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Australian Securities & Investments Commission

ASIC and insolvency – current activities and future directions in enforcement and policy

An address by Professor Berna Collier, ASIC Commissioner, to the IPAA Conference in Adelaide, 28 May 2003

The Australia Securities and Investments Commission has an excellent relationship with the IPAA which we look to as the peak body representing insolvency practitioners in Australia. Yesterday the Commission was pleased to host a lunch for the members of the IPAA including your new President, Bruce Carter, and immediate past President, Michael Dwyer. We are keen to continue our liaison arrangements with the organisation on both a national and regional basis, as we believe there are mutual benefits to us all in doing so.

The topic of my paper is "ASIC and Insolvency – Current Activities and Future Directions and Enforcement and Policy" (which is almost a paper in itself!!)

There is a great deal for me to say on this topic. Events are moving fast in a number of directions. So rather than spend the rest of the evening talking on this topic – which would be quite easy - I think it would be appropriate for me to pick on a few topics and concentrate on them

Funding

The first thing I want to note is that ASIC has received extra funding in the Federal Budget for our Corporate Insolvency initiative. The Budget has allocated to us $12.3 million over 4 years for this purpose. We are pleased that the

government has recognised the importance of this as an issue, and we also recognise the support of the IPAA in the public arena in relation to ASIC's regulation of this area. Although the allocation of the funds is an internal matter, I am pleased to confirm that the funding will support the continued operation of the National Insolvency Co-ordination Unit, also known as "NICU", headed by Stefan Dopking with the very able support of Diane Osborne from Adelaide, and the Complaints Compliance programme which is run out of Sydney by Adrian Borchok.

What sort of work have we been doing?

You may have seen some of our work in the press – ASIC has been very busy on a large number of fronts. In the insolvency arena, we have been busy in relation to both small and large matters.

Insolvent trading

For some time we have been receiving complaints from insolvency practitioners concerning the need to action insolvent trading by companies and the potential liability of directors. Since the beginning of this year we have been running a project involving insolvent trading surveillances in Sydney in Melbourne, and now with our increased funding we are proposing to expand that project. Part of this project has involved taking secondments from accounting firms with insolvency practices, and we propose that those secondments will continue. Benefits arising from this process includes ASIC gaining from the expert knowledge brought to us by practitioners in the field, and hopefully the practitioners leaving us at the end of the secondment period with an understanding of the way in which the regulator works and "looking at things from the other side."

During this time we have conducted solvency reviews of 169 companies and 56 directors, from small proprietary companies through to listed entities. We identified the companies we reviewed from a number of sources, including :

- Complaints we receive (and note that we define "complaints" broadly to include for example information from the media)
- Companies referred from the accounts surveillance project we had running last financial year
- Information received from liquidators
- Referrals from elsewhere in ASIC

Outcomes from our surveillances include :

- In 60 cases directors were preparing further information
- 12 insolvency appointments had been made and the directors have agreed to appoint an insolvency practitioner in 6 cases
- 11 matters had been referred to Enforcement

We have made it clear that if we are of the view that a company is insolvent and the company takes no action, we will.

This programme has concentrated on Sydney and Melbourne to date. With the increase in funding we are looking to expand it to other capital cities.

Complaints Compliance Programme

Many of you will be aware of the programme we currently have in operation in relation to lack of co-operation by directors of companies in liquidation or other forms of insolvency administration, with the insolvency practitioner. Essentially, for the better part of a year we have had a campaign going whereby we are prepared to prosecute company officers if, for example, they fail to provide a RATA when requested by a liquidator. We ask only that the liquidator make a formal complaint to us in relation to the absence of co-operation, and complete an affidavit in the form on our web-site.

As of a week ago when I got the most up-to-date figures, 303 company officers nationally had been prosecuted for 463 offences under the *Corporations Act* for failure to co-operate with liquidators. These prosecutions have resulted in $350,272.35 in fines and costs. Further, we have obtained 69 civil orders in which the court has ordered company directors to provide a RATA or hand over books and records. At the moment, we have before the Courts another 111 individuals and corporations facing 169 charges, while another 128 similar matters are being investigated.

All these figures are on our web-site.

In addition to these matters we have 16 briefs of evidence with the DPP in relation to more substantial matters, for example disqualified persons managing corporations.

Some local information which may be of interest :

- In South Australia, to date 13 company officers and one company have been prosecuted for 24 offences under the *Corporations Act*. These prosecutions have resulted in $11,542 in fines and costs. At the moment, we have another 14 individuals and one company before the courts facing 24 charges, while another 7 similar matters are being investigated. All but one of these matters involved liquidator assistance type matters (for example, failure to submit a RATA). One matter presently before the courts involves an alleged contravention of section 471A (1)(a) *Corporations Act*, whereby the defendant allegedly continued to act as a director of the company following the appointment of a liquidator to that company. We also have a brief of evidence with the South Australian office of the Commonwealth DPP in respect of a disqualified person managing a corporation and the lodgment of documents with ASIC containing false and misleading information.

- In relation to the Northern Territory, we are currently preparing one matter for prosecution action. It involves failure to submit a RATA to the liquidator and a failure to provide books and records to the liquidator. It is yet to receive a court date.

So as you can see, we are very busy, and currently working hard in this respect to help liquidators.

Other Enforcement Actions

ASIC currently has a very full plate, not only with the small end of town insolvencies but the big end. You would all have seen the release of the HIH Royal Commission Report – Justice Owen in the report made 56 referrals to ASIC. As part of the Federal Budget we have received funding to respond, and we are in course of establishing a taskforce of around 40 people to do so. This taskforce will be a dedicated group of people looking at matters arising from the collapse of HIH, including the referrals, but also at other issues which we consider justifying investigations. We already have one criminal case against Rodney Adler arising from the collapse, and others already under examination.

