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12th February 2010

Department of the Senate

PO Box 6100

Parliament House

Canberra, ACT 2600

Australia

RE: Inquiry into Liquidators and Administrators

The Australian Credit Forum is an organisation made up of leaders in the Credit Management profession. Information regarding the ACF may be seen on our web site at http://www.australiancreditforum.com.au/

Whilst acknowledging that the majority of insolvency practitioners do a good job under difficult circumstances, the Forum believes that there is substantial room for improvement in the conduct of some Administrators and Liquidators and in particular there should be an examination of fees charged.

Administrators and Liquidators utilise the funds in their possession to recover further *funds eg 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.

Case in point, recounted by a member of the Forum, is the instance several years ago of a Sydney based Consumer Electronic Company being placed into Liquidation. At the time of the appointment of the Liquidator there were unsecured debts of almost $800,000 and almost $700,000 worth of stock (not subject to Retention of Title claims) on hand leaving a shortfall of some $100,000. Despite most suppliers agreeing to take

their stock back for credit in reduction of their debt the Liquidator arranged for the stock to be sold at auction receiving approximately $250,000 from the sale. Over the next 18 months the Liquidator utilised the services of a legal firm to claw back a further $200,000 worth of preference payments. In the final report to creditors issued some two years after his appointment the Liquidator advised that after all his costs and the legal expenses associated with winding down the business etc there was only $1.00 available for distribution to the $800,000 worth of unsecured creditors.
The Forum acknowledges that in many cases there are no assets available to Liquidators to cover even the cost of them carrying out the legal requirements and duties in relation to the windup of a company. This naturally means that in those particular cases their firm suffers and wears the cost of their appointment. It has been suggested that some Liquidators may inflate/pad the expenses and costs associated with winding up those companies with assets to make up for the losses caused by those appointments where there are no funds available to cover their costs and expenses. This in turn impacts on the return if any to unsecured creditors of those companies that in fact were asset rich.

The Forum feels that some form of sinking fund from company taxes or registration fees and the like should be established and Liquidators apply for reimbursement of fees and costs associated with liquidating a company which is asset or cash poor.

Despite that fact that most suppliers have Terms & Conditions of Sale that give specific authority for them to enter their customer's premises and carry out stock takes or inspections of their stock Administrators and Liquidators frequently refuse to allow creditors on to the company's premises to carry out supervised stock takes in relation to ROT claims.

With regards to the appointment of Administrators the law requires that the Administrator must declare that they have had no prior involvement with the company. Frequently it is subsequently revealed that the Directors consulted with the Administrator who reviewed the business and financial affairs of the company and then recommended that the company be placed into Administration with him appointed as the Administrator.

The Forum feels that where a company believes that they may be insolvent and there is a need to retain an outside financial consultant to examine their affairs and make recommendations re their continued trading or being placed into Administration then that Financial Consultant or adviser after accessing the company's financial position should refer the Directors to a court approved/appointed Administrator.

Perhaps consideration needs to be given to the need to apply to the court to have an Administrator appointed from a pool of Administrators. Creditors become concerned when they are faced with an Administrator who admits to providing financial advice prior to being appointed the Administrator and then there are questions of impartiality by the Administrator especially if company assets have been disposed of shortly before his appointment.

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12 February 2010

Department of the Senate
PO Box 6100
Parliament House
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Dear Sir/Madam,

RE: Submission to the Inquiry into Liquidators and Administrators

I wish to make a submission to your Committee in respect of the above inquiry.

I have been involved in the insolvency profession for many years and therefore I find the terms of reference to be very wide; "This inquiry will 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."

I suspect that you are seeking comments generally, rather than solutions to any problem. It may be that the following comments identify the existence of problems.

Qualifications

I am well qualified to make submissions to this Inquiry.

I practice as both a Barrister and Accountant.

I commenced in the insolvency profession as an accountant in 1982.

I was made a partner of Hall Chadwick, through its predecessor firm Love & Rodgers, on 1 July 1986 at the age of 23.

I became a Registered Company Liquidator on 1 July 1988, an Official Liquidator on 4 June 1991, a Registered Trustee in Bankruptcy on 27 September 1996 and a practicing Barrister on 22 August 1996.

In mid 2008 I decided to leave the insolvency profession as an accountant and concentrate my efforts at the NSW Bar. I has been a wonderful change.

