



ASIC

Australian Securities & Investments Commission

What matters to ASIC, the insolvency profession and the wider insolvency market

*A speech by John Price, Commissioner,
Australian Securities and Investments Commission*

*Insolvency Practitioners Association of Australia (IPA) NSW
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CHECK AGAINST DELIVERY

Introduction

Thank you for inviting me to speak today.

As you know, 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 continue to work with ASIC to improve standards and deliver better outcomes for all parties involved in external administrations.

Ladies and gentlemen, today I want to revisit some issues raised by ASIC's Chairman, Greg Medcraft, at the IPA's national conference in May this year and update you on recent ASIC activity. I will also give my thoughts on 'what matters' to ASIC, the profession and the wider insolvency market. I would like to leave a little time at the end for questions.

ASIC's strategic priorities

You may have heard our Chairman talk about ASIC's three strategic priorities:

- confident and informed investors and financial consumers – this includes holding important gatekeepers in the financial system to account
- fair and efficient financial markets
- efficient registration and licensing.

Importantly, we see registered liquidators as a key gatekeeper in the financial system. To be more specific, ASIC's focus on registered liquidators is in the areas of:

- independence
- competency
- improper gain.

These areas are key to ensuring investors, including creditors, are confident and informed, and markets are fair and efficient, in the context of insolvency. I will now briefly address each in turn.

Independence

Independence is vital to ensure 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 fulsome 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
- issue your declarations, knowing that you are free of any conflict, both actual and perceived.

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

Adrian Brown, the Senior Executive Leader of our Insolvency Practitioners team, recently wrote to all registered liquidators setting out the main issues we're finding with declarations and how you might improve them. I think it is great to see a session later today on this very topic and to see the IPA put our letter on its website.

I am very much aware of the opportunity for the IPA to work with ASIC through the revision of the IPA Code of Professional Practice (IPA Code) to strengthen independence disclosure requirements for registered liquidators. This would give creditors confidence that registered liquidators act in creditors' interests, and their interests only.

Competency

We've seen relatively high levels of insolvency appointments in recent times. There is 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.

Completing administrations efficiently and in a timely manner gives creditors the best opportunity to maximise their return in the shortest possible time.

In May, we released our second annual report on the supervision of registered liquidators.¹ It includes our work on addressing competency concerns for those practitioners we review who don't meet the requisite standard. In saying this, I acknowledge that the large majority of practitioners do devote resources to their internal systems and staff training to ensure standards are maintained.

We encourage practitioners who suffer ill health or other personal problems that impact their practice to seek help from their professional body – the IPA or ASIC. Previously, we have entered into voluntary undertakings with these practitioners to help them leave the industry and transition their external administrations to other practitioners. We are sympathetic to those who do put up their hand but are less so when we find these issues through our risk-based surveillance work.

In closing on this issue, the key proposition is that the competency you bring to your work directly affects creditors' confidence and the fairness and efficiency of the market.

Improper gain

We've also explained in the past 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, adversely affect your reputation and have financial consequences. We saw this very recently in the Supreme Court of Victoria decision following its inquiry in the matter of Andrew Dunner.

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

Adrian Brown recently wrote to you setting out the five key areas in which we believe you can improve your disclosure to creditors. I know the IPA appreciates these communications as a means of highlighting what you can do, at a very practical level, to improve disclosure.

Again, the current review of the IPA Code also provides an opportunity to strengthen requirements concerning disclosure and good practice.

Our surveillance and enforcement work

ASIC achieves its three strategic priorities through six regulatory tools:

- enforcement
- surveillance work
- guidance
- education
- policy advice
- engaging with industry and stakeholders (such as today's event).

We make no apology for what might seem like a strong emphasis on our enforcement and surveillance tools and the way in which we broadcast our achievements. Our approach helps shape behaviour in the market, provides further guidance on what unacceptable behaviour looks like and builds confidence in our supervision of the insolvency market.

Our approach is informed by a recent stakeholder survey reported by ASIC.² The survey indicated that a comparatively lower number of people agreed that insolvency practitioners act with integrity compared to various other professions. The survey also found a comparatively lower proportion of respondents rated ASIC positively for holding insolvency practitioners to account. While we think we are making good progress in these areas it is very important we continue our work to raise public confidence in the profession generally.

On the topic of surveillance, we have become more sophisticated in data mining and working with other government agencies. For example, we are currently working with the Australian Taxation Office (ATO) about how best the ATO can further assist us by identifying and reporting poor liquidator conduct when ATO officers see it, including matters relating to illegal phoenix activity. As you know, the ATO is a creditor in the vast majority of external administrations and maintains strong and frequent

² ASIC stakeholder survey 2013, September 2013.

interaction with liquidators. We expect our work to pay dividends over the longer term.

ASIC's other insolvency activities

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

We administer the Assetless Administration Fund (AA Fund) and finance preliminary investigations and reports by liquidators into the failure of companies with few assets when we may wish to further consider enforcement action.

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

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.

While we do review possible misconduct associated with the collapse of a company, we will not take enforcement action in every case. Our enforcement guidance in ASIC Information Sheet 151 *ASIC's approach to enforcement* (INFO 151), discusses the factors we will consider before we take action.

We also have active programs to deregister companies and disqualify directors of failed companies.

Late last year, we issued regulatory guidance on how ASIC would exercise its wind-up power in relation to abandoned companies. The principal aim of an administrative winding-up is to allow employees to access the government's safety net under the General Employee Entitlements Scheme (GEERS) or the Fair Entitlements Guarantee (FEG). We have now exercised our wind-up power in six matters and have more in the pipeline.

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

Following the end of our National Insolvent Trading Program in 2010, ASIC issued regulatory guidance³ setting out directors' obligations in relation to insolvent trading.

³ Regulatory Guide 217 *Duty to prevent insolvent trading: Guide for directors* (RG 217).

I understand that some of the profession might feel that ASIC should continue that program, but we must focus our resources on the main risks in the market. In response to the GFC, we increased liquidator surveillance significantly and given the recent ASIC stakeholder survey results we think our focus in this area is right.

That does not mean we are walking away from insolvent trading matters. For example, we recently successfully prosecuted two insolvent trading cases and currently have the Kleenmaid matter before the courts.

Self-regulation

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

I am 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 by setting standards, particularly in areas such as ethics.

However, 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, you do see governments step in with law reform, and, of course, this can have unintended consequences.

For these reasons I believe it is generally far better for an industry to fix its problems rather than default to a 'black letter law' solution.

Improving communication

The final issue I want to raise is the part liquidators play in educating parties with whom they interact.

This can be achieved through better communication, especially with 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.

Putting our Insolvency notices website aside, we are seeking to do our bit by improving the existing Report as to Affairs (RATA) about companies under external administration. To that end, this financial year we will publicly consult on improving the RATA so that it provides better information. We believe that this initiative will improve the external administration process and improve communication.

Conclusion

I would like to summarise by saying:

- I believe 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. They do this 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.
- A key message for you is that liquidators who are not doing the right thing are not doing you any favours. They undermine your professional reputation. It is in your interest to see ASIC succeed in its actions against poor liquidator conduct and, if necessary, remove those liquidators from the industry.
- ASIC believes in the role of self-regulation and how it can complement legislation. ASIC will continue to work with you to enhance confidence in your profession.

Thank you. I would be happy to take questions.