



ASIC

Australian Securities & Investments Commission

Keynote address

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Introduction

The Insolvency Practitioners Association of Australia (IPA) represents a key stakeholder group for ASIC.

We work closely together to bring guidance and education to registered liquidators and do our best to ensure that the industry sets and maintains high standards.

We've made significant progress in recent years, and while there is much to be done, I know the IPA will work with ASIC to improve standards, implement reforms and deliver better outcomes for all parties.

Ladies and gentlemen, I've been asked to speak about how ASIC sees the roles that registered liquidators and directors play in providing fair and efficient markets for investors, creditors and employees.

Insolvency Law Reform Bill 2013

Before I begin, I'd like to briefly speak about the Insolvency Law Reform Bill, which frames the context for this address.

The Bill aims to improve practitioner professionalism, competency, communication and transparency, and the efficiency of insolvency administration.

Last year, ASIC established an Advisory Panel to provide input to ASIC on the implementation of the Government's insolvency law reform initiatives. The IPA participates in that forum and has made a submission to Government.

ASIC has worked closely with Treasury and other stakeholders, including the IPA, on the law reform. We will continue to do so and look forward to seeing the legislation go to Parliament.

ASIC's priorities

ASIC has three strategic priorities:

- confident and informed investors and financial consumers
- fair and efficient financial markets
- efficient registration and licensing.

We see registered liquidators as a key gatekeeper in the financial system. In fact, all participants in the financial system play a role in promoting confident and informed investors, and fair and efficient markets.

ASIC's focus on registered liquidators is in the three key areas of:

- independence
- competence
- improper gain.

These are cornerstones for ensuring investors and creditors are confident and informed, and markets are fair and efficient, in the context of insolvency. I will go through each in turn.

Independence

Independence is vital to a fair and efficient market, particularly given the referral model that is widely used in the insolvency profession. Solicitors, accountants and other advisers refer work to you. And those advisers act for their client. No doubt registered liquidators wish to maintain the referral relationships leading to future work.

However, it's important to remember that the law imposes a high fiduciary duty on you to act in the interests of creditors. Creditors must have absolute confidence in that. You contribute to that confidence through proper and full disclosure in your declarations of independence, relevant relationships and indemnities.

We expect – in fact, the market expects – that you:

- conduct thorough conflict checks
- document the results of those checks, and then
- issue your declarations, knowing that you are free of any conflict, both actual and perceived.

As you know, your declarations are issued when you do not have a conflict. The declaration's objective is to fully inform creditors of relevant relationships that are not threats to independence, but must be disclosed to creditors to ensure transparency.

I acknowledge the IPA's work in this regard and encourage practitioners to attend the IPA education courses.

Directors and their advisers need to understand your duty explicitly. To that end, there is an opportunity for the IPA to work with ASIC to strengthen independence disclosure requirements for registered liquidators, to give creditors further confidence that registered liquidators do act in the creditors' interests and their interests only.

Competence

We've seen relatively high levels of insolvency appointments in recent times. In the IPA March 2012 journal, Belinda Gibson cited ASIC's concern that some practitioners take on too much work, in the sense that they do not have the resources to progress each administration in a timely and effective manner.

The creditor community expects that you will complete administrations efficiently and in a timely manner. This gives creditors the best opportunity to maximise their return in the shortest possible time.

Last week, we released our annual report on the supervision of registered liquidators.¹ It sets out our work in addressing competence concerns for those practitioners who we review that don't meet the requisite standard.

I acknowledge that the large majority of practitioners devote resources to their internal systems and staff training to ensure standards are maintained. I'd also like to acknowledge the positive work the IPA does in raising standards through the Code of Professional Practice. I know that the IPA is keen to see those who can't meet those standards disciplined.

The basic proposition is that the competence you bring to your work directly affects creditors' confidence and the fairness and efficiency of the market.

Improper gain

In the same article I referred to earlier, Belinda also explained how improper gain may be made through excessive remuneration claims or inappropriate transactions with associated parties.

It's critical to have proper disclosure to creditors, which supports the fees charged and to avoid transactions that might give rise to improper gain. These issues, if not properly addressed, will adversely affect your reputation and the confidence of creditors.

Director's duties

I will now turn to the role of directors.

While directors must meet their duties and act in the company's interests, in the context of an insolvency, creditors' interests intervene. When that happens, ASIC expects – and again, the market expects – that directors meet

¹ Report 342 *ASIC regulation of registered liquidators: January to December 2012* (REP 342).

their positive obligation not to trade while insolvent and to appoint an external administrator. Our guidance to directors is clear on that.

When facing insolvency, a director's first port of call may well be their accountant, solicitor or other adviser. In that relationship, we expect those advisers to correctly advise directors so that directors can meet their obligations.

Directors also have an obligation to assist registered liquidators when acting as liquidators and administrators. If they don't, ASIC will assist through its Liquidator Assistance Program and help obtain a report as to affairs (or RATA) and a company's books and records.

ASIC's figures show the success of this program, including its prosecution of directors who do not provide books and records or reports to external administrators. In the period from July to December 2012, ASIC successfully prosecuted 301 directors who did not meet their statutory obligation to provide external administrators with a RATA or a company's books and records.

We recognise that the existing RATA can be improved. To that end, ASIC expects to publicly consult in the next financial year on improving the RATA such that it provides more effective information and makes it easier for directors to complete. We believe that this initiative will improve the external administration process.