The other big corporate insolvency of the past few years – that is One.Tel – is continuing. You may have noticed we were successful in interlocutory proceedings in relation to our claims as to the duties of chairmen of corporations in the Greaves matter from earlier this year. We have settled with Brad Keeling, the former joint managing director of One.Tel, who admitted liability. We expect this case to be in court again later this year, with probably a trial date during 2004.

The third case I wanted to mention was Waterwheel. We brought an insolvent trading claim against the managing director of Waterwheel (Plymin), a non-executive director (Elliott) and the Chairman of the Board of Directors (Harrison), claiming insolvent trading over six months from the end of 1999 until the

appointment of an administrator in February 2000. ASIC claimed a declaration that each of the defendants had contravened section 588G and orders for the defendants to pay compensation and bannings from acting as directors. We had previously reached a settlement with Harrison who made full admissions, and on 5th May we were successful in relation to Plymin and Elliott before Justice Mandie in the Supreme Court of Victoria. There is a penalty hearing set down for this matter next Tuesday 3rd June. Frankly, we were very pleased with this decision. We saw this as an important case, not just because of the message it would send to the market but because of the real prospect of recovering funds for creditors. Insolvent trading is notoriously hard to prove – and even in cases where we have taken criminal action and been successful, the penalties have usually been small. Two examples of this within the past two years have been the *Farmer Furniture* case in Western Australia and the *Twintara* matter in Victoria, both of which involved a great deal of resources of ASIC and in both of which the defendants received suspended sentences and good behaviour bonds. (In *Farmer Furniture* the defendant directors' sentences ranged from three to five years suspended with $20,000 good behaviour bonds for insolvent trading. In *Twintara* the defendant director was sentenced to two years and nine months jail wholly suspended upon entry of a three year $2,000 good behaviour bond for insolvent trading.)

The *Waterwheel* success is a psychological victory in the market even though no criminal charges were laid and, we hope, a financial victory for creditors.

Although the *Waterwheel* matter is over, please note however that we have not given up our hopes in relation to prosecuting other directors who intentionally trade whilst insolvent – we have just laid criminal charges against a number of company directors in Tasmania for insolvent trading, and we will see how we go.

Policy

On the policy front, we are continuing to be busy. We will be participating in the CAMAC analysis of restructuring of large corporate enterprises, as referred to CAMAC by Senator Campbell last year, and we expect to appear before the Parliamentary Joint Committee Inquiry into Insolvency some time in July.

PS 43 and 44

Further, we are in the process of settling reviews of Policy Statements 43 and 44 – that is *Accounts and audit relief* (PS 43) and *Annual General Meeting – Extension of Time* (PS 44). The relevance of these Policy Statements is essentially that under Part 2M.3 of the *Corporations Act*, disclosing entities, public companies and large proprietary companies must prepare, lodge and distribute to members their annual accounts.

Disclosing entities must also prepare and lodge half-year reports. Under s250N, public companies with more than one member must hold an annual general meeting.

The law provides no automatic exemption to these requirements when a company is under any form of insolvency administration – the obligation is imposed on the company. Accordingly, technically the administrator, for example, is required to prepare and lodge financial reports on top of his or her other duties.

The problem was that many insolvency practitioners were not doing this – presumably because they weren't aware of this obligation. In order to avoid panic, we issued interim class order *CO 02/968* to provide financial reporting relief, subject to conditions, for various forms of externally administered companies whose financial years and half-years end on or before 31 May 2003. We do not have power to grant class relief in relation to the AGM obligations.

Although I can't yet comment publicly on these policies because they are still being finalised – and in fact, we had a meeting this afternoon to do so – it is likely

that relief so far as we can provide it will be made to companies in a variety of insolvency situations. At present, the relief is limited to companies in receivership. We expect to release our revised policies shortly.

Policy more broadly

One of the functions of the NICU unit is to hold regular liaison meetings. A purpose of our interaction with the profession is to ascertain possible areas for the issuance of new policy guidance.

One such area is the way practitioners are registered, regulated and dealt with when problems are identified that require disciplinary action. Unlike some overseas jurisdictions there currently is little detailed formal guidance on a minimum set of standards under which the profession is assessed. For example in Canada there is a codified set of guidelines by which practitioners are expected to comply.

A policy initiative that ASIC is considering is working towards providing the industry a similar set of conduct standards.

This review would enable consideration of issues associated with:

- Entry requirements to become a liquidator
- Classes of liquidator
- Minimum standards expected to maintain registration
- Ongoing requirements to maintain registration

We will be working with the profession this year through our liaison arrangements to develop our ideas further in this area.

Conclusion

ASIC's regulatory responsibilities relating to insolvency in the administration of the *Corporations Act 2001* are wide. Some of our insolvency priorities for 2003 are :

- Enhancing ASIC's liaison with the industry;
- Taking action against recalcitrant directors, to assist liquidators in undertaking their functions;
- Reducing compliance costs for the profession through the introduction of electronic systems;
- Developing appropriate ASIC policy and guidance on interpreting relevant law;
- Better regulating the profession and in conjunction with Companies Auditors and Liquidators Disciplinary Board addressing improved processes; and
- Taking action on more reports of offences from liquidators.

Our enhanced focus in this area has been visible to many in the form of renewed liaison meetings and assistance to liquidators and insolvency related court action. We aim to further enhance our role by working with the profession to develop insolvency policy guidance where there is an identified need.

