COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Reference: Liquidators and administrators

WEDNESDAY, 23 JUNE 2010

CANBERRA

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SENATE ECONOMICS

REFERENCES COMMITTEE

Wednesday, 23 June 2010

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

Substitute members: Senator Williams to replace Senator McGauran for the committee's inquiry into the role of liquidators and administrators

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

Senators in attendance: Senators Eggleston, Fierravanti-Wells, Pratt, Williams and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

Committee met at 7.35 pm

CHAIR (Senator Eggleston)—I declare open this final hearing of the Senate Economics References Committee into the role of liquidators of administrators. On 25 November 2009 the Senate referred the inquiry to the Senate Economics Committee for inquiry and report by 31 August 2010. This inquiry was set up to investigate 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. The committee has received over 90 written submissions and has held public hearings in Canberra, Adelaide, Sydney and Newcastle.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or to disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the grounds upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera, and such a request may be made at any other time. For those witnesses before the committee who are officers of departments, the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

[7.38 pm]

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

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

CHAIR—Welcome. Your submission No 36 has been received. I invite you to make an opening statement if you so desire.

Mr Robinson—Thank you. The IPA welcomes the further opportunity to appear tonight and address the inquiry. The IPA has taken the opportunity to listen to and analyse the evidence from various witnesses, although we note that many submissions remain confidential. We have also noted the areas of apparent concern of the members of the committee throughout the hearings. We have been in contact with individual members of the committee offering any comments or assistance. We have provided the secretariat with direct briefings and other information on the law and practice of insolvency. Denise North and I are therefore here tonight with some sense of the issues of concern to the committee, which we will address, and also issues of concern and interest to the Insolvency Practitioners Association as the peak insolvency body.

We also mention that since March this year the IPA has made some significant progress in the following areas. Firstly, the endorsement by its annual general meeting of members on 19 May of a revised disciplinary regime that will allow the IPA to act more promptly in the case of alleged misconduct and which allows the IPA to more promptly refer matters to a regulator. Secondly, further changes made at the AGM will allow us to work more closely with the other professional bodies in the conduct of quality assurance reviews for insolvency practitioners in order to further support our members' compliance with the law and the IPA code. Thirdly, we progressed our review of our code of professional practice and we are consulting with all stakeholders in that regard, and we are working especially closely with ASIC and the ITSA. The revised edition of the code will give enhanced guidance on independence, member cooperation, remuneration and other issues.

Finally, I mention that we held a very successful annual conference in Adelaide, attended by over 250 delegates, which traversed numerous current issues in insolvency practice. We were honoured to have had Mr Michael Kirby give a speech. His speech is in our latest journal, which we have provided to the committee. We were gratified by his perceptive and focused views on insolvency practitioners.

In our initial submission at our appearance on 12 March we made five points. Firstly, Australia's current insolvency regime is sound and it contributes positively to the economy and community, and its practitioners are closely regulated by law, regulatory authorities and the IPA code. Secondly, insolvency practitioners play a key role in the orderly wind-up of insolvent businesses. Thirdly, the community must have confidence in the regime and the integrity of practitioners. Fourthly, ASIC is the body responsible for practitioner registration and discipline, with ITSA regulating personal insolvency practitioners. And fifthly, practitioner remuneration is

closely regulated both in corporate and personal insolvency. We maintain these as our main messages for the inquiry.

Other issues that we have identified as the subject of focus since that initial submission include the following, and accordingly they are addressed in the IPA's second submission. Firstly, registration requirements for practitioners could be reviewed, even though the present requirements in relation to qualifications and experience are significant. Any interview process or written assessment may well add to this process. In that respect, specialist insolvency educational requirements could be required, for example, by way of the Insolvency Practitioners Association's university practice and ethics based assessments or an equivalent program.

Secondly, remuneration continues to be an ongoing issue for the profession. It is perhaps inevitable in circumstances where complex work is often required in seeking to recoup, preserve and increase available funds. There are a range of processes whereby fees are subject to scrutiny and the IPA code's remuneration report seeks to provide that opportunity in a manageable format. At the same time, the IPA continues to emphasise remuneration and independence in its code and in its training. In cases where there are disputes we would support any non-court process, for example such as what is proposed in personal insolvency—a reform which we supported.

Thirdly, in assetless administrations the reality is that creditors, the community and our members bear the cost of these, and we have explained that fee rates are set taking these into account. Government funding, as in the case of personal insolvency, may be one issue to confront in relation to these costs. If rates of practitioners were to be pegged in some way the consequence of that in terms of expertise and attention to insolvency matters would need to be considered. We continue to support insolvency process mechanisms that reduce costs, such as electronic communications with creditors via website, email and other means. At this stage, the law on these mechanisms is lagging.

Fourthly, the question of better creditor control in insolvency proceedings is another theme—in particular in relation to the rights of creditors to replace a practitioner who they consider is not performing. There is a ready answer to that in that bankruptcy law has, for over a century, simply allowed creditors to replace a trustee by resolution. That said, the motivation of certain creditors in so doing may be questionable, and accordingly some control may need to be placed on this power. It is apparently not often used in bankruptcy, in any event.

Fifthly, in relation to practitioner regulation, the idea of an ombudsman was one raised by the IPA and others. We are generally aware of the nature of such a role both here and overseas. We have not developed firm ideas on the role, mainly because it cannot be seen in isolation from the whole regime of regulation of the profession, comprising, as it does, the IPA, creditors, regulators, the courts and the media. The role may have a place as an oversighting body of both the professions and the regulators. In our submissions we have drawn attention to the reforms proposed in the 1988 Harmer report, which involved a statutory board in a similar role. That recommendation involved an increased role for the IPA and other professional associations. The IPA would wish to be involved in any such review.

Sixthly, we do consider that the present regime of discipline by the two regulators is somewhat uncoordinated and accordingly might benefit from some review. The process in corporate

insolvency of actions being undertaken by ASIC to the CALDB is not that different from a court process in terms of time and expense involved. ITSA's processes, by contrast, involve a more informal committee to which the IPA nominates a member, and this may be an option. The different approaches to review and the extent to which there is communication with the professional bodies, including IPA, differ considerably between ASIC and ITSA. We are also not aware of the extent of communications between those regulators. For example, one practitioner currently being reviewed was both a trustee and a registered liquidator.

Seventhly, in relation to the sum of the evidence taken, we have sought objectively to put the context in which that evidence is given. For example, in our second submission, in many cases the courts have determined the outcome of the circumstances raised, often in favour of the practitioner.

Eighthly, in terms of understanding of the insolvency regime and process, in relation to the issue where we have considered that the law and practice may have been misunderstood we have sought to clarify this in our second submission—for example in relation to the law and practice of receivers. In this regard I would like to make two points about receivers from my own professional experience. The first point is that in our second submission we have given an account of the UK regime whereby the administrator takes on the joint role—in effect as receiver—and our Australian experience is that secured creditors are often content to leave the resolution of the company's insolvency to an experienced voluntary administrator rather than themselves appoint a receiver. The VA regime works well in that respect. The second point is that the response of banks to their customers' financial difficulties is different nowadays from what it was in past recessions. Fifteen years ago there was a need for financiers to maintain their balance sheets and sell up underperforming businesses at asset values. However, now the emphasis is on getting value for the business and receivers are more often trying to resurrect a failed business or at least improve it, often over some period of time, at the secured creditors' expense so as to secure a better return for both the secured creditors and the unsecured creditors.

Finally, we make the point, as do many others, that statistical information on corporate insolvencies is wanting, and this hampers the IPA and, we would think, the inquiry in being confident about many of the issues being considered. For the purposes of this inquiry, the IPA has done its own brief surveys of its members in relation to fee rates, write-offs and so on, but real information about creditor returns, assets of insolvent companies compared to creditor claims and reasons for insolvency, particularly based on industry sector or at least up-to-date information in that regard, is not generally available. We think that this issue warrants significant attention, and we have since the inquiry been approached by ASIC as to the information which we consider is needed. Thank you.

CHAIR—Thank you very much, Mr Robinson. I might just ask you a couple of questions initially. One of the concerns that have run through this series of hearings is that ASIC might be overloaded with work and perhaps not properly or sufficiently resourced to deal with insolvency cases. Would you agree with that observation, the suggestion being that perhaps some other body than ASIC should deal with these matters? You say in your five points that they are responsible for registration and discipline.

Mr Robinson—I am saying that we have made some recommendations as to improvement to the regime. I consider that ASIC is the best placed and experienced organisation to implement

those improvements, but those improvements of necessity demand resources and ASIC would need to be appropriately resourced.

CHAIR—One of the complaints we heard was that complaints and information are passed on to ASIC and sometimes it is a very long time before ASIC responds. That suggests that it really is seriously under-resourced. Would you agree with that observation?

Mr Robinson—I am in the position of not really being able to comment with authority, from the point of view that there might be other significant issues in terms of any question raised of ASIC. It might take them a considerable time to determine what the factual position and the legal position are before they can decide to take appropriate action. It is on a case-specific basis, and so it becomes very difficult to answer from that point of view.

CHAIR—Can you imagine a situation in which another body or a body already in existence might be able to deal with insolvency matters more quickly and perhaps more effectively than ASIC seems to be doing from the evidence given to this inquiry?

Mr Robinson—No.

CHAIR—What about the disciplinary side of the issue? One of the suggestions put before this committee is that there should be a stronger registration system in which people would be registered for a limited period and required to undergo continuing education during that period and then be re-registered after that period, which might be three or five years, and that there should be a power to suspend registration so that a liquidator could not practise while that suspension was in place. What would your views be about those kinds of suggestions?

Mr Robinson—Supportive. Certainly I think that would be better for the profession and the community at large.

CHAIR—Thank you very much. Do you have any comments about the general issue that we are dealing with—that is, malpractice within the insolvency profession? Do you see that as a matter of great concern or is it perhaps a matter of some concern which could be contained?

Mr Robinson—The question of malpractice is always of great concern, and I think the IPA, together with the statutory authorities, has taken significant strides in the last few years to address those concerns through the development, for example, of the IPA Code of Professional Practice, which has had considerable traction from the judiciary, creditors and practitioners alike. It also forms the foundation of our education, which includes education around ethics in the insolvency context. So, yes, it is and always will be an issue, and considerable resources have been applied to address it. I guess the question is: how much regulation is enough regulation, or is it about effective use of existing regulation?

CHAIR—That is certainly an issue that we will have to think about: whether there is sufficient regulation or whether the existing regulation, while sufficient, is not administered effectively. So that is something that the committee will consider. I would like to turn to Senator Fierravanti-Wells for questions.

Senator FIERRAVANTI-WELLS—Mr Robinson, you said earlier that you have put in place a revised code. Could you tell us a little bit about the material differences between what was in place before and what you have revised?

Mr Robinson—It is on a continuing theme that was always envisaged in relation to the first cut of the code. So it is the first revision of the code and, in terms of this committee, its primary focus is on two areas. One is in terms of streamlining the disciplinary process such that we can garner—and require our members to provide to us—information in a more streamlined manner than previously and get their undertaking that we are allowed to forward all of that required information to the relevant regulatory bodies. The other area, in terms of enhancing the code, that would be of interest to this committee is around the quality assurance regime in partnering with our foundation bodies, the Institute of Chartered Accountants and the CPA, in terms of, because they are a lot larger organisations and more resource rich, bringing them up to speed to allow them to do that and also require our members to share the appropriate information with them such that a proper quality assurance regime can be implemented. Denise, do you have some further comments on that?

Ms North—Not in particular. But in terms of the revision of the code, there is the section on independence and declarations of relationships, which has been enhanced in the revised drafts, and I think there is more coverage of bankruptcy issues in the code.

Senator FIERRAVANTI-WELLS—You would have looked through the evidence that was given. There has been talk about an insolvency ombudsman. I notice that in your submission you have had a further think about it and you have said that the idea is worth considering, 'but'. Can I put that in the context of your previous comments. You say in section 2 that you pointed out in your first submission 'that we believe that many of these allegations stem from disappointment, anger and frustration about the fate of the business in question rather than from any action by the practitioner'. Do you think though that by having an ombudsman at least an independent body could help, if I may put it this way, alleviate some of that frustration in the sense of being an independent person who could actually explain to people, 'Look, this is really what this process is really about'?

