

(August 2011

The Manager
Governance and Insolvency Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Manager

Harmonisation of the regulatory framework applying to insolvency practitioners in Australia – Treasury Consultation

Thank you for the opportunity to provide comments on the proposal for harmonising the regulatory framework applying to insolvency practitioners in Australia.

Based on the experience and knowledge gained through my office's interactions with the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia, this office would like to address two proposals raised in the Treasury's options paper:

1. Regulator powers – Option One: Increase regulator powers in an aligned matter
2. Regulator powers – Option Two: Ombudsman.

Role of the Commonwealth Ombudsman in relation to the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia

The office of the Commonwealth Ombudsman exists to safeguard the community in its dealings with government agencies, and to ensure that administrative action by the Australian Government agencies is fair and accountable. In particular, this office performs integrity oversight functions in relation to the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia. The two main statutory roles this office has in relation to Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia are:

- *Complaint investigation:* investigating and reviewing the administrative actions of the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia upon receipt of complaints from members of the public, groups, professional representatives and organisations; and
- *Own motion investigation:* investigating, on the initiative or 'own motion' of the Ombudsman, the administrative actions of the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia – often arising from insights gained from handling individual complaints.

My office also liaises with officials from the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia to canvas ways to improve administration and prevent or respond more effectively to complaint issues.

The office has an additional statutory role in relation to the Insolvency and Trustee Services Australia under the *Bankruptcy Act 1966*. As part of an investigation of a complaint about the Insolvency and Trustee Services Australia, under sections 139ZA, 139ZIO and 149K of the *Bankruptcy Act*, this office has the power to request that the Inspector-General of Bankruptcy conduct a review of particular bankruptcy decisions.

These decisions include:

- a decision of the trustee to file a notice of objection (Section 139ZA of the *Bankruptcy Act 1966*);
- a decision of a trustee to make an assessment (Section 139ZIO of the *Bankruptcy Act 1966*); and
- a reviewable decision by a trustee (Section 149K *Bankruptcy Act 1966* and of the reviewable decision as defined in Section 139ZIB).

There have been occasions during the course of investigations of complaints about the Insolvency and Trustee Services Australia that my office has exercised this statutory discretion to direct that the Inspector-General of Bankruptcy conduct a review of a bankruptcy decision. However, we cannot direct that a review reach a particular outcome.

Our role in respect of the Australian Securities and Investments Commission is the same as that for all prescribed authorities under the *Ombudsman Act 1976*.

There are three priority areas in which my office is looking to work with all Australian Government agencies, including the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia, in the next three years. These are: improving the language of government, providing greater access to services for all (in line with the public service's broad social inclusion agenda) and improving complaint handling.

Specific comments on Regulator Powers Reform Options

1. Regulator powers – Option One: Increase regulator powers in an aligned manner

Information about the complaints received by the Ombudsman in respect of the Australian Securities and Investments Commission's oversight of registered liquidators is attached.

It is apparent from the issues raised by complainants that they expect the Australian Securities and Investments Commission to have a wider role than it currently does in respect of external administrators generally. Complaints to the Ombudsman of this type are generally received from creditors, who are small businesses or individuals, and who find alternate remedies too costly. In my view some of the complaints reflect an unmet need for an independent opinion as to whether a liquidator or other external administrator (regardless of how they are appointed) is doing a fair, reasonable and timely job, or for access to information on which the creditor can form their own opinion about this.

In this regard I would particularly support reform options that will improve access to information from the Australian Securities and Investments Commission and, through it, other stakeholders. This in turn would enable the Australian Securities and Investments Commission to provide better explanations to complainants at first instance and also assist it in its regulatory role.