I have had many ups and downs in my career as an accountant.

I have controlled and administered possibly over 2,000 appointments, both personal and corporate. On average I was appointed jointly or severally to 100 assignments each year for over 20 years.

I have contributed to law reform proposals.

I wrote a 73 page discussion paper for the IPAA on deficiencies in the law on Voluntary Administrations back in 1995. I was on the National Strategic Planning Committee for the IPAA back in about 1997.

I was the leading contributor to the June 1998 report issued by the Legal Committee of the Companies and Securities Advisory Committee on Corporate Voluntary Administration ('the CASAC Report'), being noted in that report on 99 occasions as having made submissions to that enquiry. The report is known as the Legal Committee of the Companies and Securities Advisory Committee, Corporate Voluntary Administration Report, Companies and Securities Advisory Committee, Sydney, 1998.

I have run leading cases in this area; McDonald v ASIC, McDonald v DCT, McDonald v Hanselmann.

I have been appointed to administer the affairs of well known companies or people such as Traveland, Firepower and Jim Byrnes.

I have had to deal with the disciplinary procedures that apply to Liquidators.

I have presented seminars for many professional organizations.

I have dealt with the large and small, honest and dishonest. I know this profession better than most.

Typical "client"

There is a whole debate about the use of the word client by an insolvency accountant.

I will discuss this problem further under the heading of conflict. I have produced an experts report on the subject (see Annexure "A")

I will take the laymen's understanding that the company to which a liquidator is appointed, or the person's estate over which a bankruptcy Trustee is appointed, is the client.

The average client is involved in small or medium business.

This needs to be appreciated, as this fact in itself imposes restrictions on the way in which the insolvency of that client can be administered.

In recent times, many larger companies have faced insolvency, but that is not the norm during ordinary economic times.

It must be appreciated that there will be business failures during normal times. These clients may be the victim of another person failing to pay them, or may be people who simply should not be in business. Whatever the reason, the average insolvency client is an SME.

The failure of micro businesses is not that prevalent, as they are too small to get credit in the first place. Their failure or closure usually results in the proprietor losing their money and not making any formal insolvency appointment.

It is the SMEs that over-extend themselves.

The particular industry in which insolvencies are prevalent is the building industry.

This high rate of failure is a result of the low barrier to entry.

It is easy to be in business for yourself as a small subcontractor in the building industry. In many cases, no qualifications are needed. If you are prepared to work hard and have some trade skills, then away you go!

However, often these highly skilled people have little or no knowledge of administrative responsibilities, such as accounting, law or finance. They simply can't control the finances if a problem arises. In the building industry, rest assured that there WILL BE A PROBLEM.

So, these businesses have a high rate of failure.

But, as a result of the low barrier to entry, they can set up again very quickly and easily. This influences that high rate of insolvency.

Compare an accountant who is suspended from membership of the ICA and loses his tax Agents license to the position of a painter who goes bankrupt and simply sets up a new company (with his wife!) or business and starts again. This debate quickly moves towards the recent investigation by the Australian Taxation office into "Phoenix Companies". I refer you to my submission to that investigation.

The fact is that many SMEs fail.

Role of the Liquidator

When a business fails, someone must clean up the mess.

In many respects, that is the role of the liquidator. It is not necessarily a pleasant one.

The circumstances require a neutral party to take control.

In the US, the system allows the directors to stay in charge of their failed company.

In Australia, the circumstances require the appointment of a new person to take control.

It needs to be appreciated that when a company goes broke, the insolvency rarely happens overnight.

There will be a period of time during which the warning signs exist and the alarm bells will be ringing louder. The financial position deteriorates and the debts are not paid.

This naturally causes distrust.

Then there will be a point where there is an admission of failure by the proprietor. This is emotional for any director/bankrupt.

This admission is also somewhat terminal for the business' operations. Once the directors admit that there is a problem, by saying something to the staff or by admitting that the company is insolvent in an email to a creditor, then everyone understandably acts very much in their own self interests.

This will damage any going concern business.

It will also mean that, unless there are rules to determine what happens to a company once it goes broke, the people are likely to succeed in helping themselves over others. Might will be right.

There needs to be a law on liquidations, to govern the process when the company goes broke and to stop the self help actions.

There needs to be a new person placed in control of the company.