Mr Robinson—I think that has definite merit and if looking at what an ombudsman's function should be I think that is primarily its focus, as opposed, let us say, to looking at commercial decisions or finer points of the law. I do not think that would be the role in respect of complaints to the ombudsman. It is more in terms of arbitration and facilitating better understanding and education as to the complainants and bringing the requisite parties together in a more productive way such that the issues can be understood.

Senator FIERRAVANTI-WELLS—You would have followed the evidence that has been effectively about a two-tiered sort of situation, although that is putting it a little bit simply, but distinguishing the assetless liquidations from the ones that do have assets and perhaps dealing with them in a different regime. In light of some of the evidence that has been given, is that something that we should be thinking about, where you have clearly got few or very little assets? Should we be looking at perhaps some sort of minimum requirements or minimum payments aspect rather than something that is full blown?

Mr Robinson—Firstly in terms of assetless liquidations, that would mean that there would be no funds internally derived to pay a commercial registered liquidator. If you are going to take the management of that out of registered liquidators' purview, it would require government to do that, as does ITSA with assetless personal insolvencies or bankruptcies. That has a huge resources implication attached to it.

Senator FIERRAVANTI-WELLS—That leads to my next question, which is: should we really be looking at the suggestion that was made to transfer the responsibility for supervision of liquidators from ASIC to ITSA? In other words, should there be one body?

Mr Robinson—In terms of corporate liquidation, there is a whole host of additional considerations, particularly in the commercial field, over and above personal insolvency. ASIC is the one with the skill sets there. If there was merit in having a different organisation, I think it would be a new style of organisation that had insolvency as its focus. I do not think ITSA is particularly well equipped to address corporate insolvency.

Senator FIERRAVANTI-WELLS—I guess that goes with the one-body concept of dealing with insolvencies. Obviously that would have to go with the requisite transfer of resources. It is just that it was very clear from the evidence that came before us that there was criticism of ASIC vis-a-vis its dealings with insolvency as opposed to ITSA. I think it is fair to say that has emerged as evidence here. So the next thought that has been suggested to us is that we have one body.

Mr Robinson—I think that is worthy of exploring. But I would say that on the corporate side it would need to have the ASIC style resourcing and the expertise of those people because ITSA is well short of understanding and being resourced to address corporate insolvency.

Senator FIERRAVANTI-WELLS—Again going to the priority issue for liquidators, that has certainly been one of the things that has been raised. In terms of incentives, how do you counter the suggestion that, because liquidators have priority, they basically know they are going to be paid first and there is really no incentive. Some of the criticism has been that that is a disincentive in terms of doing a good job and maximising the value of the assets. I put that question because that is part of the evidence that has been raised.

Mr Robinson—Professionals do a job and, when they do a job, they expect to be paid if there is a means of being paid. There is also within the law the ability to be remunerated other than by time costing. There is an ability, if the practitioner and the creditors are so minded, to be on a commission basis—percentage of asset recovery. So there are alternative bases on which to be remunerated that can be agreed and negotiated between a practitioner and creditors. In incentivising a professional to do something, they would ordinarily expect to be paid.

Senator FIERRAVANTI-WELLS—What about the suggestion that there is a minimum fee? In other words, you split fees so a minimum fee gets priority and the balance of it is in line with everybody else.

Mr Robinson—Let's simplify it: if we are looking to peg insolvency practitioners' costs or fees, one way of doing it quite effectively is removing from a liquidator in certain administrations the current public interest functions that we perform, which is trawling over the

coals of the past—malpractice, prime commercial transactions and preferences. Instead the practitioner could focus purely on maximising the return of the available assets and just devote their time to that, leaving the investigation—if an investigation is required—to a statutory body. That may be one way of reducing the impost of practitioner fees: dialling back the statutory reporting requirements.

Senator PRATT—What is the role of your industry association in lifting standards? Some of the evidence that has come before us is that there needs to be a new approach that will see a commitment to looking at standards within the industry—how might you be involved in that?

Mr Robinson—I might start and then I will pass to Denise. I think we have been very proactive in lifting standards with our code of professional practice and the effort that we have gone to in producing that together with the engagement of all the relevant stakeholders, including the regulatory authorities. It is included in our education process, and there is also the fact that it is more regularly referred to as the expected level or standard of practice in court proceedings. That indicates that it is a good body of work.

Having said that, we are limited in what we can achieve in that regard. It goes to how much regulation is good regulation. To coin a simple example: there is a lot of policing but you still cannot stop speeding. What we are about with the code is trying our best to change the insolvency culture. I think that is what the code speaks to and that is where we will see an uplift in improvement: development of a higher cultural plane. That is what the code supports.

Ms North—I would just like to add a more general response to that. You started your question by saying that there has been a lot of suggestion in evidence that standards need to improve. We absolutely reject a lot of the assertion that has come through in the evidence, that the standards applied by most insolvency practitioners are poor. We do not accept that it is the case, we think the vast—

Senator PRATT—In part, though, it is collecting those at the bottom of the pool and lifting them up—

Ms North—Certainly, and just to reinforce what Mr Robinson said, the answer is that it is a primary role in setting standards. I think you might take note of the fact that the Accounting Professional and Ethical Standards Board released a new insolvency standard earlier this year. They are a very large and very well resourced organisation and they have virtually adopted our code of professional practice, developed by our organisation as the appropriate standard for all accountants working in insolvency. Since our code has been released, as I think Mark mentioned in the introduction, it has been very favourably commented on by the judiciary who look at these things, and by other bodies as well.

Senator PRATT—What is the approach of the association to poorly performing or even corrupt practitioners operating in the sector? It is hard as a membership organisation not to represent everybody, so it is a difficult question—what is the approach to those issues?

Ms North—In the current environment we are aware of a single corrupt liquidator, Stuart Ariff, who has been banned and rejected. We are aware of a lot of allegations of wrongdoing and we are aware of some findings that some practitioners from time to time have fallen down on

meeting the high standards. But falling down on meeting high standards is not the same thing as corrupt.

Senator PRATT—No, I agree.

Ms North—There are very, very few corrupt practitioners. We do have a role and we play that role in educating members and informing them. We play that role primarily. We take complaints about members, investigate them and refer them, where possible, to other bodies that are also able to work on those. As we have said in our first submission, we definitely welcome other forums which would improve that complaints investigation and complaints handling process .

Senator PRATT—It has been put to the committee that one of the areas that needs improving is that, in the minds of some people, there is unnecessary commissioning of solicitors to undertake work, and the corresponding management fees at times—and clearly these are difficult judgments—eat into people's assets in a way that is not commensurate with the return from the services of those solicitors, and that that is something that needs to be looked at in standards and regulation. What is your response to that issue?

Ms North—That is addressed in some detail in our second submission. I apologise for the fact that senators have not had that for very long. We submitted it only on Monday.

Senator PRATT—It has been a busy week here.

Ms North—I understand that. It is addressed quite clearly there. For instance, there is one matter that came up in the Adelaide hearings that relates to Golden Chef. I draw your attention to that. Witnesses complained that there was an outrageous amount in legal fees. As we point out in that submission, and it is raised in some other matters as well, most of the reasons for the incurring of those legal fees was the refusal of the directors of the insolvent company to cooperate with the lawful activities of the liquidator, and they challenged their authority to do their job at every turn. In that situation the practitioner has a duty to respond. In most cases, when it comes to going to court, especially if you are talking about a receivership, the secured creditor who is appointed the receiver has to approve all of that activity. They know that that expense is going to affect the return that they are going to get and they have to approve it. In other cases a practitioner will get funding from a litigation funder, which means that the litigation funder has made a very careful calculation that there is a reasonable likelihood that there will be a recovery of a substantial amount because some wrongdoing has taken place.

It is an important question. If you hypothesise that liquidators are running round involved in unnecessary litigation, when that litigation comes before the court the judge will say, 'What on earth are you doing here? Run away.' It happens quite infrequently, and in most cases judges have said, 'I will not second-guess the liquidator's practitioners' commercial decision and legal decision about whether or not it was appropriate to take this action.' If they think that it is completely inappropriate they will definitely say so in their judgments.

Senator XENOPHON—You may have seen Dr John Hewson's article in the *Financial Review* on 18 June.

Mr Robinson—Yes.

Senator XENOPHON—It was quite a critical article. Essentially, Dr Hewson is saying that liquidators now have a vested interest in company failure and in his experience as a company director it is very hard to turn companies around. He was quite critical of the current regime and the potential conflicts of interest. Could you respond to those quite scathing criticisms of Dr Hewson.

Mr Robinson—Certainly. I will kick off and then I will pass to Denise. Firstly, that was an interesting response, given that he is under a lot of pressure as a director of a failed organisation, Elderslie Finance, and there is quite a bit of investigation into his conduct in that regard. In terms of those comments, we are taking him to task and we have drafted a response which we are hoping is in the editor section of the *Fin Review* tomorrow. Denise, Michael Murray and I have drafted that response, so I will pass to Denise to give a precis.

Senator XENOPHON—But doesn't Dr Hewson have a point—and I am conscious that Senator Williams has some questions as well—that there are perceived or real potential conflicts of interest in the way that some liquidators operate?

Ms North—Do we think that doctors have a vested interest in sickness?

Senator XENOPHON—I am asking you about liquidators.

Ms North—That is an analogy that I draw. They are paid to treat it and liquidators are paid to treat insolvency in a professional manner.

Senator FIERRAVANTI-WELLS—There is more competition in the medical field than there is in the insolvency field.

Ms North—Not relative to the amount of activity.

Senator FIERRAVANTI-WELLS—Are you simply dismissing Dr Hewson's comments because there are allegations against him? Ms North, is that the gist of what you are saying?

Ms North—I certainly make the point in relation to Dr Hewson and in relation to many other people—and it is close to a point that I think you made at the first hearing, Senator Fierravanti-Wells—that there are very many directors of insolvent companies whose response to being investigated is to criticise the motivations of practitioners involved. I think that that is a matter of record. Dr Hewson's opinion piece on Friday contains no specifics at all. It says broadly that liquidators have a vested interest in insolvency.

Senator FIERRAVANTI-WELLS—You could argue that about my years of practising in this area. I had personal experience and I saw lots of things. That taints my judgment. You could say, 'Senator, you haven't been able to point to any specific instances' or whatever, but I still hold that belief because of my experience.

Senator XENOPHON—I think Ms North will want to respond. I simply put Dr Hewson's very strong opinion piece to you. I am conscious of Senator Williams wanting to ask some questions. I am not sure whether you want to respond further to Dr Hewson's article. Should we wait for tomorrow's *Fin Review*?

Ms North—I can send you a copy of the letter, if it—

Mr Robinson—We can, but the reality is—in quick response to your question—of course a lawyer has a vested interest in litigation and currying up conflict, if you like. In raising and developing the appropriate culture amongst practitioners we look at the value-add, maximising the return to creditors. As doctors concentrate not on sickness but on making people healthy, lawyers should not look at the fees for litigation but instead try to cross a bridge to get reconciliation to achieve a result. I think we are not in a dissimilar camp to any other profession.

Senator XENOPHON—It depends on whether doctors are practising voluntary euthanasia or trying to heal the patient. I am trying to put it in context.

Ms North—There is definitely an increase in the amount of work that our members do, which is informal restructuring in company rescue work. You do not see this work because it is not in the formal statistics and it is not public because, by definition, the company does not want it to be.

Senator XENOPHON—I am really conscious of time, but on notice can you provide some more details of that because I am quite interested in it.

Ms North—Indeed.

