INSOLVENCY PRACTITIONERS:

ACCOUNTABILITY FOR THEIR MISCONDUCT IN OFFICE

Address to the Insolvency Practitioners Association

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Introduction

Just as the categories of negligence are never closed[1], it would seem that the areas of misconduct by external administrators are, perhaps, also never ending.

This paper[2] looks at some of the more prominent problems confronting persons aggrieved by the conduct of errant external administrators. [3]

As we know 'ousted' directors of a company under external administration always retain the right to challenge in the Courts the conduct of a external administrators.

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1 *Donoghue v Stevenson* [1932] AC 562

2 My thanks to the students at Victoria University who assisted in research for this paper.

3 Includes a receiver, voluntary administrator, deed administrator, liquidator, provisional liquidator and controller

The statutory right of the company to apply to the court to have a controller removed for misconduct is contained in s 434A[4]. A similar provision exists which deals with the conduct of liquidators and is set out in s 536.[5]

Any challenge, falling short of "misconduct", will have to be seen in the light of the decided cases[6].

And just what sort of breaches may be envisaged by such misconduct?

Well let's take just take, for example, one person, and see how many breaches may be committed by that person.

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[4] **434 A Court may remove controller for misconduct**
Where, on the application of a corporation, the Court is satisfied that a controller of property of the corporation has been guilty of misconduct in connection with performing or exercising any of the controller's functions and powers, the Court may order that, on and after a specified day, the controller cease to act as receiver or give up possession or control, as the case requires, of property of the corporation.

[5] **536 Supervision of liquidators**
(1A) In this section:
liquidator includes a provisional liquidator.
(1) Where:
(a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:
(i) a requirement of the Court; or
(ii) a requirement of this Act, of the regulations or of the rules; or
(b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;
the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
(2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.
(3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

[6] *Expo International Pty Ltd (recs and mgrs apptd) (in liq) v Chant*, *Re B Johnson & Co (Builders) Ltd* [1955]Ch 634; [1955] 2 All ER 775.

In one recently reported case the Court found breaches of the following **27** sections of the *Corporations Act* 2001:

Sections 180, 438A, 439A, 444B, 446A(1)(b), 447E, 477(2)(k), 449E, 450A, 450B, 450C, 475, 476, 499(3), 504, 508, 509, 531, 533, 536, 537, 539, 542(2), 598, 1279, 1290, 1324

Quite an extraordinary performance! The offender is a person known to many in the IPAA. His name is Robert John Edge[7].

His misconduct required the Court to consider the following breaches:

- **Duties of liquidator**
- **Court inquiry into defendant's conduct as liquidator**
- **Improper delegation of duties**
- **Failure to maintain proper books, including books of account**
- **Failure to prepare and lodge prescribed documents, including six monthly and final accounts, minutes of meeting and s 533(1)(c) reports**
- **Failure to advertise, convene and hold meetings, including final meetings**
- **Unauthorised destruction of companies' books and records**
- **Undue prolongation of liquidations**
- **Drawing remuneration without approval or adequate supporting documentation**
- **Exaggerated claims of work done**
- **Failure to open separate bank accounts**
- **Intermingling of funds**
- **Writing of cash cheques and cheques direct to liquidator's business or creditors**
- **Failure faithfully to perform duties as liquidator**
- **Removal**
- **Funds drawn without approval disgorged**

7 *Australian Securities & Investments Commission v Robert John Edge* (2007) 211 FLR 137

- **Unfitness to remain liquidator**
- **Voluntary Administration**
- **Delegation of sending notices to director**
- **Failure to prepare adequate s 439A reports**
- **Failure to execute deeds of company arrangement**
- **Failure to disclose prior association with director**
- **Whether administrator's management, acts or omissions prejudicial to interests of creditors or members.**

But more of this case later.

So now that we are cognisant that the areas of misconduct are never limited, why are there recourses to the Court open for such misconduct? It is because of the duties owed by a transgressor at law.

Duties

Although the theme of today's seminars revolve around 'Directors' Duties' one asks, does any other person owe a fiduciary duty to a company? The statutory duties outlined in sections 180 to 183 of the Act apply equally to '*officers*' as well as directors. The definition of '*officer*' in section 9[8] of the Act includes a receiver, a liquidator, an administrator of the company and an administrator of a deed of company arrangement.

