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Insolvency industry must change

Adele Ferguson
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A GROUP of victims of unscrupulous practitioners is soliciting support to run a multi-million dollar class action against the corporate regulator ASIC.

Talks have been held with victims, including Brian Mitchell Motors, Bill Doherty from Independent Powder Coating and others, and the next step is to approach litigation funders to gauge their appetite to bankroll such a controversial move.

This may seem fanciful on many levels, but if the group widens its scope to attract the many investors of collapsed companies and managed investment schemes, including Storm Financial, it could prove a huge PR disaster for the corporate regulator.

A Senate inquiry into the insolvency industry set up in November held hearings in Canberra on Friday and will hold hearings in Adelaide from April 9. There is a lot of frustration at the approach of ASIC when dealing with complaints, and the time it takes to get results.

There is also concern that many of the industries ASIC monitors have systemic problems that ASIC is failing to fix. One indication of ASIC's ineffectiveness is its revelation last week that one in five audits conducted by big accounting firms deliver an opinion the auditor cannot verify.

There is also concern that ASIC behaves too much like a funeral director, dealing with the body after it is dead, instead of being more proactive and conducting annual audits, which would help it identify problems before they turn into disasters. ASIC lost a great deal of credibility over its dealings with Stuart Ariff.

Many complaints were made to ASIC back in 2005 about Ariff but ASIC only started acting in 2007 after adverse media attention when a creditor revealed Ariff had ripped out \$13 million in disbursements and fees including lavish family holidays - almost three times the company's original \$4.5 million deficiency declared by Ariff in 2003 just after his appointment. He was banned for life as a liquidator in 2009.

Not surprisingly, there is a great deal of lobbying going on to strip ASIC of some of its powers. For instance, when it comes to regulating financial planners, some individuals are privately questioning whether another body should be set up to monitor, supervise and license the sector. This follows revelations that many financial planners wrote to ASIC well before Storm collapsed warning ASIC of its questionable practices. And the need for a Senate inquiry into the insolvency industry - the seventh review in two decades - says it is all about its efforts in this aspect of its job.

Between July 2006 and December 2009, ASIC received 45,162 complaints and inquiries, with 1647 or 3.6 per cent of them against insolvency practitioners. Given there are less than 600 insolvency practitioners in the country, this is proportionately a lot of complaints.

With so much criticism of the sector and ASIC, it begs the question why the government doesn't explore the benefits of putting company insolvency and individual bankruptcies under the one piece of legislation, similar to the Insolvency Act in Britain.

In Australia company insolvencies fall under the Corporations Act and are monitored by ASIC, while bankruptcies have a dedicated Bankruptcy Act and a separate regulator, the Insolvency and Trustee Service Australia (ITSA).

Under such a move all company insolvencies and director-related cases would be heard in the Federal Court,

instead of the state supreme courts and the federal court that now have judicial control over the Corporations Act.

There is little doubt that ITSA is more proactive with its members than ASIC. Indeed, ITSA lobbied a submission into the insolvency inquiry that questioned why its annual inspection program used to track bankruptcy trustees and debt agreements is not used by ASIC to monitor liquidators and administrators. Bankruptcy trustees are audited regularly by ITSA and are interviewed by ITSA before they can become a trustee.

One of 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.

The Senate inquiry into the insolvency industry was launched in November by Nationals senator John Williams to examine the industry and the role of ASIC in the lead-up to and collapse of a business.

Some of the ideas raised through the 60 submissions and the hearing held in Canberra last Friday include creating a separate ombudsman capable of handling complaints and whether prospective liquidators and administrators should be interviewed by a panel prior to licensing or registration.

Other suggestions came from Senator Williams, who questioned ASIC on whether it should be compulsory for the insurance company to alert ASIC if a liquidator cancels or lets lapse their Professional Indemnity Insurance.

But it is clear that radical change is required. Put simply, under the current system the requirements to register as a liquidator are fairly low yet it is difficult to de-register a liquidator.

Unlike past inquiries, which failed to do much, this inquiry has big ambitions. Let's hope it achieves some of them. A good start could be combining individual and company insolvencies under the one law, one regulator and that fall under the jurisdiction of just one court.

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