This person is the liquidator. It is a necessity of business life. They need to get about stopping the self-help actions, selling off the remaining assets, investigating the records and distributing whatever funds are available.

I find that the person needs to have commercial experience, rather than legal expertise.

They have to make decisions, rather than give advice to others about the decision to be made.

The difference between the profession of insolvency accountant and that of a Barrister appearing before the Supreme and Federal Court judges is remarkable.

Give me the Judges any day!

I will leave with my accounting friends those little old ladies that have lost their $100 deposit and are blaming you, the liquidator, for not getting it back. When your Y Gen staff don't return their phone call to explain their position, they then go to ASIC, the IPAA and their local member to complain about you and their lost $100.

I am sorry, but it happens like this all the time.

Regardless, the role of Liquidator involves making hard decisions. In many cases, you are damned if you do and damned if you don't.

As a bankruptcy trustee, I recently had to litigate against the NAB. The major creditor refused to provide any assistance to fund the litigation. He complained that the case was a waste of time. I was able to settle fairly quickly and the estate received $20,000 net of costs. The major creditor then complained that the amount was not enough!

Also, in this case, he had a priority such that the extra $20,000 should now, other things being equal, be paid to him.

But, the starting point remains that someone needs to appoint the Liquidator. It is best that this appointment occur voluntarily by the people in control of the company.

The Voluntary Administration laws, created by Australia's Ron Harmer, have been widely acclaimed around the world as one of the best laws in this area. They have been adopted in other countries.

These laws allow the directors to appoint an Administrator (who may ultimately become the Liquidator).

The fact that the directors have to make the appointment AND choose the Administrator has been widely criticized. The directors get to choose the person who will investigate the directors.

Again, the issue of conflict arises.

But, our system is correct in that it removes the directors from having control of the assets.

The role of an Administrator was meant to be different to that of a liquidator.

Unfortunately, the Government failed to adopt one of the recommendations of the Harmer report of 1988 and the process of going into voluntary liquidation remained cumbersome. This was corrected in 2008, some 15 years or so after the 1993 Harmer law changes.

So, for many years, directors would appoint an administrator even if the company was to go straight into liquidation. This was possible under the laws and necessary in many cases (e.g. compliance with a Directors Penalty Notice).

Of recent times, the role of an Administrator has moved towards being a business savior.

However, the stigma was created from the original days and most people see the appointment as being marginally different from that of a Liquidator.

This has caused the emergence of a new profession, called Turnaround Management.

This is huge in the USA.

But, there are some key differences between Australia and the USA which will mean that Turnaround management may never succeed in this country, despite the positive objectives of the role.

In the USA, a small business could employ up to 250 people. In Australia, a similar company would be considered large.

What follows is that the average business in the USA is better resourced than that of the Australian equivalent.

The involvment of a Turnaround manager costs money. The average small business in Australia simply cannot afford to pay for the highly specialized and ongoing assistance.

Furthermore, the director's obligations and exposure once a company becomes insolvent are far more onerous in Australia compared to many countries.

I understand that the Government is reviewing this area of the law.

The fact that a Turnaround Manager may be deemed to be a director and then personally liable for the debts of the company he/she was trying to save, means that the role is too risky compared to the limited returns.

The role of a Turnaround Manager will be limited to large companies. This will somewhat limit the expansion of the profession. In many ways, the big 4 accounting firms have been doing this work, as consultants to clients, for many years.

Remuneration and Liability

The issue of fees or remuneration is the most heated topic when talking about Liquidators.

I am told "you guys get paid well", or "you guys really know how to charge".

The remuneration of any person should be a function of their qualifications, responsibilities and exposure/risks.

There are very few professions in which it is normal to get sued personally every month. This is the life of a Liquidator.

There are very few professions where you take control of the mess created by someone else, with the objective of salvaging something extra for other people (the creditors) by trying to sell a business as a going concern rather than liquidation fire-sale of the assets, yet you are personally liable for all of the debts that are incurred whilst you continue trading.

The risk is high.

What is the reward?

There is rarely any thanks.

The only reward can be the fees.

The system of time cost has become entrenched. This does not reward any efficiency, nor any risk taking.

The recent law changes of 2008/9 and the new ethical guidelines have only deepened the role of time costing in the way of Liquidators are remunerated.

However, these changes are merely about approving the level of remuneration.

What remains as a regular problem is the ability of the client to pay any remuneration.

