



Liquidation failings put heat on ASIC

- Calls for stronger oversight
- Inflated fees, misconduct targeted

Patrick Durkin and Alex Boxsell

The corporate regulator has been strongly criticised over its scrutiny of the insolvency industry, prompting calls to create an ombudsman and tougher annual audits targeting excessive fees and other forms of misconduct.

Submissions to a Senate inquiry examining the pay and practices of liquidators and administrators involved in corporate collapses have called on the Australian Securities and Investments Commission to dramatically increase its surveillance and monitoring of the industry.

The federal government's bankruptcy regulator, the Insolvency and Trustee Service Australia (ITSA), has questioned why its annual inspection program used to track

bankruptcy trustees and debt agreements is not used by ASIC to monitor liquidators and administrators.

The more than 60 submissions to the inquiry include numerous complaints from those who have had negative experiences with insolvency practitioners.

They include claims that fees charged are "horrendous and seem hardly justified", leaving lower ranking unsecured creditors with little or no returns.

There are also concerns that liquidators are not required to advise the corporate regulator once their professional indemnity insurance lapses, potentially leaving creditors and shareholders exposed to losses.

Corporate collapses increased 4 per cent in 2009 and bankruptcies

Continued page 12



 back



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From page 1

rose 6 per cent while debt agreements (a bankruptcy alternative) rose 11 per cent.

Experts predict these numbers will rise further this year, as the effects of the global financial crisis persist in the small to medium enterprise sector.

Nationals senator John Williams, who called for the inquiry late last year, said the submissions raised serious questions about the competency of the regulator.

"The phone calls and submissions we have received can only be described as alarming," Senator Williams said.

The co-chairman of the committee, Senator Alan Eggleston, said that, while he would not pre-empt the committee's finding, due in August, anecdotally there appeared to be some serious problems.

"We want to focus on the regulator and whether adequate penalties and policing is being conducted.

"We expect the question of whether the penalties are adequate will be a major issue," Senator Eggleston said.

Labor MP Bernie Ripoll, who chairs the Parliamentary Committee on Corporations and Financial Services, which has oversight of ASIC, said change was long overdue.

"There appears to be a range of activities happening in the insolvency industry which warrant inquiry and appear to require better oversight," he said.

"I certainly think that it needs improvement."

The inquiry was launched in November after disgraced liquidator Stuart Ariff was disqualified for life and ordered to repay \$4.9 million in a Supreme Court decision last year.

But he was later declared bankrupt, with claims for more than \$11 million lodged with his trustee. Because Mr Ariff had not been

meeting his indemnity insurance payments, creditors were not protected.

Submissions to the Senate inquiry claim that complaints were made to ASIC for years before Mr Ariff's activities finally came to light.

ASIC commissioner Michael Dwyer told a public hearing of the inquiry last month that ASIC first received complaints about Mr Ariff in late 2005 and 2006, but at that time no action was taken.

ASIC has oversight for the insolvency industry and refers matters to the Companies Auditors and Liquidators Disciplinary Board, an independent statutory authority that may consider disciplinary action.

Insolvency firm KordaMentha said in its submission to the inquiry that "in any profession there are bad apples and unfortunately the same can be said about the insolvency profession. The case of Stuart Ariff is one such case".

ASIC sought an extension until today to lodge their comprehensive submission to the inquiry but those familiar with its contents claim it is offers no firm recommendations for a way forward to improve the system.

"All complaints by ASIC are individually assessed and actioned as appropriate", ASIC reportedly says in one part of its submission.

One source who had seen the regulator's submission said: "There are no particularly revolutionary comments made by ASIC."

Substantial parts of ASIC's submission have been made confidential and will not be revealed to the public. It declined to comment yesterday.

ASIC officials will be questioned about the issue again this Friday when the Senate Economics References Committee holds public hearings in Canberra.

Treasury and the bankruptcy regulator, Insolvency and Trustee Service Australia, will also appear.

ITSA's call for ASIC to use its an-

nual inspection program has been supported by the Insolvency Practitioners Association of Australia (IPA), which represents more than 500 liquidators. The program reviews decisions made by trustees and any complaints made against them, as well as conducting a survey of affected debtors and creditors.