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[8] ***officer* of a corporation means:**
(a) a director or secretary of the corporation; or
(b) a person:
(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
(ii) who has the capacity to affect significantly the corporation's financial standing; or
(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
(c) a receiver, or receiver and manager, of the property of the corporation; or
(d) an administrator of the corporation; or
(e) an administrator of a deed of company arrangement executed by the corporation; or
(f) a liquidator of the corporation; or
(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

External administrators, at law, owe fiduciary duties to the company to which they are appointed. This principle is conveniently found in ***David Hill & Ors –v- David Hill Electrical Discounts P/ L (in liq) & Ors***[9], where an application was brought for the replacement of a liquidator due to allegations that the liquidator's actions as deed administrator amounted to a breach of his fiduciary duty. Santow J, in granting the application confirmed that:

> *"…there can be no doubt that in combination with the statutory duties imposed on an administrator, the nature of the administrator's position is fiduciary in character…"*

Yet as we know there are all sorts of other duties owed by external administrators. Take for example the duties and liabilities of a receiver or controller. The duties of a receiver or controller may be seen as being derived from three sources[10]:

- the debenture pursuant to which the receiver was appointed;
- the statutory law[11]; and
- equity.

For the purpose of today's discussion, the duties may conveniently be categorised as general duties and statutory duties.

It is important to remember that the receiver's primary duty is to the secured creditor, that is, to recoup sufficient from the company's assets to pay out the secured debt and that all of the receiver's other duties and powers are ancillary to that duty.

While the primary duty is owed to the secured creditor, it is nevertheless established that a duty is owed by the receiver to the company.[12]

In addition to any general law duty, ss 180-184 of the *Corporations Act* reinforces that receivers, as officers of a company:

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9 [2001] NSWSC 271

10 *Gomba Holdings UK Ltd v Homan* [1986] 3 All ER 94; [1986] 1 WLR 1301

11 ss 419, 421, 421A, 426, 429, 430-433, ITAA s 221P

12 *Expo International Pty Ltd (in liq) v Chant* [1979] 2 NSWLR 820; (1979) 4 ACLR 679.

- must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances;
- must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose;
- must not improperly use their position to gain an advantage for themselves or to cause detriment to the company;
- must not improperly use information obtained in their position as receiver to gain an advantage for themselves or to cause detriment to the company; and
- commit an offence if they are reckless or intentionally dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the company or for a proper purpose.

Some further examples

Negligence

We are aware that a controller owes duties to the secured creditor. While it is not within the ambit of "duty", a receiver may elect not to pursue a cause of action against the secured creditor or one of its subsidiaries. Nevertheless, a duty is owed to the secured creditor; for example, it has been suggested that the receiver may be liable to the secured creditor in negligence if, due to his actions, guarantors of the secured debt have been discharged.[13]

Exercise of the power of sale

A mortgagee in possession exercising a power of sale has a statutory duty to use reasonable care. In all Australian states the duties of the mortgagee and its receiver are governed by statute law. A similar duty is also imposed on controllers by s 420A.

[13] *American Express International Banking Corporation v Hurley* [1985] 3 All ER 564; [1986] BCLC 52.

A useful summary of the steps that a receiver would normally have to take to satisfy his or her duty on exercise of power of sale is found in *Ford's Principles of Corporations Law*[14], as follows:

- identify the appropriate market in which the property should be sold[15];
- ascertain the value of the property on which the offering price or reserve price at auction can be based[16];
- consider adequately whether there is any probability that more would be gained by selling a plurality of items together or by selling them separately[17];
- engage competent selling agents where necessary;
- plan a sale designed to test the market by public auction where an auction sale would be usual for the type of property in question;
- see that the sale is properly advertised with full information about the features of the property likely to attract buyers[18];
- allow adequate time for the advertisement to have effect;
- refrain from telling possible buyers a reserve price at auction[19] and details of the amount due to the chargeholder[20].