In many cases, the Liquidator simply does not get paid.

This is a position to be avoided, by any business. In fact, what respect would any creditor have for a Liquidator, as a business man, if he was prepared to work without any prospect of being paid.

Naturally, Liquidators want to be paid.

The law properly recognizes that they must be paid with priority.

The law could be clarified further to make sure that the Liquidator is paid "reasonable fees", for the work done to preserve and realize assets, before any other debts, secured or unsecured are paid. However, this is a minor technicality.

The problem with remuneration also stems from the fact that there are limited resources.

The more paid to the Liquidator, the less available for payment to the creditors.

This increases the animosity and the level of conflict.

Alternatively, if a company or person wishes to propose a settlement with the creditors, then the costs of the insolvency accountant add significantly to the amount that is needed to be able to make a worthwhile offer.

Some one bears the cost.

The conflict will never be overcome.

What is challenging is the system for fixing the appropriate amount.

Again, I have written an article on the subject, appearing in lawyers Weekly magazine (see annexure "B").

Conflict

The greatest problem for the insolvency profession is that the members are often in positions of conflict and the system simply allows it to happen.

I have tested the boundaries on occasions, but this is with the bar set at a particular level.

I find it to be deceptive and dishonest.

I changed my profession because of the frustration with the conflicts within insolvency.

The problem is best illustrated by examples.

A director walks into the office of an advisor.

The same type of person walks into my office now as they did some three years ago.

Now as a barrister, I have clear boundaries. This person is my client. They will always be my client. I will not be acting against them. I will fight heart and soul for them.

As an accountant, the position was different.

The person, being a company director, needs to appoint a Liquidator. Assume that the decision has been made. No need to consider whether or not to do it. He needs to.

He says that he is seeing three liquidators, before deciding upon one to appoint.

The liquidator says to himself; "How do I convince the Director, in order for him to sign on the dotted line, to pick me?"

"What sales pitch do I use?"

"Do I reduce my fees?"

"If so, does that mean my office does less work and cuts more corners?"

That is not acceptable to me.

He then says to himself; "What else can I do?"

"Do you say to the director that "I will go easy on you"?"

I have never said that. I did not want to be part of that. But what was said by others when that director went elsewhere to sign up with another Liquidator.

Then importantly, the person chosen by the director to be "his liquidator" MUST turn on the director. He must investigate the conduct of the director and, in all probability, he must consider suing him for "insolvent trading".

The conflict is obvious.

An insolvency accountant should not be able to give any advice to a company and then subsequently take on the appointment as Liquidator. The circumstances are different for an Administrator.

The conflict is also obvious where a firm acts for a bank.

I approached a Big 4 firm recently, on behalf of a client and asked if they would consent to be the Administrator on a large resort. A bank was owed about $30million.

The partner of the Big 4 firm said that the bank was their client and they could never act without the banks agreement.

How can these firms ever accept any appointment voluntarily as a Liquidator if a bank is involved.

They see the banks as their clients and they service them accordingly. I respect that fact. But the appointment as Liquidator involves duties to all creditors and the company as a whole.

Those firms must not act voluntarily on any appointment other than a Receivership appointed by the Banks

It is wrong. It has been ignored for years.

I could go on further, but time will not permit.

I would be pleased to elaborate upon these thoughts at the upcoming senate hearings, if that will be of assistance.

Yours sincerely,

Geoffrey McDonald
Barrister at Law

Annexure "A"

Client

42. *In the insolvency profession, the term "client" is often misused and misunderstood.* This is a direct result of the normal position of conflict faced by Insolvency Practitioners that is not understood by fellow professionals or the community at large.

43. An Insolvency Practitioner does not have a client.

44. An Insolvency Practitioner is appointed to an entity. The entity is not known as a client of the Insolvency Practitioner.

45. The position in paragraph 44 does not apply to services wherein the Insolvency Practitioner does not undertake an "appointment". These services can include those known as "investigating accountants reports", "monitoring for secured creditors", "credit appraisals" or "pre-lending reviews". In those cases, the role of the Insolvency Practitioner is to provide a service to a particular client for a fee agreed with that client.

46. The position in paragraph 45 differs greatly to that of an Insolvency Practitioner who is appointed as External Administrator to an entity.