2. Regulator powers – Option Two – Ombudsman.

This office notes the Senate Economics References Committee report, *'The regulation, registration and remuneration of insolvency practitioners in Australia'*, released in September 2010. The Senate Committee received a number of submissions that suggested establishing an Ombudsman as part of the insolvency framework. These submissions proposed a variety of roles and functions for an Ombudsman including dispute resolver, regulator, educator and scrutineer. The Senate Committee in its report concluded that if the responsible regulator did not handle complaints promptly and effectively, that an 'Insolvency Ombudsman should be seriously considered'.

While my office currently performs a scrutineer role in relation to the Australian Securities and Investments Commission and the Insolvency and Trustee Services Australia complaints, it does not perform direct regulatory functions. Instead we work with the specialist regulatory bodies and review the reasonableness of their processes. For example, the Tax Practitioners Board performs regulatory functions regarding tax agents and people who prepare Business Activity Statements and this office has an oversight role through investigating, and making recommendations to resolve complaints made about the Tax Practitioners Board.

Combining a regulatory and oversight role in the same body carries a risk of negatively affecting the public's perception of the independence, transparency and accountability of that body. That is, an original decision-making body is unlikely to be accepted as its own review or accountability mechanism, leaves the public without further right of review.

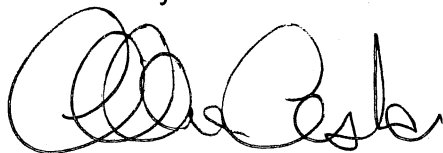
In summary, whilst the value of the introduction of a regulatory function in respect to insolvency practitioners has obvious merit (option 1), I do not consider that the regulatory function is a role that an Ombudsman should undertake (option 2).

The Ombudsman already provides a scrutineer function for both agencies and existing legislation provides sufficient powers to investigate complaints about these agencies. As previously mentioned, my office already performs a similar role for the regulatory function performed by the Tax Practitioners Board and has worked with the Board to introduce an effective complaints management system.

The experience gained from the Tax Practitioners Board role shows that, as reasonably expected, complaint numbers are high following commencement of a new regulatory regime and reduce gradually with the introduction of an effective complaint management system. The likely increase in complaint approaches resulting from the regulatory process will need to be appropriately resourced, especially in the first two years of establishment, regardless of whether it is the role of the Commonwealth Ombudsman or a newly created industry Ombudsman.

I would welcome the opportunity for my office to speak with you about our comments. If you require any further information or wish to discuss our comments, please contact Margaret Chinnery, acting Senior Assistant Ombudsman, on 02 6276 3705.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Allan Asher', written in a cursive style.

Allan Asher
Commonwealth Ombudsman

Attachment

Statistics

Over the last two financial years (July 2009 - June 2011), the Ombudsman's office received just over 130 complaints about Insolvency and Trustee Services Australia. Outcomes of these complaints made about ITSA have generally involved:

- referral back to ITSA as complainant has not raised complaint originally with ITSA
- better explanation provided to complainant
- action expedited, and
- apology

During the same period we received approximately 330 complaints about ASIC. The majority of these complaints concerned penalty fees, registration matters and decisions by ASIC not to investigate complaints. Approximately 5% of complaints concerned ASIC's oversight of registered liquidators.

Complaint issues regarding registered liquidators included:

- Concerns that a registered liquidator was not taking sufficient action to recoup funds;
- Concerns that ASIC had not followed up the provision of liquidator's reports in a timely fashion;
- Concerns that a registered liquidator has not sought funding to investigate issues under the Assetless Administration Fund and ASIC had not assisted or required it to do so;
- Concerns that ASIC had not thoroughly investigated a complaint about the conduct of a registered liquidator, in particular that witnesses (such as the complainant), have not been interviewed or monitoring has not occurred;
- Concerns that ASIC had not instigated disciplinary action in circumstances where a conflict of interest is alleged (particularly, where a liquidator has been appointed by the directors).

Frequently the outcome of these complaints was a better explanation of ASIC's role and powers in respect of registered liquidators and other external administrators, or an assessment of the reasonableness of the steps ASIC had taken in respect of a complaint. In other cases, ASIC reviewed or provided a better explanation of its decision.