator FIERRAVANTI-WELLS**—Does that have the power to go up or down?

**Mr Osborne**—Yes, those will be the two outcomes.

**Senator FIERRAVANTI-WELLS**—Is that decision reviewable?

**Mr Osborne**—The decision on the initial costs is not reviewable. The decision on the review of costs can be taken to a court for a review.

**Senator FIERRAVANTI-WELLS**—Do you have a minimum charge?

**Mr Osborne**—As currently set out in the bill before the parliament, it is $5,000.

**Senator FIERRAVANTI-WELLS**—So anything above $5,000 will have to be according to the new system?

**Mr Osborne**—Correct.

**Senator FIERRAVANTI-WELLS**—Whereas at the moment you might have up to, say, $5,000, plus 20 items, now you would just work out something. You were not present to hear the comments in relation to agreements and the potential for some form of cost agreement. That is not the really case here because we are talking about bankruptcies that are mostly small; we are talking about individuals. In the bigger bankruptcies, if I can put it that way, where there is a

considerable amount of money, there are a lot fewer personal bankruptcies than the corporate equivalent; you do not have the run-of-the-mill company without assets. So you do not really have too many big bankruptcies, do you? Did you understand my question?

**Mr Hanley**—Senator, are you talking from the point of view of whether ITSA administers the bankruptcy or whether there are big bankruptcies?

**Senator FIERRAVANTI-WELLS**—No. What I am saying is that, in corporate insolvencies, there is far greater scope for companies and where you have complex insolvencies that incur much greater fees and those sorts of things. With the comparison with personal insolvencies, do I understand that it is a different scenario because most of the people you are dealing with at the personal level are just ordinary people who are really going into bankruptcy because they cannot pay, sometimes regrettably, a $5,000 or $6,000 credit bill?

**Ms Ingram**—That is not to say that there are not the big ones.

**Senator FIERRAVANTI-WELLS**—No.

**Ms Ingram**—For instance, Alan Bond. So there are the odd ones which are complex and inextricably linked with their business affairs, so it can be quite complex and, of course, the fees will reflect that.

**Senator FIERRAVANTI-WELLS**—But they are dealt with in that same framework?

**Ms Ingram**—Yes.

**Senator FIERRAVANTI-WELLS**—So if we do set up a costs framework there is no difference. You have shown that you can deal with the small ones and the big ones using the same framework?

**Ms Ingram**—Sure.

**Senator HURLEY**—It might be included your practice statement but I am not sure about the wording. If there is an identified problem, do you have the ability to come in, stop the work of a particular trustee and have a look at the situation to see whether it is proceeding properly?

**Mr Hanley**—Yes. A large part of the work we do is complaints handling. That may be a bankrupt, a debtor, a creditor or an interested party who just wishes to make a complaint. We will go and perform an inspection. Our inspectors will physically go into the practice and examine the allegation, and then we will report the findings to the person who made the allegation.

**Senator HURLEY**—So the actions of the incumbent trustee are suspended for that time while you go in and investigate, and you do not need to go to a court to stop things or get any agreement from the bankrupt?

**Mr Hanley**—It is a twofold answer. If the trustee is aware we are investigating a complaint, it will be expected, and we make it quite clear when we notify them about the complaint, that we

will want to examine the file in its entirety. Our inspections are usually quite fast, so it is not as if they are going to have to wait six months before they can continue actioning it. We aim to inspect a number of administrations in a matter of days.

**Senator HURLEY**—Do you require the trustees to have professional indemnity insurance?

**Mr Hanley**—Yes.

**Senator HURLEY**—Do you check that?

**Mr Hanley**—Yes. It is required at the point of registration, and three years later at the point of renewal, and we annually check it as well.

**Senator BUSHBY**—How many registered trustees in bankruptcy and debt administrators are there?

**Ms Ingram**—There are 209 trustees in bankruptcy and I think 57 debt agreement administrators.

**Senator BUSHBY**—Does that change much? Are there many applications each year?

**Ms Ingram**—It is fairly static. The number of debt agreement administrators has increased more so than trustees.

**Senator BUSHBY**—So the absolute number does not change. What about the composition of the individuals who actually are trustees? Is there much change in that? Are new people coming on and other people dropping off the list?

**Mr Hanley**—It is quite static. On average over the last couple of years there might have been one or two or three new trustees per annum. With debt agreement administrators, as the Inspector-General mentioned, because it is a relatively emerging industry there have been more, but that is starting to plateau out now down to three or four new ones per annum.