47. The appointment of an External Administrator is made by a limited number of parties who are entitled to make such an appointment. The parties are listed below for the appointment of an Administrator;

Party		
• Directors	Yes	Upon passing resolutions
• Shareholders	No	
• Secured creditor	Yes	If entitled to enforce security
• Liquidator	Yes	
• Liquidator of himself	Yes	With leave of the Court
• Court	No	
• Unsecured creditor	No	
• Employees	No	
• ASIC	No	
• APRA	No	
• Australian Taxation Office	No	

48. In the above type of appointment (i.e. Administrator), the most common manner of being appointed is on a voluntary basis by the Directors.

49. Even though the Administrator is appointed at the behest or instigation of the Directors, the Administrator does not have a duty or obligation to protect or advance the interests of the Directors. The duty is to the company, as an officer of the company. At times, this duty will conflict with the interests of the creditors and/or directors, either as a whole or individually.

50. One common example of the conflict of an Administrator with an individual creditor is the need for an Administrator to reject the claims of individual creditors that they have retained title to goods held by the company.

51. One example of the conflict with the creditors as a whole is the objectives of Part 5.3A of the Corporations Act being the part on Voluntary Administrations. Under that part, the objectives are described under section 435A of the Act as follows;

The affairs of the Company are to be administered in such a way that:

a) *maximises the chances of the Company, or as much as possible of its business, continuing in existence; or*

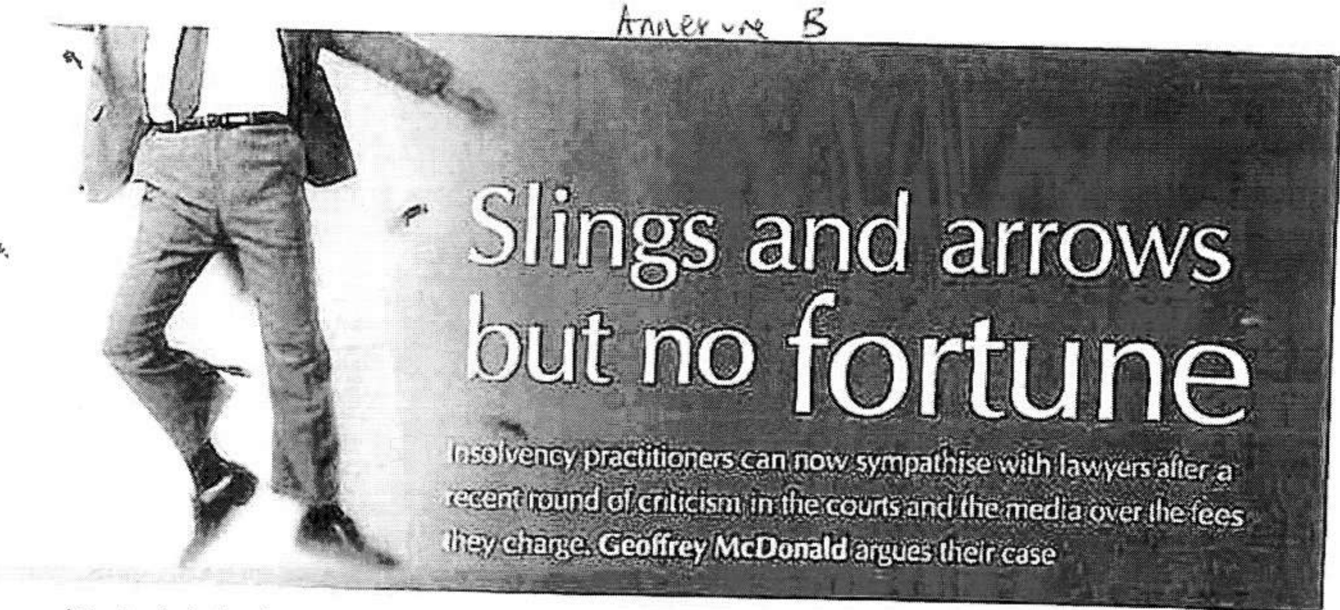
b) *if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company.*

It can be seen that the principal objective of this law is to maximize the chances of a company remaining in existence, rather than maximizing the return to creditors of that company.

52. It is the creditors as a whole who are the party which has the ability to approve or fix the fees of the Administrator. However, the creditors have no ability to negotiate or determine that fee before the appointment of the Administrator takes place and the Administrator commences carrying out the work. This position is again peculiar to the insolvency profession.