To that list could be added the following considerations as a result of the recent decision of Vickery J in June 2009 in *Nolan V MBF Investments Pty Ltd*[21] :

- obtain marketing advice and put in place a marketing program, particularly where the timing of the sale is not the best possible when considering the property being sold; and

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14 at [26.020]

15 *Jeogla Pty Ltd v Australia and New Zealand Banking Group Ltd* (1999) 150 FLR 359, leave to appeal refused *Skinner v Jeogla Pty Ltd* (2001) 37 ACSR 106

16 *Mike Gaffikin Marine Pty Ltd v Princes Street Marina Pty Ltd* 17 ACSR 495

17 *Champagne Perrier-Jouet v HH Finch Ltd* [1982] 3 All ER 713 at 725

18 *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676; *Mike Gaffikin Marine Pty Ltd v Princes Street Marina Pty Ltd* 17 ACSR 495

19 *Barns v Queensland National Bank Ltd & Nott* (1906) 3 CLR 925

20 *Mike Gaffikin Marine Pty Ltd v Princes Street Marina Pty Ltd* 17 ACSR 495

21 [2009] VSC 244

- supervise the selling agents engaged -- the power cannot be delegated and the receiver will be responsible for any contravention of s 420A.[22]

Lack of independence

An external administrator must be, and be seen to be, independent. The authority for this principle is well established.[23] Other 'tests', 'rules' and 'principles' stated in the cases are best understood as elaborations of this essential key principle.

In applying the key principle to the removal of external administrators Courts have used two different formulations. One, articulated[24] is that an external administrator will be removed where it is in the best interests of the administration to do so. This formula has been approved in many cases.[25]

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22 *Jeogla Pty Ltd v Australia and New Zealand Banking Group Ltd* (1999) 150 FLR 359; [1999] NSWSC 568.

23 *Re National Safety Council of Australia, Victorian Division* [1990] VR 1 at 34; *Tracker Software International Inc v Smith* (1997) 24 ACSR 644 at 645; *Deputy Commissioner of Taxation v Barroleg Pty Limited* (1997) 25 ACSR 167 at 174; *Re Central Springworks Australia Pty* Limited (2000) 34 ACSR 164 at 167; *National Australia Bank Limited v Wily* [2002] NSWSC 573 at [22]; *Bovis Lend Lease Pty Limited v Wily* (2003) 45 ACSR 612 at 641.
A variation in the language used appears in *Re Biposo Pty Limited* (1995) 17 ACSR 730. In that case, Young J held that the question was *whether in the interests of the public the removal of the liquidator would be for the general advantage of persons interested in the winding up*.
A different formula was used in *Advance Housing Pty Limited (in Liquidation) v Newcastle Classic Developments Pty Limited (*1994) 14 ACSR 230. In that case Santow J held that *the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances, by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance*.
In *Dallinger v Halcha Holdings Pty Limited (administrator appointed)* (1995) 60 FCR 594 at 599-600 Sundberg J proceeded on the basis that there were two separate tests. In *Bovis Lend Lease Pty Limited v Wily* (2003) 45 ACSR 612 at 697 Austin J expressed the view that the two tests, or formulations, were not inconsistent with each other.

24 *Commissioner for Corporate Affairs v Peter William Harvey* [1980] VR 669 at 696

25 *Re Giant Resources Limited* [1991] 1 Qd R 107 at 115; *Network Exchange Pty Limited v MIG International Communications Pty Limited* (1994) 13 ACSR 544 at 550; *Dallinger v Halcha Holdings Pty Limited (administrator appointed)* (1995) 60 FCR 594 at 599; *City & Suburban Pty Limited v Smith* (1998) 28 ASCR 328 at 336; *Multi-Core Aerators v Dye* (1999) 17 ACLC 1,172 at 1,179; *Ultra Tune Australia Pty Limited v McCann* (1999) 30 ACSR 651 at 672; *Re Central Springworks Australia Pty Limited (Administrator Appointed)* (2000) 34 ACSR 169 at 551. Not all of the cases refer expressly to the *Harvey* decision.

In yet another case (in which I appeared) Warren J in *Re Central Springworks Australia Pty Limited (Administrator Appointed)*[26] adopted a medial position, stating that it would be in the best interests of the administration to remove an external administrator where there was a reasonable apprehension that the administrator lacked independence.

Misfeasance, neglect or omission

Obligation to answer inquiry of court

Under s 536(3) the court may, at any time, require the liquidator to answer any inquiry in relation to a winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation of the books of the liquidator.

The Australian Securities and Investments Commission is the body charged with a crucial role of supervision and investigation, in this regard. Under s 536(2) ASIC may report to the court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and a court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.