ASIC's activities in insolvency

ASIC also undertakes a range of other activities in our regulation of the sector.

We administer the Assetless Administration Fund and finance preliminary investigations and reports by liquidators into the failure of companies with few assets, when it appears that we could take enforcement action in accordance with our enforcement policy.

In December 2011, Government expanded the scope of the Fund, so we issued revised guidance on accessing funds for legal action for asset recovery in circumstances where there may have been illegal phoenix activity.²

We investigate possible misconduct by registered liquidators in their conduct of external administrations. Where appropriate, we will enter into

² Regulatory 109 *Assetless Administration Fund: Funding criteria and guidelines* (RG 109).

enforceable undertakings, other negotiated resolutions or refer misconduct to the courts or to the Companies Auditors and Liquidators Disciplinary Board.

We assess external administrators' reports lodged with ASIC. These reports provide important intelligence and, if received in a timely manner, can alert us to possible misconduct by company officers.

We don't always investigate possible misconduct associated with the collapse of a company in every circumstance. However, it is an important source of intelligence for us. Our enforcement policy sets out the factors we will consider before we take action.³ They are:

- the extent of harm/loss
- the regulatory benefit versus cost
- the availability of evidence.

We can also deregister companies and disqualify directors of failed companies.

Late last year, we issued our guidance on how ASIC would exercise its wind-up power in relation to abandoned companies.⁴ The principal aim of such an administrative winding up is to allow employees to access the Government's safety net under the General Employee Entitlements Scheme (GEERS) or, now, the Fair Entitlements Guarantee.

We are currently assessing initial cases which might see ASIC exercise its wind-up power in the near future.

Finally, there will be instances where ASIC reviews a company suspected of trading while insolvent and have the directors focus on the company's solvency.

Following the end of our National Insolvent Trading Program in 2010, ASIC issued guidance to directors setting out their obligations regarding insolvent trading.

I understand that some of the profession might feel that ASIC should continue its focus on that program. The reality is that ASIC must focus its resources on the main risks in the market. In response to the global financial crisis (GFC), we increased liquidator surveillance significantly, and it's appropriate for ASIC to maintain its focus on this area.

³ Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

⁴ Regulatory Guide 242 *ASIC's power to wind up abandoned companies* (RG 242).

Self-regulation

As the IPA knows, industry should not wholly rely on ASIC to regulate the sector. Industry and professional bodies have a role to play as well.

I'm a strong believer in the efficiency of self-regulation.

Industry standards are critical in terms of complementing regulation. They provide guidance on how to comply with the law and even go beyond the law in setting standards, particularly in areas such as ethics. However, in order for self-regulation to be effective, it needs to be enforceable. Industry associations like the IPA need to be able to set standards and monitor compliance with those standards. They must also be able to enforce them.

If self-regulation does not work to the extent necessary, you will see Government step in and impose legislative reform, and this can sometimes have negative unintended consequences. It is far better for an industry to fix its problems than for Government to come in and fix them and possibly over-regulate the sector.

I'd like to acknowledge the IPA's work in not only establishing the Code of Professional Practice, but instigating a review to improve the Code – a review in which ASIC is engaged and will contribute.

Improving communication

At our recent ASIC Annual Forum, education, including financial literacy, was a recurrent theme. Industry and professional bodies must play their part in educating parties with whom registered liquidators interact.

This can be achieved through better communication, especially to creditors. Creditor engagement in an external administration promotes good conduct in the external administration. Importantly, the profession must play a role in providing sufficient, clear and comprehensible information so that creditors can make confident and informed decisions about their own rights during an external administration.

Creditors need to engage in an external administration to exercise their rights and, to the extent they can, control their interests. For this to happen efficiently, registered liquidators must communicate fully and clearly to allow creditors the best opportunity to exercise their rights and look after their interests.

Some firms communicate with creditors very effectively using technology, including the internet. However, other firms communicate poorly, which can lead to reports of alleged liquidator misconduct to ASIC and increased

creditor queries. This means more costs and, ultimately, a lower level of confidence in your administration of insolvent companies.

Going back to my point about self-regulation, the more industry solves its problems, the less likely the Government will intervene. At the end of the day, we need to promote confident and informed investors and creditors, and fair and efficient markets.

In the theme of improving communication, through law reform, we launched the insolvency notices website in July last year.⁵ In the first 10 months of operation, there were over 300,000 visitors to the site. We have received and published almost 24,000 notices, excluding deregistration notices. This is a good example of how technology can be used to improve communication.

Conclusion

I would like to summarise by saying:

- Directors play an important role by considering the interests of creditors when their company approaches insolvency or is insolvent. It's critical that they meet their positive obligation to place a company in external administration. It's also important for them to obtain independent advice about their options and ensure that advice is not principally aimed at serving their interests.
- The large majority of insolvency practitioners understand their gatekeeper role. They play their role in promoting a fair and efficient market and ensuring investors, including creditors, are confident and informed, by meeting the high standards imposed on them. Particularly in terms of independence, competency and ensuring they act in the creditors' interests at all times.
- I'm a firm believer in self-regulation and how it can complement legislation. ASIC will continue to work with you and the IPA to enhance confidence in your profession.

⁵ See www.insolvencynotices.asic.gov.au.