Senator WILLIAMS—I will be as quick as I can. Our next witnesses say that perhaps this inquiry was a knee-jerk reaction to Mr Ariff and his actions. When I called this inquiry I had not heard of Mr Ariff. I called it on the actions of two other liquidators, one in Sydney and one in Adelaide. I see you have taken action at your AGM. You are going to have a revised disciplinary regime and changes to QA, remuneration. The problem I see with the industry is that so many people out there think they are being ripped off by liquidators. I will give you an example. Take a married couple where the lady had a little business and went into bankruptcy for $10½ thousand. To get her bankruptcy annulled—and I would like you to check this out; I will give you the companies' names—the bill was $50,000, to pay the $10½ thousand of debt she owed. But the fee just happened to be a magic $30,000. There were 13 hours of work on one job—some accounting work—that this company did. Then this person's accountant said, 'I could do that in 30 minutes.' This is one of the things I am getting at. Take the case of Westpoint. ING appointed Korda Mentha to the liquidation of Westpoint. Now I hear of some $34.39 million on eight Westpoint entities. The information I get is that there have been up to $15 million of expenses already in the liquidation of that amount. That is 40 per cent of the value of the asset. This is the point we come to. It just seems to go on. The hourly rate is very high, of course, but then the hours just seem to go on and on. Is this something that your body would look at as part of these remuneration issues? Can I bring a complaint to you if someone complains to me about what is being charged?

Mr Robinson—We would ask that person to come directly. The power to approve fees vests with the creditors. If they choose not to approve our fees, we do not get paid.

Senator WILLIAMS—In this case, the annulment of this bankruptcy, the liquidators sold up the assets—took a stay on everything—for about $139,000, and there was about $85,000 left over. The people had their assets sold up and wanted that money to go into new business, but

they could not get it. It was amazing that the day after I rang them, the cheque was in the mail. That company was holding the cheque for months, and it was not their money. They had taken their fees and everything else. These are the things that I think give your industry a bad name.

Mr Robinson—I am more than happy to take on board those details.

Senator WILLIAMS—I am quite happy to talk to you privately, actually, off the record.

Mr Robinson—I am happy to put the details on the record as well. If you give me those details, we will get to the bottom of it and relay back to you. In terms of the submissions made by other parties in Adelaide, Newcastle and Sydney, we have done our best in terms of those that are not held confidentially or in camera to get to the bottom of them and report back. That is part of our second submission. We have found, in a lot of cases, that there really is another side to the story and a legitimate reason that those people find themselves in those circumstances.

Senator WILLIAMS—Time is going to pull us up.

CHAIR—We still have time.

Senator WILLIAMS—Bill Doherty said in his submission: 'I personally complained to IPA, CPA and ICA more than 50 times and to ASIC three times to no avail. The press eventually embarrassed ASIC to act.' This, of course, is in relation to Mr Ariff. Are you aware of those complaints from Mr Doherty to your organisation?

Mr Robinson—Yes, we are, and we have written to the committee about it.

Ms North—In fact, Senator Williams, we wrote to you in April about that.

Senator WILLIAMS—Yes, I am aware of that. I just want to put it back on the record.

Mr Robinson—I think it was the most comprehensive—

Ms North—It is an attachment to our submission.

Senator WILLIAMS—I have read the letters as well.

Ms North—It is true that with the first complaint that the IPA received about Stuart Ariff, it appeared to us as though he had answered it appropriately. We have acknowledged that since day 1. Many subsequent complaints were received, and they were investigated. The suggestion that it was to no avail is an incorrect suggestion. Mr Ariff has been struck off, he has been banned for life, so it was to some avail.

Mr Robinson—And we referred it to ASIC.

Senator WILLIAMS—What we are looking for is to iron out the problems in the industry, and I believe there are some. We will have ASIC along later on tonight. There is the problem of people complaining and not being heard. Then, when you have a liquidator who is doing the

wrong thing, getting them out of the company is almost impossible, as with Carlovers. It must have been so frustrating to spend $1.8 million on legal fees to get Ariff out of their organisation.

Here are the problems we see. I am just going to close this question on licensing of insolvency practitioners. You can have a situation where, if enough evidence is put in front of you, or put to ASIC or an independent body controlling the IP industry, they can say, 'Your licence is now suspended until you go through the proper court process and inquiry.' I say that because Mr D'Aloisio told us how difficult it is to deregister a liquidator. There were two years of complaints about Ariff but it took another two years to get him in front of a judge, to get him out. That, to me, is so wrong. If you drive your car more than 45 kilometres over the speed limit in New South Wales, you can lose your licence instantly. If you have a high-range PCA, you lose your licence instantly. I think having that regulation in the process would be a red light warning to everyone in the industry to say, 'You do the wrong thing and you can lose your licence instantly.' Call that a big stick approach, but it would be a clear indicator to the industry to say, 'You will do the right thing or the body can scrub you out with a phone call.'

Mr Robinson—In terms of our initial submission, our supporting submission, we are open to exploring a licensing regime that incorporates proper education—continuing professional development.

Senator WILLIAMS—I read about that, yes. How do you feel about the suspension of licences—if the body had the power to suspend anyone's licence instantly? How do you feel about that?

Mr Robinson—As long as the proper process and natural justice is followed—

Senator WILLIAMS—Yes, of course.

Mr Robinson—As long as that is appropriately dealt with, yes.

Senator WILLIAMS—If you had your licence suspended then you would have the right to go to the court to declare your innocence or prove your innocence—

Mr Robinson—I note that, if suspension were the straight-up response before you could defend yourself, that would have a direct impact on livelihood. Maybe the natural justice process would have to occur prior to suspension.

Senator WILLIAMS—If that is the case, then we would go through a two-year courtroom process again.

Ms North—No. If I may, I think there is quite a spectrum between the immediate suspension—'I think you've done something wrong; you're out,' with no process—and a process that takes too long and is not transparent. We are very open to and supportive of a complaints-handling process that is speedier, cost effective, open and transparent and accessible to people. We have from the beginning been absolutely supportive of any improvements along that line. The improvements have to be developed in a reasonable way, as Mr Robinson says, but we are absolutely supportive of any of those improvements and whatever means it takes to get those.

Senator WILLIAMS—Thank you.

Senator PRATT—Some of the evidence put before the committee indicated concern about companies calling in an administrator to help sort themselves out only to find that those administrators had turned into the liquidators. That conversion is made and you still have the same institution in that position. There is concern that that is not a fair thing if those who had called in the administrators never thought that liquidation would be a possibility.

Mr Robinson—That complaint does occur from time to time, but it is quite often the case that, if directors have a company in financial trouble and they consider it might be insolvent or about to become insolvent, they put up what they believe the situation to be financially and what they believe the prospects of the company to be and appoint an administrator with a mind to implementing a plan. That plan might well be to try and save the company. The administrator is required by law to conduct an investigation, and the administrator is also personally liable for any trading. So, if the actual situation that the administrator discovers after appointment is materially different from what the directors represented to that administrator prior to appointment, it quite often will result in a different outcome to the one that the directors expected.

Senator PRATT—I can accept that that may well be the case, but it does put the administrator in a rather powerful position. Even if it is just an issue of image and perception, that is nevertheless a very important thing when an administrator is in quite a powerful situation. Is there something that could be done to improve the transparency around that?

Mr Robinson—The VA regime does provide a very rigorous reporting regime. There is also an ability, if it rolls into liquidation, to replace the administrator with somebody different. That mechanism is already there. It is acknowledged that the administrator is in control of the company and bears all the risks and responsibilities with that so, yes, that is a powerful position.

Senator PRATT—How does that work in terms of ensuring that someone else could pick up that role, just so that you can militate against any vested interest from rolling from one into the other?

Mr Robinson—It is a decision of creditors. When a company goes into insolvency, the power and responsibility is no longer to the shareholders, who quite often in small companies are the directors, and that responsibility is instead not with the administrator but with the creditors. So the creditors hold the power in terms of deciding the fate of the government.

Senator PRATT—Is it possible that the shareholders could be treated unjustly in that scenario and that they should not also have a right to say they could actually convert; they are just asking for another party to undertake that? This is one of the things have been put to the committee, so I am keen to hear the answer.

Mr Robinson—The answer is no. The reason the answer is no is that the shareholders are not stakeholders. The creditors are the ones bearing the brunt; they are the ones that are going to get less than 100c in the dollar. It is a basic premise in insolvency that the primary stakeholders in an insolvency event are the creditors, so they call the tune.

CHAIR—We thank you very much for your evidence tonight.

[8.31 pm]

ANDERSON, Associate Professor Colin, Private capacity

MORRISON, Associate Professor David, Private capacity

Evidence was taken via teleconference—

CHAIR—We welcome Dr Colin Anderson from the Queensland University of Technology and Dr David Morrison from the University of Queensland. Would you like to make an opening statement?

Prof. Morrison—No, thank you—the submission is fairly clear. We would be happy to take questions.

CHAIR—You do not want to make an overview comment? It might be of assistance to the committee. We are leading you into it, but if you would like to do so please proceed.

Prof. Morrison—Our basic position is that, first, the terms of the inquiry are quite wide, and therefore make it difficult to precisely address a specific problem. To the extent that they appear directed to behaviour as in the case of Ariff, we feel that more information is required in order to make a generalisation from a specific case. Particularly, we note in our submission that there is an almost complete lack of information around the sort of detail that would be required to make an informed decision about the state of insolvency practitioners professionally. The matters that we address in our relatively short submission go to that very point.

CHAIR—Thank you. That sets the scene for your submission. I would like to ask you a couple of opening questions. You argue in your submission:

... there is scope within Australia for a body to be established along the lines of the Australian Institute of Criminology that independently gathers, analyses and researches data relating to corporate law and corporate operations (including insolvency).

Do you want to elaborate on this idea for the purposes of the committee? Would it be adequate for a new insolvency regulator to have a unit responsible for the collection and analysis of insolvency data?

Prof. Anderson—Our point of view is that if you rely upon data which is coming from the regulator then it always raises the question of whether you are being told only what you want to hear. I am not saying that either ASIC or ITSA are doing that, but it raises that potential problem. It seems to us that in an important area like the regulation of the economy through corporations and through insolvency there is room for some way of funding information in an independent way. Maybe the Institute of Criminology is not a perfect method for doing that in the circumstances. It is just a suggestion as to the type of thing, whether it be funded completely independently of those regulators or whether it be funded as part of those particular regulators. It is just a way of raising the issue.

Critically, if you go back to the Harmer report or to the parliamentary joint committee report, they are saying they have got very little data to work on. Now we have another parliamentary inquiry and again there is no data. If we do not change things now, maybe in 10 years time there will be another inquiry saying, 'There is no data.' That is our view on that. I do not know whether David has anything to add to that.

Prof. Morrison—What Colin is saying is saying about the need for independent data is absolutely right. If you look at the data that is available now, it is astonishingly incomplete, and I think that goes in some way to the width of responsibility that ASIC has. For ASIC, insolvency is only one small part of all of the things that it has to do, so there is not a lot of focus. But if you want data from ASIC, if you are an academic and you would like to look at something independently, unless it is a priority area that is presumably flagged between the government and ASIC, ASIC cannot provide it to you. If you want to pay to get data at ASIC, even if you can afford to pay for it—and most of us cannot, of course, because we are employees of the government and therefore paid small amounts of money—the records they have are based on paper and microfiche, so you have to pay a search fee every time you want something and you have to go into quite an archaic set of files. So, even if ASIC wanted to help people with independent information, they actually do not have the technology to do it, and that is in very stark contrast to ITSA, the bankruptcy regulator.

CHAIR—That is quite an interesting answer because there has been concern expressed to this committee that ASIC'S brief was perhaps too broad and that perhaps it has not been possible for ASIC to pay enough attention to insolvency issues. That leads to a couple of other issues, I suppose. Firstly, do you believe that ASIC probably does receive data on insolvency and that it is not collated properly—or not perhaps to a degree that would be regarded as useful by people like you in providing an overview of the insolvency industry—and that if they did not have such a broad range of responsibility they might do that more effectively? Or should another body be responsible for overviewing insolvency issues?

Prof. Morrison—I think this is a very difficult question to answer because we actually do not have the information to be able to assess it. If you look at what ASIC asks a company to report on an annual return, it is a very small amount of data. Yet the annual return is a significant processing document tendered on a regular basis monitored by the organisation. So without knowing that, we do not know whether ASIC has got too much on its plate or too little. It suffices to say that this is also connected with how ASIC is funded. I do not know the answer to this question but if you have got a certain amount of limited funding then you can only do so much. Whenever I have asked commissioners for assistance with things they talk about limited funding and they talk about priorities, which are presumably at least partly set by the political process. Therefore their direction is towards things which are immediately required and for which there is funding. I think there is a lack of funding.