The court's powers are predicated upon the making of a report by the Commission. The court may, of course, make orders under s 536(3) or make inquiry under s 536(1).

It was under this power that the previously mentioned interesting case of Robert Edge was brought before the Court. So how did the Court deal with the complaints filed by ASIC against this fiduciary of the company?

Over a 70 page judgment[27] Justice Dodds-Streeton examined the role of Robert Edge in his conduct of 24 administrations:

- 9 companies were Court-ordered winding up;

[26] (2000) 34 ACSR 169 at 173

[27] *Australian Securities & Investments Commission v Robert John Edge* (2007) 211 FLR 137

- 11 were creditors' voluntary winding up; and,
- 4 were companies that had entered voluntary administration.

The Court was scathing in its criticism of this apparently seasoned insolvency practitioner (he had been a close associate of Tony Hodgson in the Pyramid Building Society liquidations in the 1990's) and cited numerous examples of misconduct[28] which is set out in full to better understand the Court's reasons for decision (emphasis added):

> *"In my opinion, the evidence establishes that for a period of some years, the defendant repeatedly contravened numerous significant provisions of the Act and Regulations in relation to numerous companies.* ***His chronic and widespread failure to comply with the statutory requirements to maintain proper books and records (including books of account), prepare and lodge half yearly and final accounts and statements, hold and advertise meetings, and prepare and lodge s 533(1)(c) reports****, cannot be viewed as mere technical or administrative default. Rather, the defendant's repeated contraventions struck at the heart of the statutory regime designed to ensure the liquidator's accountability, to facilitate the audit and review of his conduct and to inform and protect members, creditors and the public. Similarly, the defendant's failure to advertise meetings, lodge minutes, prepare adequate s 439A reports and ensure that DOCAs were duly executed was conduct prejudicial to the creditors and members of companies of which he was administrator or deed administrator.*
>
> *The defendant's* ***wholesale destruction of the books and records of many companies****, in breach of s 542 of the Act, has rendered impossible a detailed and comprehensive review of his conduct of the relevant liquidations and administrations. The unauthorised destruction of the books and records was a serious breach of duty.*
>
> *The defendant's* ***long-term delegation to, and reliance upon, an unqualified, unsupervised and incompetent associate*** *did not, as the defendant submitted, excuse the contraventions, but was itself a serious breach of duty, as was his delegation of numerous insolvency administrations to another firm.*
>
> *The defendant repeatedly drew or caused to be drawn funds characterised as remuneration, which, in some cases, was paid by a cheque directly to a party subsequently identified as a creditor of the defendant or his associate. The*

[28] (2007) 211 FLR 137 at pp 230-1

> ***remuneration was not validly approved and satisfactory supporting documentation was not prepared*** *or was not in evidence. The defendant* ***failed to open separate bank accounts for some administrations and caused the funds of various companies to be intermingled in the bank account of his practice****, from which payments were subsequently made without making or maintaining any appropriate record. The defendant signed blank cheques, which he provided to his associate, and permitted cheques to be written to cash.*
>
> *…*
>
> *I am satisfied that, by reason of the matters discussed in detail above, the defendant failed faithfully to perform his duty as a liquidator, and has conducted administrations in a manner prejudicial or potentially prejudiced to the creditors and members of the relevant companies. The entrenched pattern of contraventions and dereliction of duty has demonstrated his unfitness to conduct liquidations as the representative of the Court or to exercise the extensive powers of a voluntary administrator or receiver.*
>
> ***The defendant's attitude to ASIC's investigation was needlessly uncooperative. He was not a conscientious, candid or reliable witness. The evidence establishes that the defendant has failed to maintain the high standards of impartiality, probity and competence demanded by his important fiduciary office. In my opinion, the defendant should be removed from those offices he currently holds and should be prohibited from holding the office of liquidator, provisional liquidator, voluntary administrator, deed administrator or receiver for a period of 10 years****."*

Importantly in this case the court also went on to order Edge, as a liquidator, to make good losses resulting from his or misconduct. A very expensive outcome for Mr Edge.[29]

Turning now to another very recent decision, s 536(3) has recently been employed before Robson J in *Re S&D International Pty Ltd (in liq)(rec & man apptd)*[30]. Whilst considering s 423 Robson J was most robust in the following passages where he said (omitting the citations and adding emphasis):

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[29] Under both s536(1) and (2) at (2007) 211 FLR 137 at 160. In light of the conclusion in *Australian Securities and Investment Commission v Edge* (2007) 211 FLR 137 at 160 that a court could order compensation under s536(1), it is likely that an administrator or deed administrator could be ordered under s447E(1) to make good losses.

