

Bringing the liquidators into line

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THE Senate inquiry into the insolvency industry is expected to release a damning report into the industry and the corporate regulator within the next two weeks as industry speculation mounts that the report will make at least two bombshell recommendations.

The first is that ASIC should be stripped of its powers and a new, more powerful industry-specific regulator created under separate legislation with beefed up powers and penalties. The second is that the insolvency industry's cosy monopoly be busted open to competition.

The report is also speculated to recommend the creation of a separate insolvency ombudsman who could handle complaints. Other recommendations are speculated to include the introduction of a licensing regime for liquidators, rather than relying on the existing registration system, to enable conditions and bans to be implemented quickly.

The chairman of the Senate inquiry, Alan Eggleston, confirmed to BusinessDay that all senators on the inquiry had received a copy of the draft report and the plan was to release it before the August 31 deadline and before the federal election on August 21.

Eggleston would not comment on the recommendations in the report but said the report didn't concentrate on the cases of malpractice raised during the inquiry as much as the more important issue of regulation.

"A separate regulator is something the committee could well consider. We are also looking at the requirements for periodic re-regulation, indemnity insurance recommendations and ongoing education," he said.

With so much criticism of ASIC and the insolvency industry heard throughout the inquiry, the talk is that the report will recommend putting company insolvencies, co-operative failures and individual bankruptcies under a new regulator. This would mean carving out new legislation, similar to the Insolvency Act in Britain.

In Australia, company insolvencies fall under the Corporations Act and are monitored by ASIC; personal bankruptcies have a dedicated Bankruptcy Act and a separate regulator, the Insolvency and Trustee Service Australia; and failed co-operatives fall under the Office of Fair Trading and a separate piece of legislation.

One of the main benefits of having one piece of legislation and a dedicated regulator monitoring all types of insolvencies is that it more fully understands the industry because that is all that it does.

Not surprisingly, ASIC wants to protect its turf and during the inquiry rejected calls to remove its oversight of liquidators, arguing that it alone has the expertise to regulate companies from the beginning to the end.

No doubt one of ASIC's concerns is that if it loses its oversight powers over the liquidators it will open up the floodgates to how effectively it is regulating other professions such as auditors. Indeed in March, ASIC revealed that one in five audits conducted by big accounting firms deliver an opinion the auditor cannot verify.

It is clear radical change is needed. Under the current system the requirements to register as a liquidator are minimal, yet it is difficult - and expensive - to get a liquidator deregistered or removed. In the case of CarLovers, it took more than \$1 million and years of court cases for the creditors to remove liquidator Stuart Ariff.

Unlike the previous six inquiries into the insolvency industry, which resulted in little action, this inquiry promised big change by widening the brief to include ASIC's role in the lead-up to and collapse of a business.

With collapses including Sonray, Great Southern, Timbercorp, Babcock & Brown, Westpoint, Fincorp, Opes Prime, ABC Learning and Allco still fresh, and the exponential rise of phoenix companies, an examination of ASIC throughout the inquiry showed that it has been too slow to act on complaints.

An examination of the role of liquidators - an area where community resentment has been brewing for years over excessive fees, abuses of power, gross misconduct, protracted settlements, lack of transparency, conflicts of interest and difficulty getting rid of them even if the creditors don't want them - has also shown an industry in dire need of reform.

A federal government joint parliamentary report entitled *Corporate Insolvency Laws: A Stocktake*, published in June 2004, showed that criticisms of the industry were not just anecdotal; nor were they the inevitable consequence of being capitalism's undertakers. That inquiry revealed that few professions receive as many documented complaints.

Combining individual, co-operative and company insolvencies under the one law, with one regulator and under the jurisdiction of one court, toughening up the penalties and introducing competition to the industry, would be a good start to reducing complaints.

In Australia, to become a liquidator you have to be an accountant and ASIC decides whether that qualification is adequate or not. Australia is the only country that does this. In Britain the exam to become a liquidator is opened up to other professions including lawyers. The same applies in the US. In Europe, you must be a solicitor before you can act as a liquidator.

The latest figures show that there are 663 liquidators in Australia. Many of these operate in the same organisation. The appointments for 2009 were 14,580. Not bad for a fee fest.

National Party senator John Williams, who instigated the inquiry last year and has been a vocal critic of the industry and its regulation, will be keen to get the report released in advance of the federal election, to save it from being buried. ASIC and the industry might well be thinking otherwise.

Source: The Age