53. In view of the foregoing, it is my opinion that it is not normal for an Insolvency Practitioner to consistently make reference to any party as a "client". It is not normal for an Insolvency Practitioner to have a professional client relationship with any particular party. It is not normal for an Insolvency Practitioner to enter into a fee agreement in respect of their appointment.

Annexure B



Slings and arrows but no fortune

Insolvency practitioners can now sympathise with lawyers after a recent round of criticism in the courts and the media over the fees they charge. **Geoffrey McDonald** argues their case

The legal profession is used to criticism about the level of its fees. Now the insolvency profession is having its turn. The negative media attention on the insolvency profession over the last few months has been unprecedented. In my opinion, it is also significantly unjustified.

Why do insolvency practitioners have such difficulty in giving 'satisfaction' to their customers from paying their fees? What are the differences between insolvency practitioners and the legal profession when it comes to methods of billing fees, ways of approving fees and the quantum of those fees?

The recent case of *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 has been well reported. The administrators sought retrospective approval of their fees after they had "without any authority taken $2,421,177.50 on account of their fees".

In the Stockford judgement, Justice Finkelstein summarised the degree of interest in the subject of administrator's fees. In doing so, he starts with the somewhat critical comment that: "there is a widespread belief, not confined to Australia, that there is overcharging and the overcharging is rife". He then refers to six reports regarding Australian insolvency practitioners fees

Interestingly, the lawyers did not escape scrutiny in the Stockford judgment. There is a growing pressure on insolvency practitioners to ask lawyers to tender or competitively quote for any work they wish to perform. In his judgment Justice Finkelstein suggested that:

"A prudent businessman will shop around to ensure that he obtains the services of good lawyers (solicitors and counsel) at the best possible rate. Personal relationships should not obscure the practitioner's duty. The sole selection criteria should be the benefit to him as a litigant. So he will avoid cosy relationships with solicitors and counsel. He will negotiate over fees with both solicitors and counsel. He will closely monitor the fees as they are incurred. (In some jurisdictions contingency fees are permitted and where they are they should be exploited). Overall, this approach is likely to cause disquiet among the profession".

So why is there such furore over the fees of insolvency practitioners?

The starting point is no different to legal practitioners. The fees are charged on a time/cost basis. This starting point is, and has been for many years, the subject of criticism. It is on the larger and more complex appointments that the fees are obviously higher and therefore subject to greater criticism. Justice Finkelstein commented that, "In complex or large administrations it is inevitable that insolvency practitioners will wish to have their fees calculated on a time basis. The courts have endorsed this approach for so long [a]time that it is now impossible to reverse the trend".

The deficiencies of such a method are obvious. In a lecture to the Insolvency Lawyers Association, Justice Ferris said:

"A moment's thought will show that charging by reference only to time spent measured in units of whatever duration, whether minutes or hours or days, is capable of being exploited as virtually a licence to print money. The person charging has complete control over the amount of time spent. He can work at whatever rate he chooses or of which he is capable. He is subject to no control save that of his own conscience which ensures that the work done is proportionate to the difficulty or importance of the task in the context in which it needs to be performed. His charging rates are fixed by himself, subject only to such modest pressures as competition may bring to bear. And, best of all from his point of view, he can make sure that he achieves those rates for every hour actually worked, largely without regard to the value achieved for the client."

Therefore, the profession is now looking at the process by which fees are approved, rather than the method of charging fees. The process for approving fees is where the insolvency profession starts to diverge from the legal profession.

Most legal practitioners have one client who will either approve, negotiate or reject their bill. Furthermore the payment of that account is usually made at the direct expense of the client.

With an insolvency practitioner, he or she is answerable to the general body of creditors. The creditors may have absolutely no interest in the payment of the fees because there will be absolutely no return to them as a creditor.

Therefore, insolvency practitioners are often confronted with a very disinterested group of people having to spend more time in negative and unpleasant circumstances (ie after just having lost money on a bad debt) to reach some form of consensus about the level of fees. Whilst there is the normal voting system wherein the majority rules, there is usually a lack of interest in properly reviewing the information.

In fact, in *Stockford* Justice Finkelstein recognised to some degree these comments when he discussed the process of fixing fees.