The other part of your question is whether or not there needs to be a separate body. It would not take you long to actually have a look at some stage on the internet and search asic.gov.au for insolvency data and then dial up itsa.gov.au, the bankruptcy regulator, and have a look a look at what they have got. I think the contrast would be quite remarkable. If you wanted to look at another agency that is very large, there is the Australian Taxation Office, which has quite a remarkably well set up and resourced website. So it is possible for government to provide relevant, accurate and timely information to anyone who wants to look. ASIC is not doing that

and that might be for a host of reasons. We are not in a position to comment on that, nor are we in a position to suggest that it is anyone's fault. We are simply saying that it is absolutely essential to have more information. An increase in information would give us the ability to ask better questions and to find answers.

One of the things that we have suggested is that we believe there is some merit in at least considering a joint regulator for these matters. At the moment they are only separate by historic accident—namely, there is a Commonwealth Bankruptcy Act and therefore a regulator, and a Commonwealth Corporations Act in cooperation with the states and therefore a regulator attached to that body. But if you look at this in terms of subject matter and you look at the issues that are being raised by people who deal with that subject matter, what difference does it really make whether or not my business is incorporated? The difference it makes is that if my business is incorporated then ASIC deals with me and if my business is not incorporated then it is a bankruptcy matter. But from the point of view of outsider, the person who deals with the business, and from the point of view of my conduct or the insolvency professional that manages it in the end game, it is all the same.

Prof. Anderson—I would just add that, in terms of the information that is actually collected, I think if you look at the reports that liquidators have to put in to ASIC, there is clearly a lot of information going into ASIC. But we do not see a lot of that information coming back out in terms of data for all the sorts of reasons that David has talked about. There certainly are a lot of accounts and so on that have to be presented to ASIC. It is not as though you need to ask liquidators to incur more costs to provide information. It is more a matter of collating and sorting the information that is there.

CHAIR—Thank you very much. This committee sees a bit of ASIC and we do have a view about their resourcing in general terms.

Senator XENOPHON—Dr Morrison, I want to pick up on your evidence that ASIC does not seem to have the same level of information or there appears to be a paucity of information compared to ITSA and the tax office, even though they are dealing in a different field. Can you give an opinion as to whether you think that is due to a lack of resources or a systemic problem within ASIC? It does seem to be almost anomalous when you compare the information you get can from the ITSA website compared to ASIC's.

Prof. Morrison—I do not know the answer to that question for all of the reasons that I have given. I do not think I can help you further with the answer to that. However, because ASIC is covering such a broad field, it may be that in total information terms ASIC is in the ballpark. I do not know. I do not think it is easy to properly understand it. I certainly could not pass any comment on whether it is a systemic problem. But if you look at ITSA, it is quite focused on one thing, and it does that one thing very well, in my view; so, too, the ATO. I look at sites all around the world when I am looking for data or speaking to other academics and I am always struck by the lack of adequacy in terms of the provision of data for ASIC. As Dr Anderson points out, there is plenty of information going in. There are good ways to collect more general information, as I have suggested, by way of the annual return.

Senator XENOPHON—You would say, though, that the paucity on the information on the ASIC website is not good in terms of policy formulation or it is not good in terms of ensuring we

have the best set of rules in place because there appears to be that lack of information compared, for instance, to ITSA. Is that what you are suggesting?

Prof. Anderson—Yes, that is what we are suggesting. Obviously because we do not have the information we cannot say whether our current system is working well or is not working well. We have anecdotal information. We have Stuart Ariff type situations and other situations. I am not saying that everybody is happy with it but, certainly from an international perspective, Australia is seen to have a good profession that is professional in that sense. It is just simply not possible to be rigorous about the evaluation of our law in this area without that sort of information. Certainly when we look at other jurisdictions we see much more rigorous evaluation in their legislation in terms of actual empirical data.

Prof. Morrison—I might just add one thing. These bodies government funded. That means that they are funded by the public purse, and it just strikes me as odd that we would not want more information in the public arena. The greater the volume of information, the more likely it is that it can be properly commented on by anyone with a vested interest, or without one—and that can only add to better decisions, such as those that are being contemplated by this committee.

Senator XENOPHON—Thank you.

Senator FIERRAVANTI-WELLS—In your submission, you talk about the paucity of information. You refer to the Parliamentary Joint Committee on Corporations and Financial Services report of 2004, then you go on to say:

> If there is one positive outcome above all others that the inquiry could promote to improve the quality of our insolvency system, it would be to recommend the independent collection of data associated with business failure and the operation of our insolvency regimes.

Could you be a little more specific about the data and where you see that there is a paucity, and how would you collect it?

Prof. Anderson—The data is perhaps already there in the sense that liquidators present reports and so on. For example, one of the things that seems to be important in all jurisdictions—not just Australia—and certainly seems to be a matter of interest to the committee, is the issue of cost and how much the liquidators are being paid as opposed to how much is getting back to creditors. The information with respect to that is that we have no information in Australia about how we rate. I mentioned in the submission that there has been a large study in the US so we have started there about how much the costs are. You could make those sorts of international comparisons if you had that data here. As I understand it, liquidators have to put in an account or report at the end of each administration and within that is included things like fees and costs. It would appear to us that at least a start could be made on collating some of that information if it were used. It seems that it is purely a regulatory thing from ASIC's point of view anyway—if there is a complaint then individuals get investigated. That sort of information needs to be more readily available.

Our suggestion in our submission is that if there were some funding specifically for the collection of this data in a general way, and if technical issues of how it is collated with

electronic data et cetera could be worked through, then that would be a way forward—if we started looking at those sorts of things. As it is now we do not seem to be going forward at all.

Prof. Morrison—I will add one thing here. You asked: what do we need to get? That is a big question because we do not really know the totality of what we can find out because we do not have enough information to even get started. How would we go about getting it? If you make it a statutory requirement for a person to submit certain information with signs and all the usual bells and whistles attached to it being incorrect, and you make that information available for people to access, then the analysis will commence; and if there is more information needed about one aspect of it, it will be pressure we brought to bear. But we are nowhere near that right now.

Senator FIERRAVANTI-WELLS—If I understand correctly, your complaint is twofold; firstly, it goes to the nature of information that is sought and, secondly, to the lack of analysis of it?

Prof. Morrison—Firstly, we are not complaining; we are suggesting in response to the inquiry. The second thing to appreciate is that we would be happy at this stage just knowing the information that is being submitted—for that to be made available. Thirdly, if we got really desperate we would say that we would be happy for that information to be made available to a select group of independent researchers who would then feed that back to the government before making it public, if it is that sensitive.

Senator FIERRAVANTI-WELLS—You make a series of recommendations, one of which is to look at the process of reporting complaints and how those complaints are dealt with. Could you elaborate on that?

Prof. Anderson—What appears to happen now with the complaints system, as we understand it, is that it all has to be channelled through ASIC. ASIC will then investigate, and if they choose to, they bring the matter before the CALDB. We felt that perhaps there may be a way of short circuiting that in a sense if there were the potential for someone like the ITSA—and I know they have a view about this and the limited resources they have—to make a complaint directly to the CALDB. It just seems to us that there is a fairly slow process now where there might be a bit of action in relation to a particular practitioner; it takes a while for that to build up into something, then a complaint is made to the ITSA and they look at matters little. Then, perhaps, someone makes a complaint to ASIC—it just seems to be a very long winded process at the moment. I really think we should be looking at ways of bringing those complaints before the board a little more quickly than they happen now.

Senator FIERRAVANTI-WELLS—I want to ask a couple more questions. You say that you strongly argue for the development of a registering authority for all insolvency practitioners, separate from ASIC. In other words, you are saying one body for both—

Prof. Anderson—Essentially, what we argue is that the people who are registered as trustees and the people who are registered as liquidators are generally the same people. Why aren't they being registered by the same body? When you look at the requirements for registration in the two areas they are almost identical, and yet, as David says, for historical reasons we have divided them up into two separate registration bodies. It seems to me that if a person was not performing as a registered liquidator then there is probably a good reason for them to be struck

off as registered trustees as well. As I said there is no real connection between those two at the moment.

Prof. Morrison—That is exactly how I feel.

CHAIR—Thank you very much gentlemen for appearing tonight. That concludes this segment.

Senator FIERRAVANTI-WELLS—I must say, it is appropriate that we are talking liquidators this evening when there are other liquidations happening elsewhere!

CHAIR—So it would appear, yes. An historic evening.

[8.58 pm]

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

DAY, Mr Warren, Regional Commissioner—Victoria, Australian Securities and Investments Commission

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

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

CHAIR—Good evening, Mr D'Aloisio and your colleagues. We welcome you to your second appearance before this inquiry. Do you wish to make any opening statement?

Mr D'Aloisio—Just a very short one. Our role has been to assist the committee. We have made two submissions; the main one and then a second submission more recently. We have also provided, in confidence, statistics in issues that we have handled. I think that for us it is really a question of whether there is further assistance we can provide to the committee this evening. As we said on the prior occasion, while we think there are areas for improvement we do not think there are systemic issues in relation to this industry. While it is for the committee to assess our performance we feel that overall we have, as the oversight body, performed our regulatory functions as required. I have got with me Commissioner Michael Dwyer, Stefan Dopking and Warren Day. Really, it is over to you, Chairman, in terms of how we can help.

Senator PRATT—People do not come across insolvency practitioners very often in life. You would hope that they would not.

Mr D'Aloisio—I have got one next to me.

Senator PRATT—In terms of requiring the services of one. I am glad you do have good in-house expertise. That is definitely a good thing. I suppose you have a relationship with an accountant over many years, but when you hire an insolvency practitioner, say, as an administrator it has been put to us that they can turn the tables on you pretty quickly and you are in a pretty vulnerable situation as a shareholder. Clearly you might already be quite vulnerable on the basis of the situation of your company but, because of the short-term nature of that relationship, it is difficult for people to understand whether someone is truly behaving in a professional way, particularly given the fact that a shareholder might feel particularly aggrieved in certain circumstances. It want to know if transparency in insolvency is particularly difficult, if this requires a special approach from ASIC and how you address that.

Mr D'Aloisio—In terms of the first part of your question around the relationship between creditors and the insolvency practitioner, I agree that you would come across these practitioners only from time to time, but there are a number of other professionals like valuers and so on in a similar position. What you really rely on is the reputation of the firm and the group that you are dealing with. There is no doubt that the framework of the law and the way it is structured tries to

ensure that creditors have all the information they need to follow what is going on. So transparency in that sense is hugely important. It would be probably useful to ask Michael to comment more specifically from his experience, having been one of those practitioners who might not have been as well known by the creditor.

Senator PRATT—Other than just creditors, I am interested in shareholders who called in an administrator—both sides of that equation.

Mr Dwyer—I think where you are coming from is the rights of shareholders and directors who make appointments of practitioners and then perhaps see that, once the creditors anoint them and they become the VA and then the liquidator, they turn on the directors and shareholders. Is that the sort of connotation you are suggesting?

Senator PRATT—It may be legitimate or it might be just how the numbers stack up.

Mr Dwyer—I think the way the law is framed is that shareholders and the directors they appoint are able to make an appointment quickly through the appointment of a VA to avoid their responsibilities and potential insolvent trading breaches. By doing that the practitioner has to make an assessment, make a report and then make a recommendation to creditors. It is then up to the creditors really as to which way they want to go. The creditors are at that stage the aggrieved parties. I think the law recognises that and allows those creditors to decide which liquidator goes forward. How he handles it from there is really up to him.

Senator PRATT—Yes, he or she may well do that.

Mr Dwyer—Or she, I am sorry, yes.

Mr Day—I think some of your question is really aimed at the fact that when a shareholder or a creditor is first involved in an event of insolvency it is very foreign to them. I think that is what you are getting at—what to do and what the language means because, as with many other things in life these days, there are a lot of acronyms.

Mr Robinson—Like ASIC.

Mr Day—Like ASIC, like CALDB, like deeds of company arrangements—DOCAs—and things like that. All those things are very daunting. As we set out in our first submission on page 71, ASIC has produced a number of information sheets to assist each of the various groups that you have identified. There are information sheets that assist creditors and there are information sheets that are directed straight at shareholders explaining the process to them in very easy-to-understand language. From the minute people contact us, be it through our call centre or our complaints, we refer them to those information sheets and we send them those information sheets because often we find people complain or raise concerns about certain steps or events or issues that are in fact just part and parcel of the process.