"The benefits of this pro-active approach are demonstrable," ITSA chief executive Veronique Ingram says in her submission.

"The preventative nature of this approach is also significant. The risk of fraud is minimised where practitioners are randomly subject to inspection and review."

The IPA's submission recommends that ASIC assess the Inspector-General's program for suitability and adaptability to the corporate insolvency practice.

"We understand that the office of the Inspector-General in Bankruptcy, Regulation and Enforcement within ITSA have an annual inspection program for their registered trustees," the IPA says in its submission to the inquiry.

The Institute of Chartered Accountants has backed the call.

In its submission to the Senate, the IPA also recommended the creation of an "alternative non-judicial specialist forum" to hear disputes about practitioners' fees as a cheap alternative to the courts.

"Given the importance of maintaining community confidence in the regime, and the potential for stakeholder dissatisfaction from an insolvency ... an industry ombudsman or some such position might be useful," it said.

The Australian Credit Forum said there was "substantial room" for improved conduct on the part of administrators and liquidators, particularly where fees are concerned.

"Administrators and liquidators utilise the funds in their possession



back



to recover further funds, for example, preference payments and the like, utilising the services of legal firms to further burn up the available funds in sometimes spurious legal action which completely drains any funds that could have been to creditors," it said in its submission.

IPA chief executive Denise North said "sometimes people will say: 'hang on, you just come in and you sell off the assets quickly and you go away'."

"But you can't sell anything until you have actually established to a degree of certainty who owns it," she said. "For someone who is meeting this for the first time, that work can look like it is adding up to a lot of fees and they don't see the point of it."

KordaMentha said the hourly rates charged by insolvency professionals administering large companies "are at the lower end of the standard rates of accounting and legal professionals" and significantly less than what was charged by investment banks for restructuring work.

A submission to the inquiry by Treasury said that a liquidator's pay can only be drawn from available assets and "often there are insufficient funds for liquidators to be remunerated in full or at all".

Flinders University academic Vivienne Brand said in a submission that the present system of liquidator regulation was "essentially a reactive model", relying heavily on reports of misconduct.

Corporate Law Minister Chris Bowen would not comment on the inquiry before it was completed.

PAYING THE COST

Recent disciplinary action taken against insolvency practitioners:

Stuart Ariff

Official liquidator, Newcastle, NSW.
August 18, 2009

- Found unfit to be an official or registered liquidator by the NSW Supreme Court.
- Prohibited from holding the office of liquidator, provisional liquidator, voluntary administrator, administrator of a deed of company arrangement or controller, for life.
- * "The decision sends a clear message to liquidators ... about what is expected when liquidators charge for professional fees and outlays." – ASIC commissioner Michael Dwyer

Geoffrey McDonald

Former Hall Chadwick partner
December 2, 2009

- The Administrative Appeals Tribunal suspended registration as a liquidator for two years after finding failure to carry out or perform adequately and properly duties as a liquidator.

Robert John Edge

Of Kew, Victoria
July 6, 2007

- Prohibited by Supreme Court of Victoria from holding the office of liquidator, provisional liquidator, voluntary administrator,

administrator of a deed of company arrangement or controller for 10 years.

Ronald Dean-Wilcocks

Liquidator in Sydney
November 21, 2006

- Registration suspended for 12 months, resulting from failure to abide by professional standards relating to independence.
- * Decision of the Companies Auditors and Liquidators Disciplinary Board (CALDB).

Dean Royston McVeigh

Foremans Business Advisors in Sandringham, Victoria
February 9, 2010

- Suspended for 18 months from acting as a voluntary administrator or liquidator.
- Related to conduct as a voluntary administrator and/or liquidator of 10 companies between 2001 to 2007.
- * Decision of the CALDB.

Richard Albarran

Liquidator in Sydney
January 15, 2008

- Registration as a liquidator suspended for nine months.
- Failed to carry out or perform adequately and properly duties or functions required of a registered liquidator under Australian law.
- * Decision of the CALDB.

Source: *Insolvency Practitioners Association*.ASIC

'I am formulating the view that white collar crime is systemic in the industry.'



ASIC chief Tony D'Aloisio ... the regulator's officials will be questioned this Friday in Canberra.