"... My fear is that if the request is made to the creditors the fees will not be closely scrutinised. In the first place, in a large administration the task of scrutiny will be a difficult one. Secondly, creditors, or even a small committee of creditors, will often lack the knowledge to be able to mount a successful challenge to the practitioner's claims. Thirdly, the creditors (even a committee of creditors) may not think that the effort is worthwhile. Thus, the greater the detail presented to the creditors the easier their task will be (*because no-one will bother to look at the information and object to it?*). Nevertheless, in a large administration it is likely that the creditors will need to call in a cost consultant."

Then there can be other circumstances where there is a direct conflict between the insolvency practitioner and the creditors. In effect, the more money paid to the insolvency practitioner, the less money is available to be paid to the creditors. Again this differs from the legal profession where the direct conflict rarely occurs. Possibly it will arise in cases of a plaintiff client's litigation, where there is a set sum of money available at the end of the day if the matter settles and that pool of funds must be used to pay both the legal fees and the client.

For insolvency practitioners, this pool of funds is absolute. The fund is set (being all of the assets of the insolvent debtor) and it is not a case that the client creditor would otherwise be paying the fees of an insolvency practitioner from its own resources. The insolvency practitioner is usually paid only from the pool of funds in the estate (subject possibly to an indemnity from a third party), at the expense of a distribution in favour of creditors. In some cases, it may

(continued on p18)

be a particular class of creditor, such as employee's entitlements to superannuation. This is when the emotion starts to build.

I recall one circumstance where the creditors said "I'm not getting paid, so I don't want you to get paid. I'm not going to approve your fees". This person was the typical contractor in the building industry, but that did not subtract from his power to restrict my fees. I then have to pay the cost of obtaining a court order to pay my fees (in this case, read part pay my fees)

In these situations the direct conflict does give rise to a great deal of interest in the level of fees. That is when the process of approving fees can be acceptable, but the information about the fees again becomes a problem.

The Insolvency Practitioners Association of Australia (IPAA) have sought to address this problem by issuing a draft *Practice Guide*, which is due to commence on 1 July. This guide requires insolvency practitioners to supply creditors with a schedule of the hourly rates, details of alternative methods of charging fees and an estimate of the fees for the administration, all at the commencement of the appointment.

Within the insolvency profession there is a great deal of leverage of staff to partners, particularly compared to the legal profession. The partner or appointee will spend a relatively small amount of time on any appointment. My own statistical analysis suggests that the amount of time spent on any appointment would ordinarily range between 5 and 10 per cent of the total time for the appointee. After that, the assignment is delegated to the various levels of staff. Obviously the more junior staff are encouraged to be responsible for more of the procedural and time consuming tasks. At the end of the day, the number of time/cost entries on any appointment will be massive. Without revealing too much detail about my own practice, I would average more than 30 time/cost entries of six minutes to different clients on any normal day. If you multiply that out by a 100 staff over a number of appointments over a number of days, you will start to appreciate the volume of time/cost entries allocated to each and every client over the period of an appointment lasting say six months.

The task of reviewing a report on the time charges is enormous. This then returns to the question of the appropriateness of each and every time/cost entry and the requirement for someone to actually review those entries.

I appreciate that this task is not necessarily different to that faced by the legal profession, but I respectfully suggest that the size of the task on each and every appointment will be much greater due to the large number of people who ordinarily work on each assignment. If you then multiply this volume of information by the number of creditors who must arguably receive the details, you start to appreciate the enormous amount of paper that needs to be produced (in circumstances where people are usually not interested in looking at it).

Also, as noted, there is some difficulty in ascertaining the appropriateness of each charge or time/cost entry.

Whilst the process of liquidating a company will be somewhat similar in each instance, the diversity of the financial circumstances of each debtor will mean that there is no norm. Once you introduce the dynamics of a trading administration, then very little could ever be consistent between debtors.

There is some suggestion that the profession could move to standard fixed-price fees. The *Corporations Act* 2001 requires the remuneration to be fixed by the creditors or the court. It is the practice of the court that it will not consider fixing any fees until the insolvency practitioner has firstly sought approval from creditors.

The Federal Court in *Stockford* has summarised the alternatives in respect of fees such that they "could be 'fixed' as a periodic salary, a lump sum, a percentage of some amount (such as the value of the company's assets under the administrators' control) or according to the amount of time spent by the administrator determined by reference to a scale or formula. The matter is simply left at large. So also is the basis upon which the quantum of the remuneration is to be determined. That is, the section is silent on the factors to be taken into account both for deciding the appropriate method of 'fixing' an administrator's remuneration and in determining the amount to be 'fixed'. The only guidance that is given, and it is given by necessary implication, is that an administrator is entitled to reasonable remuneration."