Senator PRATT—Does that make it hard for ASIC to sort real complaints from what is just natural difficulty for creditors? How do you sort through that file?

Mr Day—I would not say it makes it difficult. If anything, I think it gives us a framework to take someone who contacts us through the issues that the particular contact is having difficulties with, be they a shareholder or a creditor. It gives us a starting point and it gives them a document so that they can start to inform themselves so they can then meaningfully respond about what they see as the issues. That allows us then to distinguish a legitimate and genuine complaint from a situation where the complaint comes from a lack of knowledge about the process.

CHAIR—There is a perception that ASIC will only investigate significant complaints from large businesses and significant creditors. How do you respond to that kind of suggestion?

Mr Day—I will respond by talking about how we receive complaints and how we deal with those. At the moment ASIC receives on average about 14,000 complaints a year. Every complaint is reviewed by our misconduct and breach reporting team. We have staff in every ASIC office around the country. Every complaint is acknowledged within two business days of receipt of the complaint and we endeavour to respond to all complaints within 28 days of receipt. We are tracking at about 70 per cent on average in relation to that. Obviously there are complaints that are a little bit complex or that require extra work and there may be certain difficulties that we might need to work through in terms of the subject matter or getting more information. That does not matter if it is a complaint from a big or small company, from a well resourced complainant to a general member of the public. We go through all of those and they are all given the same level of attention as the next complaint. In relation to whether or not we only look at those things that relate to big collapses rather than small collapses or big insolvencies compared to small insolvencies, I would not say that that is true—where ASIC prioritises or focuses on some of those things might be taken into account, but I would not say that that is true.

Mr D'Aloisio—The issue on that, I guess, is also one of perception in the sense that generally when you have major collapses and major issues the media and the attention around ASIC's work is much greater. A lot of the smaller matters and the matters that we give attention to and focus on do not get the same report and focus and that gives rise to that sort of impression. Overall we allocate our resources, as Warren said, across all complaints and all issues not just the so-called major ones. I think it is the media attention to those that probably gives rise to that perception.

CHAIR—It was said in evidence to the committee on 12 March that ASIC has a surveillance process, but it is only in response to the complaints it receives. Can you explain the basis upon which ASIC investigates an insolvency practitioner? Also, does there need to be a pattern of complaints from different parties before you initiate an investigation or does ASIC investigate on the basis of a single complaint?

Mr Dopking—It depends on the issues. The area that Warren looks after assesses those complaints. Complaints officers around Australia filter the ones that appear not to be serious. With the ones they are not sure about they will talk to the specialist team, the IPL team, which is made up of experienced insolvency people. They will, together, decide whether the matter should be looked at more closely and, if it looks like it should be, it is referred to the specialist unit to look at more closely. The decision to take that further could be based on a single complaint. We have had issues we have taken on in recent times. It could be a combination of a number of complaints where the complaints area will see that there is a trend happening with a

particular practitioner. That may be enough to trigger a referral to a specialist unit. In the first submission, at paragraph 132, we cover these issues.

CHAIR—When we were in Newcastle it was said to the committee that the response time from ASIC was very slow when a complaint was made. In your first submission you said that ASIC has recently improved its online complaints process. Can you explain to the committee how these changes will help complainants—that is, the people complaining about insolvency practitioners ? What sorts of time lines do you set in place internally for the response to complaints?

Mr Day—That is a very good question. Some of it gets down to what is meant by response time and how long it takes ASIC to respond. As is set out in the first submission, and as I indicated before, all complaints are at least acknowledged within two days. We endeavour to respond within 28 days. That response might be that the matter has been referred to a specialist team, such as Mr Dopking's team, in relation to insolvency practitioners, or one of the other stakeholder teams within ASIC. At that point it may be that surveillance is conducted or the matter may be referred directly to a deterrence team. That does happen from time to time.

As I think we said on the previous occasion, ASIC's inquiries are conducted confidentially, so at that point it becomes difficult to keep a complainant informed up to the minute about where ASIC is at in relation to the handling of those complaints. At the point that prosecution takes place, that process could take a longer period of time.

You ask what time frames we have in place. As I said, the complaints handling process is quite public. The time frames in which we will respond are part of our service charter. Outside of that, it really depends on the matter and its carriage through ASIC—whether there is a need for surveillance, investigation and prosecution. It depends on the facts and the details and the amount of material that has to be gone through.

CHAIR—Some of the witnesses in Newcastle said that, beyond the initial response, it was a very long time—months and months—before there was a further response, which was clearly unsatisfactory.

Mr Day—Yes.

CHAIR—I accept that you act in good faith, but that raises the question of resourcing. Do you feel you have sufficient resourcing to deal with insolvency issues? That is my first question. I have a second question to accompany that.

Mr D'Aloisio—There is no doubt that people wanting quick resolutions to issues is not just a factor in this area. We have the same issues in a number of other areas as well. There is complexity about being able to investigate. A lot of the time, these matters do not lead anywhere in the sense that the evidence just is not there. That does not necessarily get accepted easily. With the programs that we outlined in our first submission, where we outlined what we were doing and how we were carrying out surveillance and the resources that we have allocated, we feel that we are working well and achieving our goal within the resources that we have allocated. We have not asked government, at this point, for additional resources.

If the committee recommends changes to that program or additional responsibilities, in our second submission we sought to identify the additional resources we would need for some of those initiatives. Then we would need resources but in the current framework we are operating under, and within the program we outlined in our first submission, as we said on the last occasion, we feel that we have the resources to carry out those things.

CHAIR—The evidence we got in Newcastle was that because the response time was so long the position of the companies deteriorated and—

Mr D'Aloisio—Can you be more specific as to what ASIC did not do, that—

CHAIR—After an initial contact—

Mr D'Aloisio—Can we talk about the nature of the case?

CHAIR—It is a bit difficult.

Senator WILLIAMS—Can I ask something, Chair?

CHAIR—I will come to you now. It is difficult to talk about specifics. We are talking about a generality—

Mr D'Aloisio—That is fair enough.

CHAIR—and it is hard to do that. The issue here is your resourcing. And the second issue is whether a body other than ASIC should be charged with dealing with insolvency matters.

Mr D'Aloisio—The issue of a different body is really a policy matter for the committee and for government—as to what are the costs and benefits are of such a change, and what additional expertise would be added over and above what ASIC would have, against the fact that ASIC, at the end of the day, does look after corporations from birth to death in terms of its overall mandate and responsibility. In our second submission we have looked at that and given the committee the pros and cons of moving to a different body. But really, in the end, that is a matter for you.

CHAIR—Indeed it is. I just wanted to get your views on resourcing.

Senator WILLIAMS—Thank you, ASIC representatives, for being here.

Senator XENOPHON—Especially at this ridiculous hour!

Senator WILLIAMS—Think of the overtime getting paid, Senator Xenophon!

We looked through the submissions to this inquiry and many of them are critical of ASIC for not acting quickly enough. I will give you some examples. Brian Mitchell, former business owner of Wyong, who lost business because of the infamous Stuart Ariff said: 'We contacted ASIC many times to alert them to what was happening. They did nothing beyond telling us to get legal advice. They were negligent, grossly negligent.'

Brian Powell said:

... letters to ASIC proved to be useless—they did not seem to have the power to act.

Armidale Dumaresq Council said:

Armidale Dumaresq Council is also critical of the Australian Securities and Investment Commission (ASIC) for a perceived lack of action in this matter. ASIC were notified several years ago about the administration of YCW, yet there has been no action taken to date to prosecute the Administrator.

I do not know if that is quite true. The Institute of Chartered Accountants in Australia said:

We are supportive of ASIC referring matters to the CALDB, however we are aware that this process is not operating effectively. As a result, ASIC and practitioners are increasingly defaulting to using enforceable undertakings (EU) to resolve matters.

Bernard Wood said:

I sought the help of ASIC with several letters only to be fobbed off with their standard "get legal advice".

The Victorian Independent Education Union said:

The complaints process to ASIC is slow—two members who have now complained to ASIC have yet to receive a response—

that is in stark contrast to what you said earlier on, Mr Day—

this function must be resourced adequately.

They say it must be resourced adequately. I have asked you, Mr D'Aloisio, several times at estimates, 'Are you resourced well enough?' and you have said that you were.

Bill Doherty said:

I personally complained to IPA, CPA & ICA more than 50 times and to the ASIC 3 times to no avail.

The press eventually embarrassed ASIC to act.

Carlover Carwash Limited and Berjaya Corporation Berhad said:

We lodged 3 formal complaints (plus numerous other informal complaints) with the industry regulator between 2005 and 2007 but ASIC did not believe us. And when ASIC finally did, their response was too slow, too little and too late.

I do not intend to make this into an ASIC-bashing session, but looking at the industry there is a general perception out there that when people come to you with complaints there is a general perception that you are not acting quickly enough, not responding to them and they are simply

left in the lurch. No matter what comes out of this inquiry, this is something that I think needs attention. Would you like to respond to that?

Mr D'Aloisio—Certainly one does not like—even if it is late at night—to get a catalogue of those sorts of statements without the opportunity to be able to respond by looking at the specifics. While I am not suggesting there may not have been delay in some cases, there will generally be a reason and there may be other issues that led to the action we took or did not take. It does not matter, but what you are saying is that that is the perception—

Senator WILLIAMS—Exactly.

Mr D'Aloisio—and we as an organisation have to deal with that perception. We have sought to reassure you that factually we do put resources into this. We do follow the processes through, as Warren and the submissions have indicated. Your findings are that we are not dealing with the perception issue. That is a clear message to us that we have got to look at increasing resources or doing other things to reassure the market that we are doing a good job in this area. We will take that as a challenge on what we need to do. If that does not deal with it, I think we can deal with it. We have to really address the perception issue. If that does lead to needing to put substantially more resources into the area, we will approach government for the additional resources.

Senator WILLIAMS—Because you do have an enormous job with 1.7 million companies out there. That is a hell of a workload. I think it is getting to the stage where the government is dumping more workload on you time in, time out.

Mr D'Aloisio—In the additional responsibilities we have taken on, we are not diverting resources out of this area. Those additional responsibilities have been separately funded.

Senator WILLIAMS—I was on the parliamentary joint committee of the inquiry into Storm, as you are well aware. The first recommendation of that committee was that financial planners, financial advisers, have a fiduciary duty of care to put the interests of their clients first. What would be your response if I said that I believe that there should be legislation saying that insolvency practitioners, administrators and liquidators have a fiduciary duty of care to look at the case of liquidators to dispose of the assets and a fiduciary duty of care to return as much money as possible to the creditors?

Mr Dwyer—I think the first thing is that liquidators and practitioners do have fiduciary duties to parties through case law.

Senator WILLIAMS—Is it in law?

Mr Dwyer—It is already in place, yes. They do have fiduciary duty and it is pretty well enshrined in case law. I am not sure that it would add any additional responsibility to them.

Senator WILLIAMS—The first thing that comes to my mind is obviously that Mr Ariff did not carry out that duty, so one could not be scolded for saying that he is in breach of the law if that is the case.

Mr Dwyer—Correct.

Senator WILLIAMS—This is another thing that people I know and talk to are very frustrated about. There seems to be a ducking of action. Mr Ariff still seems not to have been brought before the DPP as far as those 83 counts of wrongdoing he admitted to. But I guess that is something to follow in the future.

Mr D'Aloisio—Following on from what Senator Williams has said, could I ask a question. In relation to the catalogue of complainants you referred to, what did they expect the result to be? What did they want?

Senator WILLIAMS—Let's take Carlovers, for instance. You know the story of them. Ariff got involved in their business and started siphoning everything out of it. They made their complaint to you in 2005 and 2007. They had to get him out of their business before he totally destroyed it. It cost them $1.8 million in legal fees, court fees and charges to get rid of him. That to me is a huge problem. When you have got the bad egg—I am not saying there are many in the basket, but he is obviously a bad egg—there is a problem in itself to get rid of him.