[30] [2009] VSC 225 at [210-214]

210 ***Section 423 is virtually identical to s 536 which deals with the conduct of liquidators. In Vink v Tuckwell, I examined the relevant authorities on its application. I held that the application of the provision involves two stages. First, whether the complainant has established a prima facie case that there is something which requires enquiry. Secondly, if the complainant does establish an initial case as a first step, then whether the court should, in its discretion, order an inquiry. In my opinion, a similar approach ought to be adopted under s 423(1). Accordingly, the first issue is whether the plaintiffs have established that there is something which warrants enquiry. If they have, the second issue is whether I should, in my discretion, order an enquiry.***

211 *As indicated above, I am satisfied that Mr Vartelas ought to have ceased to act as receiver and manager as at 19 October 2007 and delivered up the possession and control of the Hillside property to the liquidator as that date. Mr Vartelas failed to do so and he thereafter retained possession and control of the property of S&D and applied its moneys to meet his fees and expenses, when he knew, or ought to have known, that the sale of the Footscray property provided more than enough moneys to pay out the secured debts owed by S&D to MIG.*

212 *In those circumstances,* ***it appears to me that Mr Vartelas as a controller of S&D has not faithfully performed, or is not faithfully performing, his functions as controller****.*

213 *In Australian Securities and Investments Commission, Re Lanepoint Enterprises Pty Ltd (receivers and managers appointed) French J stated:*

> *Section 423(1)(a) of the Act provides for a process of inquiry by the Court where it appears to the Court that a controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller's functions. Section 423(1)(b) allows an inquiry upon a complaint by a person to the Court. Either process requires a substantive application. The orders sought, by minute filed at the commencement of this application and of which the receivers had notice, did not in terms seek an inquiry.*

214 ***In my view a substantive application has been made in this case for an inquiry. I find that the Court in its discretion should inquire into Mr Vartelas' performance as controller of S&D as provided in s 423(1)(a). In any event, in Hall v Poolman Hodgson J and Austin J (with Spigelman CJ dissenting) held that a complaint sufficient to raise the jurisdiction of the Court to order an inquiry under s 536 need not be instituted by a formal application but could be done orally by counsel appearing in a case dealing with another issue.*** *They said:*

> *All that is needed, on this construction, is that there be criticism expressed to the court, in any context, with respect to the conduct of a liquidator connected to performance of the liquidator's duties.*

And a little later Robson J stated:

222 *I reject these submissions.* ***In my opinion, Mr Vartelas did fail to faithfully perform his duties. His failures were significant. He failed to ascertain what his appointer was owed. He failed to take proper care to ensure he was not improperly prolonging the receivership.*** *He did not obtain advice from Mr Parncutt until 21 February 2008, some four months after he should have terminated the receivership.* ***He took inadequate steps to account to those for whom he held the surplus moneys on trust.***

223 *In any event, the Court has power under s 423(1)(b) to order an inquiry where a person complains to the Court about an act or omission of a controller of property of a corporation in connection with performing or exercising any of the controller's functions and powers. In Hall v Poolman the Full Court of New South Wales held that s 536(1)(b) [the equivalent of s 423(1)(b)] would cover complaints about incompetence or lack of diligence as well as complaints about failure to perform duties faithfully. They said:*

> *We see no reason to read down those words [the words in 536(1)(b)] by reference to another subparagraph expressed as an alternative to subpara (1)(b).*

224 ***Accordingly, even if s 423(1)(a) is not activated, on the assumption Mr Vartelas has performed his functions faithfully, in my opinion the Court has jurisdiction under s 423(1)(b) to order an inquiry as a complaint has been made to the Court by the plaintiffs about acts and omissions of Mr Vartelas as a controller of property of S&D in connection with performing or exercising his functions and powers. The plaintiffs did not expressly rely on s 423(1)(b). Nevertheless, the plaintiffs did complain about acts and omissions of Mr Vartelas as a controller of property of S&D****. Hall v Poolman establishes that the Court has jurisdiction to inquire into the matter complained of without any formal request to the Court to institute an inquiry under 536(1)(a) and (b) which is almost identical to 423(1)(a) and (b). For the reasons referred to above, in my discretion I propose to order an inquiry into the conduct of Mr Vartelas relying on either or both s 423(1)(a) and (b).*