**Senator BUSHBY**—Are there any ongoing professional education requirements?

**Mr Hanley**—We require them to have the minimum qualification standards. With respect to debt agreement administrators, we run two professional development days per annum.

**Senator BUSHBY**—Do they have to go to those?

**Mr Hanley**—We require them to attend and we actually find the majority of them and their senior staff attend.

**Senator BUSHBY**—But it is not in the legislation that they have to go.

**Mr Hanley**—No, that is right; we just do that.

**Senator BUSHBY**—You mentioned that the qualifications for debt administrators did not require an accounting degree. Is there any minimum qualification?

**Mr Hanley**—It is a minimum Certificate IV in Financial Services which specialises in accounting, plus experience. As I said, it is an emerging industry.

**Senator BUSHBY**—You have set out in your submission your inspection of administration systems and how you go about that. Do you have any statistics you can give us that would present the number of issues you find in terms of your annual inspections? What do you actually find? If you conduct 100 inspections, what percentage of those would actually throw up some problems?

**Mr Hanley**—I have some statistics on that. In 2009-10, with the official trustee we have examined 150 administrations and identified 12 category C errors, which are at the lowest end, being more administrative errors. For registered trustees we have examined so far this year 315 administrations and have identified 137 errors.

**Senator BUSHBY**—Are they category C as well?

**Mr Hanley**—They are across the board, categories C, B and A—A being the worst. If you wish details on what we determine as category A, B and C errors, I would rather give that information in camera. We have a lot of people who are very curious about our risk rating system.

**Senator BUSHBY**—If you could do that in camera I am sure we would accept it.

**Mr Hanley**—With regard to debt agreement administrators, so far this year we have examined 226 administrations and identified 39 errors. Administrations across the board total 691, with 188 errors identified so far.

**Senator BUSHBY**—I noticed that in your submission there is a list of possible actions that you take when breaches are identified—

**Mr Hanley**—That is correct.

**Senator BUSHBY**—and there is a range of things that you do, which I would imagine would be relevant to the level of breach that has occurred. In the end, you also have imposition of penalties. The last three are litigation, involuntary cancellation or registration of proceedings. Particularly regarding involuntary cancellation, if someone has committed a very serious breach and it is the opinion of ITSA that they have basically abrogated their right to be a trustee in bankruptcy, how would you go about addressing that? What process would you need to go through?

**Mr Hanley**—As I mentioned earlier, we conduct inspections. That was in response to a complaint. Part of our annual program is to do inspections. If we identify systemic or serious enough errors in that, we issue as a first instance what is called a show-cause process. We outline the issues we have identified and ask them to respond within a very short period of time as to how we would like them to respond to those allegations. If we are not satisfied with the show-

cause process, we convene a committee. It is similar to the registration committee, which comprises a senior member of my staff, a senior member of the Australian Public Service and an IPA representative. That is the same composition of a deregistration committee or a committee to determine. The committee will then conduct its investigations and make a recommendation to the Inspector-General.

**Senator BUSHBY**—So it conducts its investigations. It has an investigative power. Do you have the power to demand further records?

**Mr Hanley**—That was bad terminology. The committee will rely on the report compiled by the regulator, which will be a chronology from start to finish, outlining the allegations. We will then put that report to the committee, they will make the determination and the determination will comprise an interview with the registered trustee or the practitioner.

**Senator BUSHBY**—Through that process, presumably the trustee would know that they are being investigated?

**Mr Hanley**—Certainly.

**Senator BUSHBY**—You get to the point of the interview. Do they have any right to legal representation at that point?

**Mr Hanley**—Yes.

**Senator BUSHBY**—Having made a determination that the committee would like to take away the right to continue as a trustee, what right of appeal would the trustee have?

**Mr Hanley**—The Inspector-General will give effect to the committee's decision. The person has a right of review with the Administrative Appeals Tribunal.

**Senator BUSHBY**—And, from there, up through the courts, as appropriate?

**Mr Hanley**—Yes.

**Senator BUSHBY**—That is all I have. Thank you very much.

**CHAIR**—As there are no further questions, we thank ITSA for appearing. Your evidence has been very useful. Thank you very much.

**Mr Hanley**—Thank you.

**Evidence taken in camera.**

*Evidence was then taken in camera—*

**Committee adjourned at 4.19 pm**