As you said before Mr D'Aloisio, deregistering one of these liquidators is a very difficult and time-consuming thing to do. This is a problem that I see in the industry. That is why in a minute I will get on to you about licensing. I see a problem when someone is doing the wrong thing. I have had many issues brought to me where I think people have been overcharged and had time wasted at, in my opinion, exorbitant hourly rates. To get rid of someone who is doing the wrong thing is so hard. That is one thing I see wrong in industry. If you go and rob a bank, the police grab you and handcuff you and throw you into the back of a truck and put you in jail. That is when you rob with a gun or a knife or something. But when you rob with a pen, you seem to be able to avoid the people who are chasing you for years and continue your robbing. That is the serious problem I have with what has been brought out in this inquiry.

Mr Dwyer—I think we detailed in our first submission the avenues available to creditors to have liquidators removed through calling meetings et cetera and removing them at the first meeting of creditors. Obviously there is a need for creditors to liaise with the liquidator and get the information from them. If they are not getting appropriate responses ASIC does get involved and does assist creditors in getting that information from the liquidators. The removal of the liquidator and removal of his registration is a different matter to removal in any particular instance.

Mr Day—Senator, I think you have responded to your own concern in that respect. It is true that it is very different for ASIC to investigate a matter that effectively is a form of white-collar crime compared to an armed robbery or a murder or some such. Clearly if there is a dead body on the ground it is pretty easy to identify that something has happened. That is the evidence. Then there is the identity of who actually pulled the trigger and so on. White-collar crime involving allegations here of, say, wrongdoing by a liquidator, wrongdoing by a director—

Senator WILLIAMS—And a mountain of paper.

Mr Day—And a mountain of paper. To a certain extent, because of the procedural fairness and the rules of evidence, there is a lot of material that needs to be gone through and a lot of time taken to go through bank accounts, other forms of data, other documents lodged, minutes of

meetings and so on. Those things are not an easy endeavour compared to someone stabbing someone in a pub.

Senator WILLIAMS—No, they are not. I understand where you are coming from.

Mr Day—They are different and they do take longer. I share your concern as to the length of time it takes but I think you sound as though you at least appreciate there is a bit more involved.

Senator WILLIAMS—I do, but when you have a company like the YCW rugby league club at Armidale when Ariff comes in, takes the weekly collection, banks it all, does not pay the electricity bill, does not pay the grog bill to Tooheys and hence Tooheys pursue him for bankruptcy, there is clear evidence there when he is taking all the money and not paying anyone that something is seriously wrong. It is not as though you have to search through miles of documents to see that he did the wrong thing there. We could on to Singleton Earthmoving et cetera where he was obviously doing the wrong thing.

Mr Day—All those are documented, I think, in the time line et cetera in the confidential submission and are obviously subject to ongoing investigation.

Senator FIERRAVANTI-WELLS—You have obviously had a look at the transcript of the proceedings. There has been comparison made of ITSA and ATSIC in relation to dealing with their respective roles in insolvency and there has been criticism. Is some of that criticism perhaps a function of the fact that ITSA is a specialist in insolvency whereas for ASIC the insolvency component is part of a wider suite of responsibilities that you have? Do you have any comments, Mr D'Aloisio? There has been comparison made in this inquiry and in fairness you may want to make comments in relation to that.

Mr D'Aloisio—If ITSA is doing a good job, that is great. All regulatory agencies have remits. To actually compare the two, the complexity around corporations and groups and schemes of arrangement and so on that the corporate law brings in is quite different to when individuals go into bankruptcy. It is a much more complex area. I think you need expertise in the corporate complex areas to handle these issues. Again, we think that the way it is structured, with the Corporations Law aspects and the liquidators and insolvency practitioners we are talking about, it does logically fit within ASIC's role. ASIC is the oversight body for a whole range of gatekeepers—auditors, accountants, boards, CEOs, financial officers and so on—from the birth to death of corporations, as I said earlier. It is an issue for the committee to separate that out into personal bankruptcy. I do not think that by separating in that way you will get improved results, because improved results are going to go with the expertise that is needed to handle complex groups and investigations.

Senator FIERRAVANTI-WELLS—One of the common suggestions in submissions is that perhaps we should move to one body, one regulator, to effectively have one registration under one umbrella for insolvency, whether it be personal or corporate. Obviously that is something that you have a view on?

Mr D'Aloisio—We in our submissions have outlined the pros and cons of those sorts of arrangements. They are really not matters for us. They are policy matters for government and policy matters for the committee. You could make similar arguments about auditors, I suppose,

and you could say that auditors ought to have a separate body that looks after auditors because it would develop an expertise to deal with those issues. There are lawyers, accountants, investment banks, financial advisers—the issue came up in the parliamentary joint committee inquiry of whether financial advisers should be separately regulated. These are policy issues, and if people see there is real benefit in that separation, ASIC has to leave that to government. In looking at what we are doing, you naturally ask what is the additional value that would be added that ASIC is not adding or could not add. As our submission indicates, we struggle to see those benefits. In the end it is a matter for the committee.

Senator XENOPHON—Supplementary to that we have ITSA, which looks at personal bankruptcy, and ASIC, which looks at corporate insolvency. What is your understanding of other comparable jurisdictions? Do they have one body that looks after both or is it not unusual to have corporate insolvencies and personal bankruptcy being dealt with by separate bodies?

Mr Dwyer—I think it varies around the world. The world banks expressed a view that they think corporate insolvency and personal insolvency should be in different regimes, so there is a scent there of international best practice in terms of what we have here. The concept of harmonisation of those laws has been on the table for quite a while. It was in the 2004 stock take. It is a matter that government has considered and continues to consider and monitor. In terms of international best practice I think the World Bank would say that the separation of corporate insolvencies and personal bankruptcy is the appropriate model.

Senator XENOPHON—What is the common practice in Europe, for instance?

Mr Dwyer—Europe is very much driven by the courts. The trustees there are lawyers and the processes are enacted, monitored and resolved through the courts rather than through the private trustee system.

Senator XENOPHON—All right. But for bankruptcies and for corporate insolvencies is there one system or are there two streams there?

Mr Dopking—The international insolvency regulators are similar. The international insolvency regulators in March of this year produced a comparative report of the different jurisdictions around the world. That would be something that would be worth our looking at. It shows that there are different mechanisms around the different jurisdictions. In the personal sphere in some countries the government regulator tends to do more of that sort of work in undertaking personal insolvency. For example, ITSA in Australia does about 96 per cent of bankruptcies in Australia. That higher number being undertaken by government departments is a common theme in some jurisdictions overseas.

Then there is the UK system where the practitioners are registered by individual accounting bodies. There are four or five different bodies of licensed practitioners. The regulation is of those accounting bodies so there are different things which have different approaches. The stocktake report that Mr Dwyer referred to covered it extensively and recommendation 59 for the benefit of the committee is the area where it summarises the conclusions of the same issue.

Mr D'Aloisio—To add to Stefan's answer if we are looking at advantages and disadvantages when you analyse corporate collapses you have to look at the accounting, the structure, and

financial issues. There is a range of expertise that you need. One of the advantages that ASIC has is that it has that expertise in different groups within the organisation. If you are going to separate that out, you are going to have to replicate it in the new body or at least the new body will have to have the resources to be able to have those skills. If you are winding up a major financial institution that is engaged in over-the-counter trading in the wholesale market with CDOs and so on, you really have to have expertise to analyse and understand those issues in a collapse situation. ASIC does have that expertise in its other groups so, if you are minded to take that area out, all I am saying is that one of the things you need to look at is the resources that are needed to replicate that expertise.

Senator XENOPHON—On the issue of resources I think some of your colleagues would have heard Professor Colin Anderson and Professor David Morrison give evidence this evening. There were very cautious not to ascribe any criticism to ASIC but they made the observation that on the ASIC website there was a relative paucity of information in terms of corporate insolvencies compared to the information you get on the ITSA website, on the ATO website—even though it is a completely different field—and on comparable websites overseas. I think it is fair to say they were not ascribing any blame or criticism of ASIC as an organisation but they did make the point that there was a lack of information which was not desirable from a public policy point of view in terms of having that information out there.

Mr Dwyer—I think they were talking about data and statistical information as distinct from other information which is readily available.

Senator XENOPHON—Yes, thank you for clarifying that. Can you comment on what Professors Anderson and Morrison said? Do you think that there is an ability to provide more information which I think Professors Morrison and Anderson said would be desirable in formulating policy.

Mr D'Aloisio—Again, you work to the market. If the market is saying that there is additional information that they would like then as a service provider we would look at that and see what we can do. At the moment part of where we are with ASIC is that we are upgrading our systems. We will have tremendously more flexibility with the new systems in place to be able to release data and statistics.

Senator XENOPHON—You are not using the same IT provider as the tax office, are you?

Mr D'Aloisio—Actually, the systems we are putting in are quite similar to the tax office systems, so—

Senator XENOPHON—Good luck!

Mr D'Aloisio—we will have that flexibility. We have learned. We will have that flexibility. I think we should look further at what is being sought, and if we can provide that and it is in our systems or it can be collected we would do that. There is also law around what we can put on the registers, and we would need to look at what changes we may need to make to enable that information to be released.

Senator XENOPHON—But you take the point, again, very carefully put by Professors Anderson and Morrison, that more information could be made available, which would be good?

Mr Dwyer—Just for the benefit of the committee, the statistical data that we have relates to two things really. It is around liquidators' lodged section 533 reports, and there is information in those which we can collate and we do make publicly available. And then there is information around liquidators' ongoing receipts and payments and statements of position, which they lodge each six months, which do have a substantial amount of information that our systems do not allow us to collate. That information is publicly available. It is on the public system and it is searchable. It can be analysed by the academics, but we do not have the technology at the moment—although we hope to have it—to be able to collate that information into the statistical data which we are all looking for in terms of the analysis of the profession.

Mr Day—Professors Anderson and Morrison were talking about microfiche. ASIC has only been in existence for 20 years. Any corporate data prior to that is in microfiche. We were provided with that, if you like, by the states at the point of referral to ASIC, which was then the ASC. We are in the middle of a project of having that microfiche information scanned and made available so that it is all more accessible by academics and other parties. Professors Anderson and Morrison made the point that they have to pay for that search. That is true, and that is a feature of the regulations and the law that require that information to be paid for.

Mr D'Aloisio—The bottom line is that, if the committee feels that we need to do more on information flow that is available, if that is seen as value—if the market wants that information or it is wanted for research or whatever—we will provide it.

Senator XENOPHON—Mr D'Aloisio, can you assure the committee that, if you thought there was a resourcing issue, you would not be shy about saying, 'In order to do our job properly, we need additional resources or additional staff'?

Mr D'Aloisio—On our resources, we negotiate with government and we put our proposals in—you have your yearly three- or four-year plans. I have outlined to the committee what we do, and we have given you an extensive confidential briefing on how we handle the specific cases. If those responsibilities increase—if, for example, we should do a surveillance of every practitioner once a year, whereas at the moment we do a risk based assessment—then clearly we would need to ask government for additional resources and we would indicate what those are. What I am saying is that, as we have understood our regulatory role at the moment and in the process, yes, we have got the resources and we are working. However, if that mandate were to increase, we would ask for additional resources and we would not be shy in negotiating with government in asking for additional resources where they were needed. Whether we get them is a government decision, and it will be reported back through Senate estimates and so on, but definitely our job is to seek those resources where they are needed.

Senator XENOPHON—Further to that, do you believe there is some efficacy in having, in addition to a risk based assessment, spot checks of liquidators on a regular basis?

Mr D'Aloisio—In a sense, we would be guided by the committee, because it has collected probably a lot of information as well, but—

Senator XENOPHON—I am guided by you as the regulator in terms of what your view is.

Mr D'Aloisio—clearly, if we could do our surveillances on each entity that is in the market—in this case, each practitioner—once a year or even more regularly, our ability to pick problems would increase.

Senator XENOPHON—That is a desirable policy outcome.

Mr D'Aloisio—It would. It is just a function of resource. Whereas if, as we do at the moment, we do a risk based assessment, that means that there is a certain percentage we would do. That must mean that statistically, unless you are lucky and you get it right, in practice you will miss things, but you say that overall, over a period of time, okay, that is the risk based model and how it works.

Senator XENOPHON—But do you also think that having regular checks of practitioners could also perhaps change the culture amongst some of those practitioners who might be sailing close to the wind?

