

11 February 2010

The Secretary
Senate Committee on Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Submission to the inquiry into the role of liquidators and administrators, their fees and their practices, and the involvement and activities of ASIC, prior to and following the collapse of a business

This submission is made by KordaMentha.

This submission fully supports the position of the Insolvency Practitioners Association of Australia (“IPA”), the key themes being:

- Australia has a sound and balanced insolvency regime that is well regarded internationally and that contributes positively to the legal and social well being of the community.
- Insolvency practitioners play a key role in the orderly wind up, trade or sale of insolvent businesses.
- It is fundamentally important that the community have confidence in the regime and in the integrity of its practitioners.
- ASIC has prime responsibility for the registration, monitoring and discipline of liquidators and administrators.
- Practitioner remuneration is closely regulated.

We have not repeated the IPA submission, but wish to briefly highlight the following:

Continuous Improvement

- KordaMentha supports the Federal Government, ASIC, and the IPA's journey of continuous improvement of the insolvency regime. A recent example is the decision by the Federal Government to overturn the Sons of Gwalia High Court ruling. KordaMentha has written numerous papers on this subject noting that the restructuring of companies was going to be much more difficult and the liquidation of companies more costly and lengthy had no change been made. We commend the Federal Government on making the change.
- This is just one example of many initiatives taken over the years that has ensured Australia has a sound and balanced insolvency regime.

Saving Businesses

- One of the purposes of the voluntary administration regime is to save as many businesses as possible. This is the ultimate goal of any good insolvency practitioner. We refer to the Timbercorp Group of companies. Timbercorp's huge businesses in horticulture (particularly the vast almonds and olives projects) and forestry operations continue as viable businesses. Many thousands of jobs in regional Victoria have been saved. Although the businesses were saved, the actual corporate entities are being liquidated.
- Many parties played a role in saving these businesses including the Federal and Supreme Courts, ASIC, major creditors, financiers, grower investor representatives, insolvency lawyers and KordaMentha as administrators.

Personal Liability

- What is not generally appreciated is an insolvency practitioner is personally liable for all debts incurred. This is a significant risk. It is an uninsurable risk. A number of insolvency practitioners have ceased business because of the liabilities incurred.
- A recent example is the Timbercorp Group. Whilst seeking the sale or recapitalisation of the businesses, we incurred \$27 million in liabilities before any of the assets were sold. Fortunately the businesses were able to be sold and the liabilities paid.
- In the public interest, insolvency practitioners are required to liquidate many companies without assets. They have personal liability for costs but are not reimbursed for these costs (i.e. advertising, calling of meetings etc.) or fees.

Costs and Timing

- The costs of insolvency proceedings are discussed widely. In fact, this issue is a global issue particularly in relation to the expensive Chapter 11 process. Given stakeholders are losing money, the focus on costs is understandable.
- Insolvency practitioner fees are predominantly based on hourly rates. We have considered fees being paid as a percentage of realisations. The problem then will be insolvency practitioners will be accused of a quick sale of the assets so as to get paid. We also note that investment banks in the restructuring areas charge significantly more than the hourly rate based insolvency professionals.
- The hourly rates of the insolvency professionals administering the larger companies are at the lower end of the standard rates of accounting and legal professions.

- A criticism of the insolvency process is that it takes too long. We have reviewed our cases and there are two common themes. The first theme is that many of the cases take years because of litigation. It is the court process that determines the length of the insolvency process. Secondly, an insolvency practitioner may realise assets in an orderly manner rather than a quick sale (to do this the company needs adequate cashflow). An example is Ansett where KordaMentha agreed with the Committee of Creditors to realise Ansett's assets in the global aviation market over an extended period of time. This has resulted in employees receiving to date \$0.95c in the dollar of their entitlements (a quick sale would have been approximately \$0.50c in the dollar).

Professional Reputation

- We note 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. We agree that ASIC and IPA need to continue to be actively involved in strengthening the professional reputation of the industry and dealings with the bad apples.
- Our observation is that particular care needs to be taken by the bodies of activities in the SME market.

Please do not hesitate to contact me should you require any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Korda'.

MARK KORDA