225 *Accordingly, I propose to order under s 434(1)(b) that within seven days of the order, Mr Vartelas renders proper accounts of and vouches his receipts and payments as receiver and manager of S&D.*

226 ***Further, I will order and direct that the inquiry into Mr Vartelas' conduct as receiver and manager be conducted by myself.*** *I direct that the inquiry should be held into the amounts and sums that should have been included in the account that Mr Vartelas, as*

receiver and manager, should have rendered to the liquidator on the sale of the Footscray property on 19 October 2007. I direct that the liquidator submit to the Court draft short minutes for orders as to the inquiry. I will reserve the question of the costs of the inquiry. Following the inquiry, I will consider whether to make further orders under s 423(1) or otherwise.

The Companies Auditors and Liquidators Disciplinary Board

The final matter I wish to refer to is alternative procedure open under s1292(2) of the *Corporations Act*. The Companies Auditors and Liquidators Disciplinary Board (***CALDB***) may:

> *... if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:*
> *...*
> *(d) the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:*
> *(i) the duties of a liquidator; or*
> *(ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;*
> *or is otherwise not a fit and proper person to remain registered as a liquidator;*
> *by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.*

The effect of cancelling or suspending the registration of a person as a liquidator is that he or she will be unable to accept appointments as an external administrator (see ss448B(2) and 532(1) of the Corporations Act).

In addition to cancelling or suspending a person's registration as a liquidator, under s1292(9) the CALDB may:

- admonish or reprimand the person;
- require the person to give an undertaking to engage in, or to refrain from engaging in, specified conduct; and
- require the person to given an undertaking to refrain from engaging in specified conduct except on specified conditions.

In *Albarran v Members of the CALDB*[31] the High Court of Australia rejected a challenge to the validity of s1292(2) based on the ground that s1292(2) conferred judicial power on the CALDB. The High Court approved the description of the CALDB's jurisdiction given in the decision on appeal (at 624):

> *The function of the Board is not, as was submitted, to find … whether an offence has been committed and, if so, to inflict a punishment therefor. It is, as we have said, to assess whether someone should continue to occupy a statutory position involving skill and probity, in circumstances where (not merely because) the Board is satisfied that the person has failed in the performance of his or her professional duties in the past. Messrs Gould and Albarran say that punishment or a penal or harmful consequence is finally inflicted on the person consequent on the finding of the committal of an offence prescribed by law. That is not what s1292(2) says the function of the Board is. It is not, in substance, what the Board does.*

A decision of the CALDB may be reviewed by the Administrative Appeals Tribunal.[32] An application for review by the Administrative Appeals Tribunal is not an appeal, it involves a rehearing of the matter in question.

CALDB decisions may also be the subject of an application for judicial review under the *Administrative Decisions Judicial Review Act 1977* (Cth). Such a review is limited to the legality of the decision, it is not a rehearing.[33]

One of the issues which Justice Tamberlin had to decide in that case was whether it was appropriate for the CALD to take professional standards into account in determining whether or not the registered liquidator had failed to perform "the duties of a liquidator" within the meaning of s1292(2). The CALDB had considered the IPAA Code of Professional Conduct and the ICAA Code of Professional Conduct. Justice Tamberlin

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31 (2007) 234 ALR 618

32 *Corporations Act* 2001, s1317B(1)

33 A registered liquidator invoked this jurisdiction in *Dean –Willcocks v CALDB* (2006) 59 ACSR 698.

held[34] that it was appropriate for the CALDB to have regard to those codes of conduct.

Conclusion

This paper has canvassed only a number of areas of misconduct of external administrators. The authorities however establish that there is recourse to the Courts for their misconduct and that they will be held accountable.

The financial consequences to the individual (and necessarily their firm) for the misconduct is, quite frankly, enormous. Costs, compensation, loss of reputation and being struck off as an insolvency practitioner are the more serious.

Legal practitioners are never shy in recommending proceedings against such persons. So beware!

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11 Novenber 2009

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[34] (2006) 59 ACSR 698 at 710 to 711