Mr D'Aloisio—The answer to that is yes. Clearly, as I have said on other occasions, if ASIC is on the beat and it is tramping through the fields, it is likely to have an impact and you would sit up—so, clearly, yes.

Mr Dopking—It is the cost-benefit analysis of what results will be achieved from the extra money spent. If we look over the years at the outcomes that have been achieved in the corporate sphere, we look at all the names that you would be familiar with—Mr McVeigh, Mr McDonald twice, Mr Wily, Mr Edge, Mr Albarran, Mr Ariff, Mr Star, Mr Dean-Wilcox. All those practitioners had been picked up, dealt with, taken to the CALDB and had the appropriate penalty handed out by the CALDB. If you want more practitioners picked up and the type of practitioners, it is an issue of whether there is a cost-benefit analysis.

Senator XENOPHON—And you think there is? Do you think the cost-benefit analysis would be favourable in terms of, rather than having a risk based system, having regular checks of auditors?

Mr Dwyer—I think it is pretty finely balanced. I think the additional costs, which we have outlined in our second submission, are quite substantial in terms of having regular surveillance of every practitioner either annually or biannually. I think it is pretty well line ball as to whether those additional costs are justifiable in terms of the impact they might have. The mechanisms that are in place at the moment and the cooperation and eagerness of the profession to move to co-regulation and their own disciplinary procedures, and this inquiry I think have sent a very solid message to practitioners that they have to lift their game, and I think it has been a very effective process. But I think the cost benefit is pretty well balanced at the moment.

Mr Dopking—I would like to say a final thing as well. It is important to recognise that it is more than just visits to practitioners that can improve standards. There are a number of projects. ASIC have a balanced approach, and we also undertake projects reviewing 439A reports, independence reports and remuneration reports. Those projects touch each of the firms that we visit. The independence report touched 74 firms. The whole picture has to be looked at—the

holistic approach of dealing with the profession and how it actually improves standards—rather than just spot checks or visits.

Senator XENOPHON—No, it is part of a package.

Mr Dopking—Yes, obviously.

Senator FIERRAVANTI-WELLS—The concept of a flying squad or something along those lines has certainly been a feature of various submissions in arguing that the random surveillance model would act to deter misconduct, but you are basically saying, if I understand, Mr Dwyer, that the difference between a sort of spot check and what you now do would not change things very much. I am trying to sort of simplify it.

Mr Dwyer—No, that was not what I was saying. I was saying that the additional resources that we have identified in our second submission would be substantial, and the cost benefit of those additional resources as against the impact of annual or biannual reviews of practitioners would be fairly line ball. I am not saying it would not have an impact; it would. It is a question of whether that cost is justified.

Senator FIERRAVANTI-WELLS—We are talking about two things: an annual or biannual review as opposed to a flying squad doing spot checks. Senator Xenophon was talking about a proactive annual or biannual review. My question is in the context of what various submitters have said about the possibility of having a flying squad.

Mr D'Aloisio—We separate the two things—cost, for the moment, from impact. What you and Senator Williams in the earlier discussion are telling as is that, notwithstanding the good work we do and what we are doing in the market, there is a perception issue of effectiveness through delays and so on. The next issue is: how can you deal with that? You can have additional spot checks, you can have flying squads, or you can actually have a program where you look at each practitioner each year. Clearly the more you are in the field, the more you are working through, the greater the deterrence impact. And you would expect from that that your chances of lifting behaviour would be greater. You then go to Michael's point and you say, 'To do that and put the resources into it, is that on a cost-benefit analysis something you want to do?' There are judgments in relation to that. It just really depends on how you weigh up the perception issue that you want to deal with and fix against the additional costs that the community would have to wear in resourcing ASIC to do that. Different people have different judgments on that.

Senator FIERRAVANTI-WELLS—You say that if you were out there more you would find more problems. My question is: do you have a handle on how big the problem could be out there?

Mr D'Aloisio—No, what I am saying is that it is not that you would find more problems, or you may, but it is the deterrent impact. What you are looking for is to deter bad behaviour. You are not just going out there to find people to prosecute. You want a system that deters potentially bad behaviour when it comes to people thinking: 'Do I charge this or do I charge less? ASIC is going to look at this and I'm going to be audited once a year.' So it is that deterrence impact. Clearly it is like a police force: if you put a policeman on every street, the chances are you will deter more crime. The question for the community—and this is what Michael is getting to—is

whether the cost of putting a policeman on every corner, in every street, for what you are seeking to do justified. It is really a judgment call.

Senator FIERRAVANTI-WELLS—But what assumptions have you made to make the judgment call that what you are doing now and the risk approach that you are adopting is the appropriate judgment call? That is really what I am getting to.

Mr D'Aloisio—We have based that on what we have done in other areas and the surveillance processes that we have conducted in other areas. You would never be able to give an assurance. In other words, the test would be that you run two systems—one that has everyone reviewed once a year, and our system—you compare the results and if the results are the same therefore you can go with our system of just surveillance. You are never going to get that sort of comparison, so it is going to be a judgment. The judgment you make on your experience is that if you do certain reviews on a certain basis you are probably getting to 80-20, 90-10, 70-30 in terms of picking up the problems and having the deterrent effect. Then the judgement is: for the extra 20 or 30 per cent, do you go the full audit, looking at everyone once a year, or not? That is a cost and benefit judgment that you need to make.

Senator FIERRAVANTI-WELLS—Earlier we heard comments about the data and the analysis of the data. If there was better analysis of the data, would that not afford you a much more concrete basis for testing the assumptions and testing the systems that you now use?

Mr D'Aloisio—The testing of the data came in the context, I assume, of material that is to be made public. ASIC does have data and a whole lot of information that we receive and collect—perhaps Stefan or Michael can talk more about that—and we analyse a lot of data.

Senator FIERRAVANTI-WELLS—When all those liquidators return all those forms, they have got a lot of information on there. The point is that, yes, that information is valuable and is utilised by you to do what you do, but there is another aspect to it—and I think this is where the doctors were coming from—which is that the analysis of that information could be very useful in terms of highlighting whether there are problems. Rather than making assumptions about the potential scope of those problems, you would do far better to have at least that analysis to give you the statistical basis for making certain assumptions.

Mr Dwyer—I think we agree that that statistical information would be very helpful, but we just do not have the technology to accumulate it into an informative data source at this stage.

Mr Day—I think Dr Morrison and Dr Anderson made statements earlier this evening comparing it to, say, the circumstance in the United States, saying that there is a lot of data there that is free—it is all on the web and you can access it that way. So I took it that some of their lament was that it is not that the data is not there; it is just that it is not accessible to them in a cheap, easy way. I am not being critical in saying that, but it would appear that they wanted access to that so that they could look at it for their own purposes and give your own analysis, and then also put a different view, perhaps, from the analysis that we do on that data.

Senator FIERRAVANTI-WELLS—But surely, if that data and more of that sort of data was publicly available, that in itself would act as a deterrent for the industry. If we are talking about perceptions, it is one thing to go out there and be the cop on the beat and do the fieldwork et

cetera, but if practitioners know that what they are doing is being not only analysed but also published in a form that assists in that scrutiny, that in itself, I would have thought, would act as a deterrent as well.

Mr Day—Sunlight being the best disinfectant—yes.

Mr Dopking—The publication of data really relies on the capture of the information in the first place. The Australian Taxation Office captures a lot of good data through their tax returns, so they can produce good information. It was set up to do and predominantly does 96 per cent of bankruptcies. Their systems have been set up to capture that data in-house, because they effectively do that work.

ASIC only receives information as a result of statutory forms lodged. The ability to change those statutory forms has improved in recent times, and we are able to implement a system, through what they call a section 533 report, to capture a lot of data. The previous inquiry recommended that that data be published triennially. That first batch of triennial data has been published. The next batch of data is due to be published at the end of this financial year. Some have commented that it would be better to have that annually. That is something we are looking at.

The other data that we do capture is through, as Commissioner Dwyer mentioned, receipts and payments. That data is collected in a PDF form. I think we have discussed the new IT systems that ASIC is developing. Part of that process will be to capture that data in a readable form. Having captured that data, we can then produce it in a way that may be of use to academics. That is part of our forward program which we have set out in our first submission.

Senator FIERRAVANTI-WELLS—If you want to go into the corporate history of a person or an entity, at the moment what is available is very limited. There is very limited information available to a member of the public who wants to go in and do a company search or a search on a person. You have to go through an agent; you have to get somebody to get you a search. If the ordinary person today wanted to do a company search to find out the directors of a particular company, they have to go to somebody—a company—to do that search for them. Sure, people involved in the commercial area will get an agent or somebody to do it for them, but if you are an ordinary member of the public, trying to just find out a little bit about the corporate history of a particular individual, I can tell you that it is really hard.

Mr Day—We agree with that, and as the chairman outlined we are going through a transformation of our technology and registry processes so that we can assist more directly in relation to the frustration you have just indicated. We want people to be able to search easily, quickly and with great data at their fingertips so that they can effectively inform themselves and therefore possibly protect themselves from that type of thing. So we agree, and those are the things that our change program for IT is aimed at.

Senator FIERRAVANTI-WELLS—Does that mean that ultimately I could go in and put in a person's name and then come up with all the corporate history of that person, because it is all publicly available documents?

Mr D'Aloisio—Yes, to the extent that we have the responsibility to capture that information.

Senator FIERRAVANTI-WELLS—I appreciate that, but the other point in all of this is that you capture a lot of information in terms of returns that come to you, whether they come to you as annual returns or something else. If I can go to an office and purchase, for example, the annual returns of a company, there is nothing to preclude me from purchasing the annual returns of company XYZ Pty Ltd. There must be something to make it simpler for me to be able to access that online. Is that the sort of thing that we are moving towards?

Mr Day—Yes.

Senator FIERRAVANTI-WELLS—What is the time line in relation to that?

Mr Day—I think I would be foolish to indicate a strict time line on that.

Senator FIERRAVANTI-WELLS—Of course. Ten years? Five years?

Mr Day—No.

Mr D'Aloisio—We have our STAR Program, and I think we are looking at 2012 for its delivery, but it is being progressively rolled out. We can give the committee a briefing on our technology systems and where they are headed if you wish. But we accept that ASIC is coming from behind. When ASIC was set up as the ASC—going back 20 years—and set up the facilities in Morwell and Traralgon, it probably had the best technology in Australia at the time. The ability to register companies and so on or to incorporate was phenomenal in those days. What has happened is that that technology is obviously based on old systems, and probably the upgrade of that technology was left a little bit too long, and over the last four or five years we have really been working hard with what we call our STAR Program to take that technology to the level of current technology and beyond. I think the program and the way we are rolling it out will see a lot of positive change in the direction that you are talking about. If we are able to give you an assurance that we will get to a point where all of the data about a company or indeed—this is where you are getting to, and I share this—all of the prize, if you like, of a director, an insolvency practitioner or a financial adviser can be searched and ascertained, that must add to the integrity of the system, provided the data is reliable and there are elements of fairness in the way that is used so that people are not disparaged in an unfair way.

Senator FIERRAVANTI-WELLS—Just on that point, the tax office has a narrative system of collecting data, and it is very useful in the sense that the narrative and the dealings in relation to individuals or companies occurred in chronological order. So, when you look at your records with company XYZ, there it is: you can pull it up and you have a corporate history and it is all together. Is that the sort of way that you and your system now operate as well, so that whoever is accessing information in relation to one aspect of a corporate entity can have access to the whole corporate history there in one place rather than one area of your organisation not particularly knowing what the other part is doing?

Mr D'Aloisio—That is where we are moving to, absolutely. You have a data warehouse, and you mine that warehouse depending on the issue you want to raise and the way you search it, so you have access to all of the information.

Senator FIERRAVANTI-WELLS—I want to go back to the question we were looking at before of where you hypothetically move to one regulator. There are obviously people who do insolvency in ASIC. Is it simply a case of moving those people to a new regulator? I detected from what you said before that there are some people who work in the insolvency area but there are other areas of ASIC that also provide advice and assistance to the insolvency people. You can move the insolvency experts, if I can put it that way, straight over to a new regulator, but there is another body of information that you say that these people draw on that you would also have to replicate. Have I understood correctly what you said?