To the credit of Justice Finkelstein, he did delve into philosophical aspects of the debate. He discussed certain views as to the reasonableness of fees. He referred to the conservative approach of minimising fees so as to maximise the return to creditors. It was pleasing to see his comment on the alternative approach that,

"The difficulty with the conservation approach is that insolvency practitioners might forsake liquidations and administrations if they can earn higher incomes in

other fields. These specialists, who by and large allow an insolvency administration to operate smoothly, efficiently and expeditiously, would then be lost."

In the end he went on to suggest that some balance must be struck between the opposing views

He then discussed the idea of a fee based on the lodestar principal adopted in the US. He explained,

"It seems to me that the proper approach is first to establish what in the United States cases fixing the fees of trustees and attorneys under the Bankruptcy Code is called the 'lodestar' amount. This amount is reached by the number of hours reasonably spent by the insolvency practitioner multiplied by a reasonable hourly rate: In *re Boston and Maine Corporation v Moore* 776 F 2d 2, 7 (1st Circ 1985); *Copeland v Marshall* 641 F 2d 880, 891 (DC Circ 1980). This step will require the tribunal to decide whether the work performed was necessary to the administration, whether it was performed within a reasonable time and whether the rate is reasonable having regard to what the practitioner, and other practitioners, usually charge their clients. The 'lodestar' amount should then be adjusted (up or down) to reflect other factors including the quality of the work performed, the complexity in the administration over and above the normal complexity of such work, the novelty and difficulty of the issues that confronted the administrator as well as the ultimate result obtained by him."

There is one other aspect of insolvency practitioner's fees that comes under some degree of scrutiny or criticism – the rate of the fees. The scale of fees that was previously used has been abandoned. The IPAA previously issued a *Scale of Fees*, which was amended to being a *Guide to Fees*. That guide was abolished in 2000, although I don't recall the scale having been adjusted at all after 1 December 1997. At that time the recommended rate for a partner was $377 per hour (excluding GST). According to my review of the CPI increases since that time, an hourly rate of $450 for a partner would now be commensurate with the 1997 rate.

At the recent IPAA conference it was suggested that this rate was relatively low compared to rates charged for other services provided by the Big Four accounting firms. On the other hand, some small boutique insolvency practices are supplying cut price services at rates of approximately $320 per hour for a partner. These rates alone do not differ in any significant manner from those of the legal profession. However, the administrative staff are also charged to the client. This adds a reasonable percentage to the account.

One of the reasons the "high" rate of fees is justified is the fact that there is no guarantee that the insolvency practitioner will be paid. There are occasions when liquidators are "obligated" to accept appointments from the Court on a rotation basis. The comments of Justice Young touch upon the problems with fees in these circumstances.

"Particularly under a regime where liquidators consent to take on a liquidation, a liquidator who takes on a non-paying liquidation will be assumed to act in the public interest on the basis of the well-known swings and roundabouts principle."

The Government did not introduce an "asset-less companies fund" as recommended in the Harmer report back in 1988. However, it is still accepted that in most cases appointments are taken on a voluntary basis and the insolvency practitioner has the ability to decline the appointment.

This does not mean that the payment of fees is still guaranteed on a voluntary appointment. All legal practitioners will know that clients may not pay the bill. They will also know that circumstances change and the assets, which an insolvency practitioner thought were readably available to meet his fees were unexpectedly encumbered or simply not available to be sold.

This is an unappreciated aspect of the insolvency practitioners life. There is regularly a doubt about whether or not your fees can be paid. This is one risk that justifies a higher return.

The other risk face by an insolvency practitioner, which is not regularly faced by the legal profession, is personal liability. An administrator is personally liable for any debts incurred by the company under administration. I know of no other profession where the external party, who is brought in to try and fix the circumstances caused by others, can become personally liable for the debts of the business which he or she is trying to save (albeit with a right of lien over the assets). The exposure can be huge.

When you balance the risk of such personal liability against the growing pressure on fees, you then start to appreciate why administrators might try to fight back against the current criticism with some serious "tough talk".

I truly think it will be a case of 'watch this space'.

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