Mr D'Aloisio—Yes, that is correct. There are two elements to it. There is the element of the individuals in the insolvency area and the experts that would be needed from the other areas. Also ASIC itself would have to retain significant insolvency practitioner expertise because it is actually dealing with a lot of other problems on a day-to-day basis. If we are dealing with a scheme of arrangement that has to be enforced or reviewed or if we are dealing with a particular form of collapse, we also need to understand how an insolvency practitioner may approach the liquidation of assets or some other part of that.

So it is not just a case of saying there are x number of people in ASIC who handle insolvency and they go across. We need that ongoing expertise. Other expertise within ASIC is used by that group. Indeed, you would not be able to say we will just take those people who deal with insolvency complaints in Warren's area, which handles complaints and so on. That would not work. We run the organisation as integrated body. Do not get me wrong, Senator, I am not being defensive about keeping—

Senator FIERRAVANTI-WELLS—No, I just asked a simple question.

Mr D'Aloisio—It is a decision for you, but I can point out—

Senator FIERRAVANTI-WELLS—I appreciate that. My question was purely based on the logistics. It is not a simple issue of just moving a group of people into another entity.

Mr D'Aloisio—In another field we are grappling with this issue—with the ASX. ASIC have inherited the surveillance of the markets. Clearly we have been trying to work out who can come across from the ASX. The ASX have to say who they need to retain. There is other expertise. It is not a new issue. But, in setting up a new body, ASIC would need to retain a substantial part of the expertise that we have now. If offers of employment are made by the other body and our people elect to go across, that would be a personal matter, but as an institution we need to have that expertise.

Senator FIERRAVANTI-WELLS—I understand.

Mr Day—I think the other things that would be forgone if it were to move out also should not be discounted. ASIC liaises with a broad range of stakeholders across all its subportfolios of work and that provides information intelligence that we use in relation to insolvency type issues and so on. Similarly, as the chairman just indicated, our centralised complaints handling unit gets information from a number of sources that may not relate to insolvency but in fact fills in the picture of what we might know about a company being in dire straits. That allows us then to join

the dots and make decisions before something becomes insolvent or is likely to go down that path. We can have discussions.

Similarly, the stakeholder senior executives are out talking to different market segments. They get that information. The regional commissioners are out talking to different market segments. We are bringing all that information to ASIC. We are sharing that knowledge amongst ourselves and, therefore, we are better informed about what is going on. If you move or put the responsibilities for insolvency in a separate group, you will not be able to avail yourself of those opportunities and probably will forgo those opportunities.

Senator FIERRAVANTI-WELLS—Various people raised having an industry ombudsman. What are your views? You have heard and seen some of the evidence that has been given to us. What is your view in relation to the establishment of an ombudsman? I asked this in the context of earlier this evening. A lot of this process and a lot of the complaints would come from the frustration and lack of understanding. Is there a role there for an ombudsman? Do you have any comments in relation to some of the evidence that has been given?

Mr D'Aloisio—I think, again, in our second submission we do try and assist with the pros and cons. Looking at it as ASIC and as ASIC's chairman, there is strong oversight. I have just come from a parliamentary joint committee hearing, we have Senate estimates, we have Treasury, we have the minister—there are a significant number of oversight bodies for ASIC and that is the way it should be. If it is considered that an ombudsman would provide additional value in oversight of what ASIC does in this area, again it is a matter for the committee, but we have not found in our experience that the committees that oversight ASIC's work have been shy about probing issues and looking at things that we should be doing better, whether it is in this area, in audit or in other areas that we work in. We are used to oversight. There are other ombudsmen that have been appointed to look at our other work as well, so it is not something that we cannot work with; we can work with that. It is simply an issue of trying to understand what value would be added. In fairness to the point, it probably does deal with some of the perception issues we talked about earlier because it is another avenue to look at what we are doing. But my sense of it is that we are one of the agencies that are very, very significantly subject to oversight.

Senator FIERRAVANTI-WELLS—Thank you.

Mr Dopking—It is covered quite extensively in our second submission, in paragraph—

Senator FIERRAVANTI-WELLS—Yes, I appreciate that. I am sorry; I do not actually have that with me this evening and I gather that it is because there were some confidential matters—

CHAIR—Thank you, Senator. Senator Xenophon.

Senator XENOPHON—Mr D'Aloisio, I received a letter from ASIC dated 3 June 2010—which you are familiar with, I take it—in relation to the Westpoint issue. Actually, it is dated 3 June, but other pages are dated 2 June. The letter is in relation to Westpoint, ASIC v Karen Sandra Carey, Federal Court proceeding VID 408 of 2010.

Mr D'Aloisio—That is from one of our chief legal officers.

Senator XENOPHON—Yes, from Louise Macaulay, Commission Counsel.

Mr D'Aloisio—Yes, I am aware of it.

Senator XENOPHON—Arising out of questions I asked in estimates on 1 June that you are familiar with, I was asked to inform ASIC whether I retained documents in my possession or had under my control copies of any of the unmasked documents referred to. I was requested to return those copies to ASIC immediately. I was also asked to inform ASIC of the names of any other persons to whom I have disclosed the unmasked documents or anyone I have discussed their content with, together with the dates of any disclosure or conversations. I was also asked to give an assurance that I would not disclose to any other person the contents of any of the unmasked documents that I read. Did ASIC receive advice on the issue of parliamentary privilege before that letter was sent to me?

Mr D'Aloisio—I did ask that that issue be looked at as well and discussed with you. I am not in a position to go further into it this evening. But the reason the letter needed to be sent, as I understand it, the legal reason, is to maintain the claim for legal professional privilege in relation to some of those documents. I think it is quite in order for you to respond to that letter—

Senator XENOPHON—Which I did—I am sorry; I could not find it earlier.

Mr D'Aloisio—as you see fit.

Senator XENOPHON—I respectfully declined your request.

Mr D'Aloisio—Yes. Senator, I entirely understand—

Senator XENOPHON—I sought advice from the Clerk of the Senate and I think I provided to ASIC a copy of the advice of Dr Laing, the Clerk of the Senate, in relation to that. I do not want to discuss the merits or otherwise of what is before the court, but I found it extraordinary that I was being—

Mr D'Aloisio—I can assure you that it was done on legal advice in order to maintain the legal professional privilege that attaches to certain documents. We are not going to contest your reply, as far as I know—

Senator XENOPHON—Does the fact that you are not contesting my reply mean that you will be taking action for the recovery of those documents from me?

Mr D'Aloisio—No, I am not in a position to go into that.

Senator XENOPHON—Are you telling me that I am doing my job in relation to parliamentary proceedings—

Mr D'Aloisio—I would like to read your reply and then—

Senator XENOPHON—The reply says I am not complying.

Mr D'Aloisio—I will discuss it with our legal people.

Senator XENOPHON—All right, so do you need an address to serve proceedings?

Mr D'Aloisio—No, Senator, that is not necessary.

Senator FIERRAVANTI-WELLS—You are easily found, Senator Xenophon.

Senator XENOPHON—I say bring it on if they need to.

Mr D'Aloisio—We need to be able to demonstrate that we took all steps that were necessary in order to maintain legal professional privilege in relation to those documents. If parliamentary privilege overrides that, it is in order for you to assert that and we go from there. So please do not take this as a personal matter, it is not an issue that cuts across your responsibilities as a senator—we have responsibilities in terms of this particular action.

Senator XENOPHON—I asked that those documents be received in the course of parliamentary proceedings—namely, estimates proceedings—so I will wait and see what occurs. Chair, to be fair to all concerned I think it is important that the letter from ASIC dated 3 June and the Clerk of the Senate's response of 7 June be tabled. I seek leave to table both these documents. There are a number of attachments, but I have not sought to table those. If ASIC thinks it would be fairer for me to table those attachments I would be pleased to do so.

CHAIR—Perhaps you should table the complete set of documents.

Senator XENOPHON—All right. That will involve a lot more photocopying. All those documents are on the public record.

Mr D'Aloisio—I need to have a look at them, but I think it is a matter for the Senate.

CHAIR—I think provided your documents are related to your work as a senator they are covered by privilege. I was once on the Senate Standing Committee of Privileges when there was an issue with another senator, Senator O'Chee, in relation to documents and it was held that documents relating to a senator's work as a senator are covered by parliamentary privilege. It is your judgment, Senator Xenophon, whether or not you table these documents.

Senator XENOPHON—At this stage, to have it on the record, I thought the prudent thing would be to table the letter from ASIC because it has a number of attached court documents—both the letter from ASIC relating to the request made and the clerk's response. I thought that would be the prudent step to take, but if my colleagues want me to table all the documents I would be happy to do so.

CHAIR—Senator Xenophon, I think it is your judgment.

Senator XENOPHON—I will simply table these at this stage and I am open to tabling other documents. It is just a question of what would be relevant to the principle at stake.

CHAIR—They are your documents and you know what they contain so I think it is your judgment, but you are covered by privilege provided they are related to your work as a senator.

Mr D'Aloisio—It is not a matter for us, but I should say in relation to the questions you asked about Westpoint, we have said we will answer all of those questions for you as well and we will give you those.

Senator XENOPHON—As I understand it, there is an indication of a date for court proceedings.

Mr D'Aloisio—On 7 July.

Senator XENOPHON—At this stage is ASIC seeking to adjourn that?

Mr D'Aloisio—No, in fact the proceedings were to be on 22 June, but I do not think it was us who sought an adjournment. I think it was an issue with the judge and the judge adjourned it because he was not able to sit on it.

Senator XENOPHON—There were some personal reasons.

Mr D'Aloisio—There was a personal reason for the judge. It will be on the 7th. We have indicated to the Westpoint investors why we think the issue is an important one and we have said we will be guided by a decision of the court. If the court forms a view prior to that—the issue had been raised and Justice Goldberg had not given leave for those documents to be released—and Justice Finkelstein forms a view that they should be released, we will obviously comply with those orders.

Senator XENOPHON—There is a broader issue here of transparency, but I think perhaps we will wait.

Mr D'Aloisio—We have carefully weighed up the issue of transparency in our duty. At the end of the day ASIC's main objective in the Westpoint case is to recover compensation for the investors. In doing that it is not for ASIC to assist parties resisting that in assisting their case. The parties involved here that are seeking the so-called documents have an interest in opposing those claims. So we are not talking here about a prosecution, we are not talking about a civil penalty proceeding, where different duties apply to ASIC in the sense of full disclosure and so on. We are talking about a very hotly contested civil action where we are seeking to recover money for investors that lost it. In that process I think we are entitled, as any litigant, to pursue our rights in the same way. Legal professional privilege attaching to documents is something that has been in our law forever. There is no adverse inference to be drawn by the fact that a party maintains legal professional privilege. A court can overrule it and we would comply. So the notion that ASIC is doing something untoward—

Senator XENOPHON—I have not said that.

Mr D'Aloisio—No, but that is the inference that you see drawn in the media or sought to be drawn. It is just nonsense. If we are not allowed to assert legal professional privilege here, does that mean that ASIC should never have legal professional privilege? What are the implications

for us of where this sort of thing goes? There is a broader public interest issue about what should be kept secret and whether legal professional privilege should be maintained, but that is a policy issue.

Senator XENOPHON—Sure. And I think there are issues in relation to the investors' views on this, but perhaps we will leave it there and we will see what occurs.

Mr D'Aloisio—In a sense it is a very important issue and I am more than happy to continue a dialogue with you through the committee structure or in some other way to assure you that we are not doing anything untoward here.

CHAIR—Perhaps we might leave you to that dialogue between the two of you.

Senator FIERRAVANTI-WELLS—Whilst we have been talking liquidation here for three hours, it is probably time we went out and found out about the other spectacular liquidation taking place elsewhere in the building.

CHAIR—10.30 approaches and somebody is appearing on TV about then, I think. If there are no further questions, we will conclude this hearing. Thank you very much for appearing.

Mr D'Aloisio—Thank you for taking our submissions on and listening to us. I assure you that we are motivated to really enforce the law as we should. I think in this area we do not believe there are systemic issues. We believe that we have done a good job and we look forward to the committee's recommendations and whatever they be we will obviously fully cooperate.

CHAIR—Thank you very much, Mr D'Aloisio. Thank you, Hansard. Thank you, staff.

Committee adjourned at 10.23 pm